



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 264/2022

In the matter between:

BUYISWA GRACE PASIYA
THANDI VERONICA MOHALE
KOLISWA NTOBONGWANA
KEELY CANCA
PRIMROSE PASIYA
YOLISA QANGULE
SHARON MNQANDI
KOLEKA MAKHONGOLO
PUMLA MDLELENI
OUMA RAMATLODI
THEMBI ZUNGU

FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT
FIFTH APPELLANT
SIXTH APPELLANT
SEVENTH APPELLANT
EIGHTH APPELLANT
NINTH APPELLANT
TENTH APPELLANT
ELEVENTH APPELLANT

and

LITHEMBA MINING (PTY) LTD
YOLISWA BALFOUR
SIPHOKAZI NYAMAKAZI
VUYOLWETHU NTOMBEKHAYA NCWAIBA
SIVE YIBANATHI STOFIE
NKOSI YAWO GUGUSHE
NOSINDA TENA
ZODWA ENID MAHLANGU
NTOMBIZAKHE MADALA
NOMFANELO MAGWENTSHU

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT
SIXTH RESPONDENT
SEVENTH RESPONDENT
EIGHTH RESPONDENT
NINTH RESPONDENT
TENTH RESPONDENT

LITHEMBA INVESTMENTS (PTY) LTD
THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION

ELEVENTH RESPONDENT
TWELFTH RESPONDENT

Neutral citation: *Pasiya and Others v Lithemba Mining (Pty) Ltd and Others*
(264/2022) [2023] ZASCA 169 (01 December 2023)

Coram: SALDULKER, ZONDI, MOTHLE and MATOJANE JJA and KATHREE-
SETILOANE AJA

Heard: 17 August 2023

Delivered: 01 December 2023

Summary: Declaratory relief – when competent under s 21(1)(c) of Superior Courts Act 10 of 2013 – company law – whether resolutions to increase authorised share capital and conclusion of loan agreement validly passed – dilution of shareholding resulting from perfection of security – whether appellants’ claims have prescribed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Gwala AJ, sitting as court of first instance):

1 The appeal is dismissed with costs including the costs of two counsel where so employed.

2 The cross-appeal is dismissed with costs including the costs of two counsel where so employed.

JUDGMENT

Zondi JA (Saldulker and Mothle and Matojane JJA and Kathree-Setiloane AJA concurring):

Introduction

[1] This is an appeal against the judgment and order of Gwala AJ, sitting in the Eastern Cape Division of the High Court, Grahamstown (high court), in which he dismissed with costs the appellants' application for declaratory relief. The relief sought included an order (a) declaring as unlawful and setting aside a loan agreement concluded between the first respondent, Lithemba Mining (Pty) Ltd (LM) and the eleventh respondent, Lithemba Investments (Pty) Ltd (LI) in 2009; (b) declaring as unlawful and setting aside the purported changes to the LM shareholding which occurred in January 2010 pursuant to the loan agreement between LM and LI; and (c) directing that any dividends to be paid by LM to its shareholders be paid in accordance with the shareholding prior to the alleged unlawful changes. This appeal is with leave of the high court.

[2] The fourth, fifth, sixth and eleventh respondents were aggrieved that the high court awarded them costs on a party and party scale instead of on an attorney and client scale. These respondents sought and obtained leave from the high court to cross-appeal against its cost order. They contended that the appellants' claims were

vexatious and frivolous and that the high court should have, in the exercise of its discretion, ordered the appellants to pay their costs on an attorney and client scale. Two main issues therefore arise in this appeal. The first, is whether the high court erred in dismissing the appellants' application for declaratory relief and the consequential relief. The second, is whether the high court misdirected itself by failing to dismiss the application with costs on a punitive scale.

Background facts

(i) Formation of Lithemba Mining

[3] The following background facts are relevant to the consideration of the issues. The appellants and the second respondent are all shareholders in LM. In 2000 the second respondent, Ms Yoliswa Balfour founded LI and invited a group of black female entrepreneurs to form a BEE investment holding company with the focus of serving as an empowerment partner in the energy sector. Once established LI identified an opportunity to develop a coal mine in Mpumalanga called the Wonderfontein Coal Project (the Project).

[4] The Project involved the exploration and subsequent development of a coal mine. The development would comprise the exploration, mining, processing, and marketing of three million tonnes of coal per annum for the domestic and export markets.

[5] At the LI shareholders meeting of 13 November 2004, the opportunity to invest in the Project was presented to members of LI but they declined, apparently, for the reason that this would have required a significant cash contribution which LI was not able to provide. And not all of its members had the necessary financial resources or a desire to invest in this capital-intensive opportunity. It was then resolved at this meeting that certain of the members of LI would be free to invest in the Project through a new entity, despite the provisions of the LI shareholders' agreement, on the understanding that LI would, at no cost, be entitled to 10% of non-financial obligated equity shareholding in the investment opportunity. This was because the investment opportunity in the Project was procured by LI. This shareholding percentage was subsequently changed from 10% to 12% following investment in the Project by Middle East South Africa Energy Investment Holdings (Pty) Ltd (MESA).

[6] The Project required a significant amount of investment, and the members were informed what their individual contribution would amount to. In furtherance of the Project an existing company, Cream Magenta (Pty) Ltd, in which the Project would be housed and pursued, was procured. On 15 February 2005, its subscribers resolved to change its name to LM. This is how LM was formed. While certain LI shareholders did not take the opportunity to invest, all shareholders of LM are also shareholders of LI, save for one individual.

[7] LM participated in the Project through various structures. LM and MESA entered into a joint venture and by agreement established a new company called Lithemba Wonderfontein Coal (Pty) Ltd (LWC). LM took up 80% of the shares in LWC, while MESA took the remaining 20%. The coal mine was owned by Umsimbithi Mining (Pty) Ltd (Umsimbithi). On 26 September 2005 LWC and Umcebo Mining (Pty) Ltd concluded a shareholders' agreement in terms of which they agreed to establish Mbokodo Mining (Pty) Ltd (Mbokodo agreement) to serve as a vehicle through which to pursue a joint venture opportunity. Mbokodo managed and operated the coal mine. Mbokodo was the only shareholder in Umsimbithi. LWC and Umcebo Mining (Pty) Ltd (Umcebo) were the only shareholders in Mbokodo.

[8] The Mbokodo agreement contained a number of clauses which entailed the transfer of shares by way of deemed offers in circumstances which were potentially prejudicial to the interest of LM shareholders, including those of LI, the effect of which would be to reduce the shareholding of LWC in Mbokodo. A number of these related to circumstances where LWC was unable to make funding and capitalisation obligations set out in the Mbokodo shareholders agreement. In particular, if Mbokodo made a cash call and LWC and LM were unable to meet their respective obligations, they would forfeit some of the shares and thus have a reduced stake in Mbokodo.

(ii) Capital Call

[9] At a general meeting of LM in October 2008, the LM shareholders were informed that there would be a call for a capital contribution for the funding of the Bankable Feasibility Study (BFS) and other costs associated with the Project. LM was informed at the 6 March 2009 Umsimbithi Board of Directors meeting and the 16 March

2009 Mbokodo Board of Directors meeting that LWC was required to provide additional capital to cover budget overruns, a BFS and certain guarantees. In terms of the Mbokodo shareholders' agreement, LWC was afforded 90 days within which to comply with capital calls otherwise it would be deemed to have offered its shares for sale to Umcebo. The LM Board was also informed that Umcebo threatened to stop the Project if funds were not paid on the due date. Thus, the LM Board urgently sought funding to cover LWC's R4.062 million portion of the Umsimbithi capital call.

[10] Various attempts were made to raise funds from financial institutions including Anglo Coal. At this time a group of shareholders, under the name 'Courageous Consortium,' also approached several parties to seek bridging finance to make an offer to other shareholders who wanted to sell their shares in LM without success. After the failure of these attempts to borrow funds, a meeting of LM Board was convened on 18 March 2009 where the Board discussed the issue of funding for the pre-feasibility and BFS stages of the Project. The Board resolved to approach LI for short-term bridging finance for the obligation, considering that even those individual shareholders who were unable to contribute, would still benefit through LI because of its shareholding in LM. LI had received a distribution from Ithemba Trust, which in turn had received a distribution from Stanlib, giving LI the ability to make the loan to LM, if it so chose. The second respondent undertook to communicate with LI and report back on the terms and conditions, if the loan application was successful.

[11] On 31 March 2009, the LM Board convened a meeting where the terms of LI loan agreement were discussed. The Board first approved, the terms of a convertible short-term loan agreement to be concluded between LM and LI. Second, it resolved to increase the authorised share capital of LM from 10,000 ordinary par value shares of R1 each to 50,000 ordinary par value shares of R1 each. And third, it resolved that LI would be issued the appropriate number of shares required to perfect its security under the LI loan agreement in the event that LM and its shareholders were to default on repayment.

[12] On 3 April 2009, a memorandum describing the general meeting of LM shareholders to be held on 18 April 2009 was circulated to all LM's shareholders. This was followed up with a notice convening a meeting circulated on 8 April 2009. Since

the date set for the meeting did not accord with the 21-day notice period for the convening of the general meeting, when notice was given to shareholders, they were requested that if there had any objections, they should communicate such objections to LM's chairperson.

[13] Ahead of the LM shareholders' meeting to be held on 18 April 2009, a report on the Project provided by the seventh respondent, Ms Nosinda Tena, was circulated on 17 April 2009 to LM's shareholders. The report noted that there was a budget shortfall in the Project and that LM shareholders were required to contribute *pro rata* towards the shortfall. LWC had undertaken to make the payment to Mbokodo by 30 April 2009. The report stressed that non-performance would trigger a deemed offer as stipulated in the shareholder agreement and that the LM Board had to do everything within its power to ensure that the clause would not be invoked.

[14] On 8 April 2009, the LM Board informed the shareholders of the amount each shareholder was expected to contribute. The shareholders were warned that at the general meeting on 18 April 2009, individual shareholders would be required to contribute to certain projects.

[15] Minutes dated 17 April 2009 detailing a meeting of LM's Board meeting, confirmed the minutes of the meetings of LM's Board held via teleconference on 9 March 2009, 18 March 2009 and 31 March 2009. It further confirmed that the relevant Board resolutions relating to the LI loan were adopted and signed.

(iii) Shareholders meeting of 18 April 2009

[16] On 18 April 2009, a general meeting of LM's shareholders was convened. The shareholders were requested to confirm their consent to waive the 21-day notice period. All members confirmed the waiver.

[17] The shareholders (including the appellants) unanimously resolved to:

- (a) Approve the conclusion of a convertible loan agreement between LM and LI. The loan would be secured against the issuance of LM shares to LI should LM fail to repay the loan.

- (b) Increase the authorized share capital of the company from 10,000 ordinary par value shares of R1 each to 50,000 ordinary par value shares of R1 each.
- (c) The chairperson of the company or its company secretary was authorised to sign all such documentation and do all such things as may be necessary for the implementation of all resolutions taken at the meeting.

[18] On 8 May 2009, LM's company secretary at the time lodged the special resolution approving the increase of the authorized share capital from 10,000 to 50,000 ordinary par value shares of R1 each with the Registrar of the Companies and Intellectual Property Commission (CIPC). The special resolution was stamped by the Registrar on 15 May 2009.

[19] On 3 July 2009, the chairperson of the LM Board at the time, circulated a memorandum to the shareholders in terms of which the shareholders were informed of a capital call to reimburse LI by subscribing to additional shares at R444.44 each *pro-rata* to the shareholders' shareholding in LM. Shareholders were requested to do so by 28 September 2009.

(iv) Loan agreement

[20] The LI loan agreement was subsequently concluded on or about July 2009. The essential terms of the loan agreement were:

- (a) First, LI advanced a loan in the amount of R4,062,161 bearing interest at 7.5% on a straight-line basis. The loan was repayable no later than four calendar months after the drawdown date namely 9 November 2009.
- (b) Second, as continuing security, LM pledged to issue to LI, if the loan amount was not paid, such number of ordinary shares in the company as would result in LI owning 51% of LM shareholding. Where only a portion of the repayment amount was settled, LI would be entitled to perfect a *pro-rata* portion of the security.

[21] On or about 9 July 2009, LI transferred the loan amount to LM. LM, in turn, used the loan to meet its cash call obligations and as a result the deemed offer provision in the Mbokodo shareholder agreement was not triggered to the disadvantage of LM and its shareholders.

[22] On 16 September 2009, the LM Board advised the shareholders of the extension of the due date for the acquisition of new shares. The date was extended from 28 September 2009 to 9 October 2009. The rationale for the extension was that the LI payment date was 9 November 2009. The extended date would allow for the necessary processes to take place. The LM Board further advised the shareholders that Price Waterhouse Coopers (“PwC”) had been appointed to manage and administer the process going forward.

[23] On 9 October 2009, the LM Board advised the shareholders of a further extension period to subscribe for additional shares in LM. The period was extended to 16 October 2009 to minimize any potential prejudice to shareholders who had not been able to meet the initial time frames that had been set.

[24] On 19 October 2009, the LM Board advised the shareholders of a further extension to 23 October 2009. The Board stressed that this was the final extension because any further extensions would jeopardize LM’s ability to meet its obligations to LI.

[25] On 20 October 2009, the Board sent a memorandum to the LM shareholders with the subject “*Mbokodo Cash Calls & Other Capital Call*” in which the Board confirmed that:

- (a) the memorandum was an addition to the memorandum sent on 19 October 2009;
- (b) on or about 23 October 2009, the LM Board would communicate the results of the round of capital raising;
- (c) in the event that not all of the LM shareholders subscribed for the shares that they were entitled to, the remaining shares would be made available to the LM shareholders who followed their rights in respect of the first round; and
- (d) payment of the second round of capital must be cleared into the LM bank account by no later than 30 October 2019.

[26] By 9 November 2009 when the LI loan was due for repayment, LM did not have sufficient funding to meet its obligations to LI. Despite the various extensions sought, none of the shareholders that sought these extensions, save for the second applicant,

in fact contributed. The shareholders that contributed were the second respondent, third respondent, fourth respondent, the second appellant, the fifth respondent, the seventh respondent, Pam Mdaka and Nambitha Stofile.

[27] On 11 November 2009, LI demanded payment of the loan by no later than 20 November 2009, failing which it threatened LM with legal action. On 13 November 2009, the LM Board sent a memorandum to LM's shareholders with the subject "*Mbokodo Cash Calls & Other Capita Call*" in which it advised that it had requested an extension from LI in respect of the amount of R4 366 823.07 that became due and payable on 9 November 2009, but it was declined, and that LI had demanded payment of the loan amount by 20 November 2009.

[28] On 2 December 2009, a meeting of the LM Board was held at which, amongst other matters, the transfer of shares to LI was discussed. On 16 December 2009, LM Board met to discuss the repayment of the LI loan.

(v) Perfection of security by Lithemba Investment

[29] As a result, LI proceeded to perfect its security under the loan agreement through the issuance of fresh shares in LM. The effect was that LI's shareholding in LM increased by 5 556 shares from 12.5% to 38.11%. On 8 January 2010 a CM15 form was filed with the CIPC reflecting the issuance of fresh shares under the LI loan agreement, whereby LI's shareholding in LM increased from 12.5% to 38.11%, a total of 6 806 shares.

[30] At that stage the total indebtedness of LM to LI including the interest was R4 366 823. Repayments against the loan totalling R1 897 503 were made by LM to LI during the period 20 November and 17 December 2009. Consequently, LM was in default in the amount of R2 469 320.

[31] Before and after LI had perfected its security, the LM Board undertook various endeavours to avoid LM shareholders being diluted. Some of these endeavours included engagement by certain LM shareholders with Anglo Coal which expressed willingness to assist and offered funding of R10 million through a special purpose vehicle. This attempt failed because most of the LM shareholders including some of

the appellants refused to participate in the process. The LM Board also engaged LI to negotiate an agreement to buy back the shares that LI had perfected as a security for the loan. The newly elected LI Board determined that it was not in the interests of the LI shareholders to sell the LM shares and consequently rejected LM's proposed share buyback agreement.

(vi) Dilution

[32] One of the central issues that gave rise to unhappiness among the members of LM was the inevitable consequence of the dilution that those shareholders suffered because of their failure to follow the rights when offered further shares to fund the loan repayment to LI. The appellants first expressed their dissatisfaction with the LI loan in October 2009 when some of them, through their legal representatives, wrote to LM seeking information and documentation related to the special resolutions passed at the meeting of April 2009. LM replied promptly explaining the events that led up to the 18 April 2009 meeting, which subsequently resulted in the resolution of the loan agreement.

[33] The LM Board met to discuss the concerns raised. It resolved to give the shareholders a further extension to respond to the cash call. The Board also resolved to seek advice as to whether a meeting could be convened with the dissatisfied shareholders to deal with the issues.

[34] On 23 October 2009, another letter was sent to LM in which the appellants, through their attorney, recorded their objection to the special resolution adopted by LM shareholders at the 18 April 2009 meeting. On 26 October 2009, the LM Board convened a special meeting to discuss the issues raised by the dissatisfied shareholders including the appellants. The meeting further suggested that a round table discussion be held with the dissatisfied shareholders to discuss the dispute. But before the round table discussion occurred, on 18 January 2010, the appellants' attorney wrote again to LM demanding that LM cease all actions to implement the special resolution and threatened legal action if the demand was ignored.

[35] Various attempts were made by the LM Board to resolve the dilution dispute. When those attempts failed, on 8 September 2012, the LM shareholders including the

appellants and the LM Board agreed that the matter relating to the dilution of shareholding be regarded as closed. It was decided that if any shareholder still wished to pursue the dispute, they could do so through expedited arbitration proceedings under the auspices of the Arbitration Foundation of South Africa (AFSA).

[36] The only step taken by the appellants was in 2013. They attempted to lodge a claim with the Companies Tribunal. The appellants sought an order requiring the parties to undergo conciliation, mediation or arbitration to restore the share value lost, and/or to compensate them with shares. The Tribunal, however, dismissed the complaint for lack of jurisdiction. Thereafter, the appellants took no further steps.

[37] LM proceeded to conduct its business in accordance with the post-dilution shareholding proportions. The coal mine became self-sustaining and, in 2014, some five years after LM met its cash call obligations, LM declared its first dividend. In the years since, over R130,044,845 worth of dividends have been declared and paid by LM to its shareholders in the post-dilution shareholding proportions, and the appellants received these payments without objection.

[38] On 9 February 2019, the LM shareholders constituted an alternative dispute resolution committee (*the ADR committee*). The ADR committee, comprising independent persons as well as shareholder representatives, sought to develop a commercial solution to remedy shareholder relations in the interests of the company. The ADR committee formulated a report which was ultimately rejected by the appellants on the basis that they were dissatisfied with the outcome despite having actively participated in the process and even though the process was aimed at a resolution in the best interest of LM.

Proceedings in the High Court

[39] On 29 July 2020, some 11 years after the passing of the relevant resolutions, the appellants instituted these proceedings for the relief set out in para 1 above. In the founding affidavit the appellants advanced various grounds on which their claim for the declaratory relief was based.

[40] They alleged that:

- (a) the second and third respondents connived to present the appellants, as shareholders in LM, with a commercially prejudicial loan which resulted in the dilution of the shareholding in LM and in the increase of LI's shareholding in LM and this resulted in the second respondent significantly benefitting in the transaction because of her shareholding in LI;
- (b) the loan was riddled with unlawfulness, improperly authorised, loan amount inflated, loan being improperly funded and constituted a related party transaction;
- (c) the minutes of the shareholders' meeting of 18 April 2009 were misleading to the extent that they reflected that the increase of the LM's shares by 40,000 was discussed;
- (d) the resolutions emanating from that meeting were unlawful because no proper vote on them was taken, and the objections to the resolutions by other shareholders with a combined shareholding of 56% meant that the special resolution threshold could not be achieved.
- (e) other funding alternatives existed which could satisfy the capital call made to LM;
- (f) the loan from LI to LM breached s 4 of the Companies Act 71 of 2008 (the 2008 Companies Act) and the Companies Act 61 of 1973 (the 1973 Companies Act) because LI had no funds at the time it reportedly made the loan to LM; and
- (g) the second respondent was not authorised by the LM shareholders to enter into the loan agreement.

[41] The respondents opposed the relief sought. They contended that the appellants failed to make out a case for declaratory relief. In support of this contention the respondents stated that the loan agreement between LI and LM was lawfully concluded. It was authorised and approved by the Board of Directors and the shareholders' meeting of LM on 18 April 2009. The loan was procured to meet the cash call obligations. The respondents denied further that the loan agreement resulted in unlawful dilution of the appellants' shareholding in LM. They stated that the decision was taken that the loan be secured, and specifically against the issuance of fresh shares in LM to LI, and that LM shareholders had the opportunity to provide the required capital, and if a shareholder failed to take up this opportunity, their shareholding would be reduced proportionately.

[42] In addition to opposing the application on its merits, the respondents raised procedural defences. They contended that (a) due to the numerous factual disputes arising in the matter, the appellants should have proceeded by way of action proceedings and not by way of motion proceedings; (b) the appellants' claims have prescribed (c); the appellants acquiesced to the dilution of shares (d); the appellants have, by conduct, waived their rights; and (e) that the appellants should be estopped from pursuing their claims.

[43] The high court with reference to *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*¹ (*Cordiant*) found that the appellants had established that they had interest in an existing or contingent right by virtue of being the shareholders in LM. However, in the exercise of its discretion, and because of the appellants' undue delay in instituting the proceedings, it refused to grant the declaratory relief sought and dismissed the application with costs including costs of two counsel where so employed.

[44] The appellants advanced two main grounds on which they based their attack on the judgment of the high court. They submitted, first, that the high court erred in its application of the test for declaratory relief. The high court, the appellants argued, failed to deal with the first leg of the test. It dealt only with the delay, which is one factor from the second leg of the test and decided the matter on that basis without considering the merits. They submitted that the high court should have dealt with the merits and only then should it have considered the question whether to exercise its discretion in favour of, or against, the grant of the order.

[45] Second, it was submitted by the appellants that the high court erred in not dealing with the merits of their claims and all of the defences raised by the respondents. Relying on the Constitutional Court judgment in *Spilhaus*² counsel for the appellants argued that the high court should have dealt with all the issues before it. The Constitutional Court in *Spilhaus*³ held that it is desirable for a lower court to

¹ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA); 2005 (6) SA 205 (SCA) para 17.

² *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC).

³ *Spilhaus* paras 44-46.

pronounce on all issues before it as the litigants are entitled to a decision on all issues raised especially where they have an option of appealing further.

Whether the test for declaratory relief was met

[46] The question is whether the high court erred in its application of the test for declaratory relief. In terms of s 21(1)(c) of the Superior Courts Act 10 of 2013, a high court may, in its discretion, and at the instance of any interested person, enquire into and determine any existing, future, or contingent right obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. The applicant who seeks a declaratory relief must satisfy the court that he or she is a person interested in an 'existing, future or contingent right or obligation' and then if satisfied on that point, the court must decide whether the case is a proper one for the exercise of the discretion conferred on it. The question must be examined in two stages.

[47] This Court in *Cordiant* formulated a two-stage approach to be followed in determining whether to grant the declaratory relief as follows:

'It seems to me that once the applicant has satisfied the court that he/she is interested in an 'existing, future or contingent right or obligation', the court is obliged by the subsection to exercise its discretion. This does not, however, mean that the court is bound to grant a declarator but that it must consider and decide whether it should refuse or grant the order, following an examination of all relevant factors. In my view, the statement in the above dictum, to the effect that once satisfied that the applicant is an interested person, 'the Court must decide whether the case is a proper one for the exercise of the discretion' should be read in its proper context. Watermeyer JA could not have meant that in spite of the applicant establishing, to the satisfaction of the court, the prerequisite factors for the exercise of the discretion the court could still be required to determine whether it was competent to exercise it. What the learned Judge meant is further clarified by the opening words in the dictum which indicate clearly that the enquiry was directed at determining whether to grant a declaratory order or not, something which would constitute the exercise of a discretion as envisaged in the subsection...'⁴

⁴ *Cordiant* fn 1 para 17.

[48] The appellants' contention that the high court failed to correctly apply the test for declaratory relief must fail. The high court considered the first leg of the test. It found that the appellant had an interest in an existing or contingent right, as they are shareholders in LM and their shareholding was diluted. This affected them not only in relation to the sharing of dividends but also in relation to the voting rights, and thus the first stage of the test was established. Thereafter the high court turned to the second leg of the inquiry. It found that this was not the case where the court ought to exercise its discretion in favour of granting the declaratory order sought. This was so, reasoned the high court, because the appellants unduly delayed in approaching the court for their relief which they sought. The appellants only sought the court's intervention in 2020 imploring it to 'turn the wheels back to the position prevailing in 2009'. It found that whilst the appellants did nothing to vindicate their rights, LM and other shareholders proceeded to organize their lives, planned, and conducted the business in accordance with the position after the dilution of the shares and a number of decisions had been made since 2009 relying upon resolutions which the appellants belatedly sought to be declared unlawful.

[49] As regards the interests of other shareholders, the high court found that LM and the other shareholders would suffer great inconvenience and prejudice should the *status quo* be changed after so many years. Furthermore, it held that it would be unjust to the other shareholders, who paid and met their financial obligations at the time, to accede to the relief sought by the appellants. One of the factors the high court considered in exercising its discretion against granting the declaratory relief sought, was the effect of prescription on the appellants' claims. It found that even if the declaratory order were to be made, it would have no practical effect as the appellants would not be able to claim the restoration of the shares, and payment of dividends in accordance with the shareholding applicable before the changes in the shareholding. This was because those claims would have been extinguished by prescription as a dilution of shareholding occurred in 2009. Having considered all the relevant factors, the high court found that there was no basis for it to exercise its discretion in favour of granting the declaratory relief sought by the appellants.

[50] The appellants have not demonstrated why they contend that the high court did not exercise its discretion judicially, or why it was influenced by wrong principles

or misdirected itself in respect of the facts. In *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs*⁵ (REDISA) this Court held, with regards to the exercise of a discretion, that on appeal a court will only interfere if the trial court exercised its discretion on the wrong principle or made a decision that was not reasonably open to it.

[51] Since the high court correctly applied the test applicable to declaratory orders, the attack on its judgment based on this ground must fail. There is therefore no basis for this Court to conclude that the high court misdirected itself on the facts or the law in the exercise of its discretion, or that it exercised its discretion injudiciously.

Whether the loan was unlawful

[52] To the extent that the high court erred in not dealing with the merits of the appellants' claim, I shall address them. But before I do so, it is necessary to distinguish the appellants' pleaded case from their case on appeal. The case that is advanced by the appellants in their heads of argument differs in material respects to the one they advanced in their papers. Nowhere in their papers in the court a quo did the appellants seek the setting aside of the impugned minutes and resolutions of the 18 April 2009 meeting, that gave effect to loan agreement between LM and LI. This ground is raised for the first time in the heads of argument in the appeal. On appeal, the appellants advance three grounds on which they seek the setting aside of the underlying resolutions. They contend, in this regard, that:

- (a) the reasons given to the LM shareholders were different to those relied on by the LM Board of Directors to change LM's authorised share capital;
- (b) the intended increase was for 10,000 shares and not 40,000 shares; and
- (c) the way the loan agreement was thrust upon the appellants, and subsequently adopted, breached the provisions of the 2008 Companies Act and the 1973 Companies Act. The appellants argue that a decision of a company's board to increase a company's authorised share capital must be exercised in accordance with the directors' duties as set out in s 76 of the 2008 Companies Act, including the duty to

⁵ *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* [2019] ZASCA 1; [2019] 2 All SA 1 (SCA); 2019 (3) SA 251 (SCA) para 87.

act in good faith and for a proper purpose. They aver that viewed objectively, the LM Board did not act in good faith and in the best interests of LM when they increased its authorised share capital.

[53] The appellants' case raises an important question regarding the identity of the Companies Act applicable to this dispute. Should it be determined in terms of the 1973 Companies Act or the 2008 Companies Act? During the hearing a considerable amount of time was spent on this issue. The respondents submitted that the 2008 Companies Act does not find application whereas the appellants argued that it does and relied on it for this contention on s 224 of the 2008 Companies Act which deals with transitional arrangements. The appellants referred to items 2, 4, 7 and 11 of Schedule 5 in support of their contention that the Legislature intended the 2008 Companies Act to apply to the transactions under consideration as from 1 May 2011 when it came into operation.

[54] The respondents' submission that the 1973 Companies Act and not the 2008 Companies Act applies to the dispute, is correct. My conclusion is based on the following grounds. First, the general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only. This means that the 2008 Companies Act must be construed as operating only on facts that came into existence after its passing (*Veldman v Director of Public Prosecutions, Witwatersrand Local Division*).⁶

[55] The events giving rise to the dispute occurred before the 2008 Companies Act came into operation. The demand for capital contribution was made in 2009. The relevant loan agreement was concluded on 6 July 2009. The resolutions concerned were passed and registered with the Registrar in 2009 and LI's security under the loan agreement was perfected in 2010. It is clear that at this stage the transactions were implemented, and rights had vested.

⁶ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007(3) SA 210 (CC) paras 26-27.

[56] As a result of the transactions which were implemented under the 1973 Companies Act rights accrued or were acquired and obligations were incurred. The repeal of the 1973 Companies Act did not affect the rights which any person acquired before the repeal and did not extinguish any obligations any person incurred before the repeal. That much follows from the provisions of s 12(2) of the Interpretation Act 33 of 1957:

'Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'

There is nothing in the 2008 Companies Act to suggest that the provisions of s 12(2) (c) of the Interpretation Act should not apply to a right which accrued to any person or an obligation which was incurred as a result of implementation of transactions under the 1973 Companies Act.

[57] Second, the transitional arrangements in Schedule 5 of the 2008 Companies Act are also unhelpful as these provisions relate to matters that were pending resolution as at the date the 2008 Companies Act was made effective. Section 224 of the 2008 Companies Act appears under the heading 'Consequential amendments, repeal of laws and transitional arrangements.' Section 224(1) repeals the 1973 Companies Act subject to subsection (3), which preserves certain transitional

arrangements in Schedule 5. Schedule 5 of the 2008 Companies Act sets out the transitional arrangements applicable to pre-existing companies and how they are to be regulated 'as of the general effective date', being 1 May 2011.

[58] Item 4(3A) of Schedule 5 does not support the appellants' argument. It provides that 'if, before the general effective date, the shareholders of a pre-existing company had adopted any agreement between or among themselves, under whatever style or title, comparable in purpose and effect to the agreement contemplated in s 15(7), any such agreement continues to have the same force and effect – (a) as of the general effective date, for a period of two years, despite section 15(7), or until changed by the shareholders who are parties to the agreement...' It therefore does not apply to agreements such as the loan agreement between LM and LI, but only to shareholders' agreements.

[59] Item 7 deals with 'Company Finance and Governance. Item 7(5) makes provision for the 2008 Companies Act to apply as from 1 May 2011 relating to the duties, conduct and liability of directors of the pre-existing companies despite anything to the contrary in a company's Memorandum of Incorporation. This must relate to the acts performed as from 1 May 2011 and not those that were performed or done before 1 May 2011. It follows that the dispute should be determined in terms of the 1973 Companies Act which is the statute that applied when the relevant transactions were concluded.

[60] I proceed to consider the merits of the appellants' claim as set out in their application and in their heads of argument on appeal. The relief sought by the appellants in the notice of motion is unsustainable. The undisputed facts show that the loan agreement was lawfully authorised, concluded and repaid; the changes to the shareholding were lawfully and properly authorised and effected; and dividends were declared and paid in accordance with the changed shareholding. The loan agreement and the board and shareholder authorisations approving its conclusion and repayment complied with the 1973 Companies Act.

(i) LM Board Resolutions

[61] As regards the Board resolutions it is not seriously disputed that the Board and shareholder meetings and all resolutions passed at such meetings, approving the loan, were recorded in the minutes. Section 205 of the 1973 Companies Act provides that where minutes have been made of the proceedings at any general meeting of a company, such meeting will be deemed to have been duly held and convened, and all proceedings will be deemed to have been duly held and convened, and all proceedings will be deemed to be valid, until the contrary is proved.

[62] Accordingly, all proceedings and resolutions recorded and passed at LM Board and shareholders' meetings are deemed to have been valid, unless the contrary is proved. The contrary has never been proven, nor did the applicants adduce any proof that would suggest that such grounds exist, particularly given the effluxion of some ten years since these events in question took place.

[63] In terms of article 75 of the Table B Articles, the quorum of the meetings of directors may be fixed by the directors and, unless so fixed, shall, when the number of directors exceeds three, be three, and if the number of directors does not exceed three, it shall be two. At the time of LM's board meetings dated 18 March 2009 and 31 March 2009, LM had four directors: namely, Ms Balfour, Ms Tena, Ms Mahlangu and Ms Nyamakazi, the third respondent. Accordingly, the quorum for the board meeting was sufficiently met.

[64] Article 73 of the Table B Articles provides that questions arising at any meeting shall be decided by a majority of votes. Article 74 of the Table B Articles provides that a director may not vote in respect of any contract or proposed contract with the company in which he or she is interested, or any matter arising therefrom, and if he or she does so vote, his or her vote will not be counted. All of the 2009 directors were shareholders of LI at the time of the passing of the relevant resolutions, and the 2009 Directors' interests in this regard were public knowledge and known to both the Board and shareholders at the time. On the basis that the resolutions passed by the Board were unanimously approved, and further approved by LM's shareholders, they were thus validly passed.

(ii) Shareholders' resolutions

[65] Article 34 of the Table B Articles provides that an annual general meeting for the passing of a special resolution must be called by not less than 21 clear days' notice in writing and article 35 of the Table B Articles provides that, unless provided otherwise, a quorum for such a meeting shall be two members present in person or by proxy.

[66] Article 34 of the Table B Articles provides that the notice of a general meeting must specify the place, the day and the hour of the meeting and must be given in manner set out in the Table B Articles or in such other manner, if any, as may be prescribed by the company in a general meeting, to such persons as are entitled to receive such notices from the company. The notice of 3 April 2009 convening the shareholders meeting of 18 April 2009 specified the place, the day and the hour of the meeting and further set out the resolutions to be tabled at the meeting.

[67] Further, LM's shareholders agreed to waive the 21-day notice period, as set out in the minutes of the meeting. In terms of s 186 of the 1973 Companies Act and article 34 of the Table B Articles, a meeting of a company is deemed to have been duly called, in the case, if a meeting which is called on a short notice period, if it is agreed before or at the meeting by a majority of shareholders having a right to attend and vote at such meeting who hold not less than 95% of the voting rights. The minutes of the meeting reflect that the meeting was attended by the shareholders holding 97.5% of the voting rights, and that the waiver of the notice period was agreed by all. The quorum requirement for the shareholders meeting was sufficiently met as the general meeting was attended by 14 shareholders and six proxies.

[68] Article 47 of the Table B Articles provides that, subject to any rights or restrictions for the time being attached to any class or classes of shares, on a show of hands every member present in person, and if a body corporate, its representative, will have one vote, and on a poll every member present in person or by proxy will be entitled to exercise the voting rights as determined by a company's articles.

[69] The minutes of the meeting further reflect that the shareholders in attendance were asked if they had any objections in respect of the loan agreement and it was recorded that there were no objections in respect of the resolutions relating to the LI

loan and issuance of LM shares as security. The resolution was thus unanimously adopted at the meeting.

[70] The minute of the meeting also records that LM's shareholders were requested to participate in signing the requisite documents to pass the special resolution because of the time constraints, all the shareholders agreed that the chairperson of the meeting could sign the special resolution on their behalf. Therefore, on the basis that the notice of the meeting was properly given, the notice period was waived, and the quorum for the meeting was sufficiently met, the resolutions tabled at the meeting were lawfully passed and adopted.

(iii) Validity of the shares issuance

[71] In terms of s 221 of the 1973 Companies Act, the directors of a company did not have the power to allot or issue shares of the company without the prior approval of the company in a general meeting. The issue of shares to LI was approved by the shareholders at the general meeting held on 18 April 2008.

[72] Section 92 of the 1973 Companies Act provides that a company may not issue shares unless the full issue price of, or other consideration for, such shares has been paid to, and received by, the company. As the shares issued to LI were issued in terms of the LI loan agreement, i.e., by way of set-off against the portion of the loan amount that remained outstanding, that amount was paid to and received by LM by way of set-off.

[73] Section 93 of the 1973 Companies Act provides that whenever a company makes any allotment of its shares, the company must within one month thereafter lodge with the CIPC:

'(b) in the case of shares allocated otherwise than for cash, a copy of the contract in writing constituting the title of the allottee to the allotment, together with any contract of sale, or for service or other consideration in respect of which that allotment was (or if such contract is not in writing, a memorandum containing full particulars of such contract), and a return in the prescribed form stating the number and description of the shares allotted, the name and address of such allottee and the consideration for which they have been allotted.' (Emphasis added.)

[74] The return of allotment in respect of the issue of shares subsequent to the rights issue was lodged with the CIPC by LM's company secretary at the time, PwC, within one month. The shares were therefore validly issued to LI in accordance with the provisions of the 1973 Companies Act.

[75] The appellants in their heads of arguments advance a new ground on which they rely for the setting aside of the relevant resolutions. They contend that the LM Board did not act in good faith and in the interests of LM when they resolved to increase its authorized share capital. In support of this contention the appellants submit that the LM Board should have provided, but failed, to provide them as shareholders with sufficient information regarding the reason for the increase of the LM share capital. This contention relies for support on *Trinity Asset Management (Pty) Limited and Others v Investec Bank Limited and Others*⁷ (*Trinity*) and *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another*⁸ (*CDH Invest NV HC*) which was confirmed on appeal by this Court in *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others*⁹ (*CDH Invest NV SCA*).

[76] The appellants' reliance on *Trinity* is misplaced. *Trinity* does not apply to the facts of the present case. *Trinity* only decided that a company's shareholders have a right to receive accurate information and to seek an interdict to stop a shareholders' meeting until correct information has been furnished. It does not support a proposition that a shareholder is entitled to claim the failure to receive accurate information entitling him to a declaration that the resolutions adopted, and the acts subsequently taken by the company are unlawful.

[77] The issue in *Trinity* was whether the court below was correct to dismiss an application by a company's shareholders to declare a loan agreement between the company and the creditor on the basis that the shareholders did not have *locus standi*.

⁷ *Trinity Asset Management (Pty) Limited and Others v Investec Bank Limited and Others* [2008] ZASCA 158; 2009 (4) SA 89 (SCA); [2009] 2 All SA 449 (SCA).

⁸ *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* [2017] ZAGPJHC 324; [2018] 1 All SA 450 (GJ); 2018 (3) SA 157 (GJ).

⁹ *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* [2019] ZASCA 53; 2019 (4) SA 436 (SCA).

This Court held that the shareholder's right to seek the declarator was triggered by the fact that a meeting had been called at which the members were asked to ratify the loan agreement. Before the shareholders could decide whether to attend the meeting to vote for or against the resolutions, or to give proxies to others to vote for or against on their behalf, or to do none of these things and to leave it to the majority to decide, they needed to have sufficient information to be able to come to an intelligent conclusion on the matter on which they were asked to vote. This right arises from a term implied in the company contract.

[78] This Court went on to hold that:

'Regard being had to the fact that an individual shareholder will be bound by the votes of the majority it must follow that the shareholder's rights extend not only to his or her being furnished with the necessary information but that all his or her fellow shareholders also receive such information. It also follows that a shareholder has the right flowing from the company contract to insist that he or she and his or her fellow shareholders do not receive information which is inaccurate and to enforce such right by applying for an interdict to prevent a meeting from proceeding.'¹⁰

[79] In this case, the minutes of the general meeting show that:

- (a) the general meeting of 18 April 2009 was attended by shareholders representing 97.5% of the total voting rights of all shareholders of LM;
- (b) all shareholders agreed to waive their 21-day notice period right;
- a comprehensive report was represented to LM shareholders describing the need to raise funds to contribute to the BFS to avoid the deemed offer provisions;
- (c) the LM shareholders were provided with detailed information regarding the Loan Agreement and its terms;
- (d) the meeting was attended by Mr Andrew Thomas, an independent consultant, who explained the deemed offer provisions and provided advice and answered various questions on the loan agreement, including the security provisions under the loan agreement. Having done so, he requested LM shareholders to indicate if there were any objections to the resolution taken;
- (e) on this basis the shareholders adopted various resolutions unanimously, including that LM conclude the LI loan agreement; LM would pledge shares to LI as

¹⁰ *Trinity* fn 8 para 36

security for the loan; the authorized share capital of LM be increased by 40 000 ordinary shares; and PwC in East London be instructed to register the above with the Companies and Intellectual Registration Office (CIPRO) and to issue the appropriate shares to LI to perfect its security on default. PwC proceeded to lodge the resolutions with CIPRO by filing the necessary CM26 and CM11 forms, which were accepted on 19 May 2009.

[80] Similarly, it is clear on the facts that the *CDH Invest SCA* judgment does not apply because LM's Board exercised their powers *bona fide* in the interest of the company. In *CDH Invest SCA* this Court held that:

'CDH's directors knew on 28 March 2014 that the round robin resolution upon which the directors were called to vote was contrary to the proclaimed purpose. They also knew that it was contrary to the MOU. Nonetheless on 31 March 2014 they signed the resolution. The egregious conduct on the part of CDH's directors was compounded when, on 4 April 2014, CDH's directors were reminded that the resolution was contrary to the express purpose as contained in the preamble to the resolution. Mr Sontshaka of Amabubesi wrote to Stadler on 4 April 2014 in this connection:

"It should be noted that there is no impediment in terms of the MOI against employing the methods in s 36(2)(a) and (b) and s 36(3). Therefore, the MOI can be amended by any one of the above methods, but only to the extent that it reflects 100 000 (one hundred thousand) authorised shares, which have already been issued, instead of the current 1 000 (one thousand) shares. The current resolution requiring that the authorised share be increased to 1 000 000 (one million) is incorrect and needs to be amended accordingly."

Notwithstanding these objections, and significantly employing the services of a firm other than Petro tank's appointed auditors, the majority proceeded to give effect to the resolution by submitting the resolution to the CIPC for filing.¹¹

[81] In the present case the LM Board acted in the best interests of LM in securing the loan to ensure that it could meet the capital call. Although only seven LM shareholders accepted the opportunity and participated by purchasing the additional shares, all LM shareholders benefited, either directly and/or indirectly. As a

¹¹ *CDH Invest NV SCA* fn 10 para 22.

consequence of LI having enabled LM to meet a capital call, both the shareholders of LM and of LI greatly benefited over the years from the dividends which flowed through these companies from LWC. Had this capital call not been met, these dividends would not have been received by LM or by LI and both sets of shareholders would have been deprived of substantial funds which are to date in excess of R130 million. Had LI not granted a loan to LM, LM would not have been in a position financially to meet the capital call and all LI and LM shareholders would have lost the benefit of the Project.

[82] The relief sought by the appellants in prayer 3 of the notice of motion, namely an order directing that dividends be paid by LM in accordance with the shareholding prior to January 2010 is not competent unless the shares held by LI and those shareholders who raised funds and participated in the rights issue are transferred to the appellants. The transactions which gave rise to the dilution of the appellants' shareholding were concluded in 2009 and implemented in 2010 when the share register was updated to reflect an increase of LI shareholding in LM. The dilution was based on a single act which occurred more than three years before the appellants instituted these proceedings. It did not constitute a continuous wrong.¹² The claim for the delivery of shares therefore prescribed in 2013. In the light of the conclusion I have reached, it is unnecessary to consider the rest of the technical defences raised by the respondents.

Cross Appeal

[83] As regards the fourth, fifth, sixth and eleventh respondents' conditional cross-appeal on the incorrect scale of costs granted by the high court, I am satisfied that the high court did not misdirect itself by not awarding costs on a punitive scale against the appellants. There is no basis to find that the proceedings brought by the appellants are frivolous and vexatious. As shareholders of LM, they have a right to bring the proceedings to challenge LM's decisions which gave rise to the reduction of their shareholding in LM. The high court exercised its discretion judicially and that being the case there is no basis to interfere with the high court's cost order.¹³

¹² *Barnett v Minister of Land Affairs* [2007] ZASCA 95 para 20.

¹³ *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) paras 113-114.

Therefore, the cross-appeal must fail.

Order

[84] In the result I make the following order:

- 1 The appeal is dismissed with costs including the costs of two counsel where so employed.
- 2 The cross-appeal is dismissed with costs including the costs of two counsel where so employed.

D H ZONDI
JUDGE OF APPEAL

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