REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **22312/2015**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED ✓

Date: 17-11-17 **WHG VAN DER LINDE**

In the matter between:

CDH Invest NV **Applicant**

and

Petrotank South Africa (Pty) Ltd **First Respondent**

Amabubesi Investments (Pty) Ltd **Second Respondent**

Summary: Company law – private company with two shareholders holding all authorised and issued shares in company – majority shareholder three board nominees, minority two - application by majority shareholder to direct board in terms of s.61(12) of Act 71 of 2008 to call

shareholders' meeting on failure of board to have called such under s.61(3) – shareholders' to resolve whether company to sue minority for shareholder's contribution - intended shareholders' meeting further to resolve to approve rights issue of portion of unissued authorised shares;

Counter-application by minority shareholder for interdict against board calling shareholders' meeting on basis of oppression – further relief to include setting aside of board resolution under s.36(3)(a) by round robin increasing authorised shares;

Held: court order under s.61(12) not automatic entitlement upon board having failed to call shareholders' meeting – applicant for relief to make out a case – factors considered – relief declined;

Held further: board's power to increase authorised share under s.36(3) and consequentially to amend memorandum of incorporation under s.16(1)(1)(b) subject to directors' fiduciary duty at common law as affirmed in s.76 and s.76(3)(a), (b) to act bona fide, for proper purpose, and in best interests of company;

Held further: element of bona fides subject to rationality test – considerations of fair play and parties' agreement in memorandum of understanding also relevant;

Held further: letter proposing resolution to increase authorised shares and proposes resolution itself misleading on the facts, and resolution and increase in authorised shares consequently set aside;

Held further: no case for relief from oppression made out and counter-application to interdict board from calling shareholders' meeting refused.

Judgement

Van der Linde, J

Introduction

[1] This is an application and counterapplication in which the two protagonists are the only two shareholders in a private company. The application in convention is by the majority shareholder (60%) and the application in reconvention by the minority shareholder (40%).

[2] The majority shareholder asks for an order in terms of s.61(12) of the Companies Act 71 of 2008 (the "Act") directing the company and the board to convene a shareholders' meeting in terms of s.61(3) of the Act for the purpose of considering and passing five resolutions: the removal of a director; the election of a substitute director; instructing the board to demand that the minority shareholder pays the company R1m; instructing the board to sue the minority shareholder for this money; and instructing the board to consider a pro-rata rights offer of 98 835 ordinary no par value shares.

[3] The minority shareholder consented to the first two resolutions, and this led to a consent being granted in respect of these two, but disputes the last three. In turn, the minority shareholder counter-applies for an order: setting aside the demand by the applicant ito s.61(2)(c)(i) to convene the shareholders' meeting; setting aside the board resolution of 31 March 2014 amending the MOI by increasing the authorised shares from 1 000 to 1 000 000 ordinary no par value shares; interdicting the applicant from calling a shareholders' meeting to vote resolutions 3, 4 and 5; and directing the board to correct para 2.1 (1) of its memorandum of incorporation ("MOI") by deleting 1 000 and substituting for it 100 000.

[4] In essence then the disputed areas are three-fold: whether or not the board should be directed by the court to call a members' meeting so that the members can debate and decide whether to sue the second respondent; whether or not the authorised shares has been validly increased to 1 000 000 or should be only 100 000 as originally intended; and whether or not the board should be directed to approve a rights offer of 98 835 of the company's authorised but unissued ordinary shares; and of course costs. If the resolution to increase the authorised shares from 100 000 to 1 000 000 is set aside, there would be no shares to offer in terms of the proposed rights offer.

[5] It is necessary to remark that the directors of the company were not formally joined,[1] although no-one took the point and the applicant itself sought relief against the board and

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[11] Rosebank Mall (Pty) Ltd and another v Cradock Heights (Pty) Ltd 2004 (2) SA 353 (W) at [11] ff.

the company. Indeed, in the consent order that was later made dealing with the substitution of directors, the parties formulated the relief against *"the first respondent and its board of directors."*[2] Since there are only five directors, three nominated by the applicant and two by the second respondent, it is safe to assume, as I do, that they are all fully aware of the application, and could have joined if they so desired.

[6] The Companies and Intellectual Property Commission was not joined in convention, but in reconvention as third respondent, and the Minister of Trade and Industry as fourth respondent, by order of Van der Westhuizen, AJ (then) on 20 March 2017. In what follows I deal, after the background and relevant statutory provisions, first with the issues around the company's authorised shares, and then the others.

Background and essential statutory provisions

[7] The first respondent ("the company") was constituted in terms of a shareholders' agreement called a *"Memorandum of Understanding"* ("the MOU") dated 31 January 2013 and the MOI. The MOI is binding between the company and each shareholder, and between the shareholders; and between the company and each director, officer, and board committee member.[3]

[8] It also enjoys constitutive priority over the MOU, because although its terms are binding between the members *inter se*, it must be consistent with the Act and the MOI; if any provision is inconsistent with the Act or MOI, that provision is void to the extent of that inconsistency.[4]

[9] The MOU provides for authorised shares of 100 000.[5] Although this conflicts with the MOI which provides for 1 000 authorised shares,[6] the parties were agreed that the latter figure

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[2] Order of Van Oosten, J dated 20 March 2017.
[3] S. 15(6).
[4] S.15(7). See also cl 3-2 of the MOU.
[5] Cl 5-1.
[6] Cl 2.1 (1).

was an obvious typographical error and that it should have read 100 000. Of these shares, 60% (or 60 000) would be held by the applicant and 40% (or 40 000) by the second respondent.

[10]Amending the company's authorised shares requires an amendment of the MOI, as well as a special resolution of the shareholders.[7] This resonates with the provisions of the MOU, which requires the affirmative vote of at least 75% of the parties – not the votes – in a shareholders' meeting to alter the MOI.[8] The board may propose such a resolution.[9] *"For a special resolution to be approved by shareholders, it must be supported by at least 75% of the voting rights exercised on the resolution."*[10]

[11]But there is another method of amending a company's number of authorised shares. It is that the board itself may do so except to the extent that the MOI provides otherwise.[11] Here the MOI has no provision limiting the power of the board to increase or decrease the company's authorised shares, and so the board's power remains intact.

[12]I am not persuaded in this regard that, as the second respondent contended, clause 8 (iv) of the MOU is consistent with the Act. That clause has already been alluded to; it provides that the MOI may only be amended by the affirmative vote of at least 75% of a shareholders' or board meeting. But s.16(1)(b) expressly provides that the MOI may be amended in the manner provided in s.36(3), which affords the board the power to increase the number of authorised shares. Thus the MOU is in this respect inconsistent with the Act and clause 8-3 (iv) not valid.

[13]The applicant's case founds on s.61 of the Act. S.61(3) provides that the board *"must"* call a shareholders' meeting if the appropriate demand for one is made, as was done here. The countervailing provision is s.61(5), whereby a shareholder may apply to court to set aside

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[7] S.36(2)(a); s.65(11)(a).
[8] Cl 8-3 (iv). More about this clause later.
[9] S.16(1)(c)(i)(aa), (ii).
[10] S.65(9). See also cl 3.6(2) of the MOI.
[11] S.36(2(b); s.36(3)(a).

such a demand *"... on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the shareholders, or is otherwise vexatious."* S.61(12) remedially provides then that if the company (not "the board") fails to convene a meeting of shareholders, *"... a shareholder may apply to court for an order requiring the company to convene a meeting ...".*

The applicant's case

[14]The applicant's case is then that as a shareholder it has made a demand on the board to call a shareholders' meeting; that demand was not complied with; neither the company nor the second respondent applied to court under s.61(5) to set aside the demand; and thus it follows that it is entitled to apply to court for an order requiring the company to convene a meeting.

[15]The founding affidavit does not assert facts or circumstances that ought to move the court in deciding whether or not to grant the relief claimed, and it seems to have been assumed that the right to apply to court for relief under s.61(12) provides of itself sufficient cause for the court to grant such an order. If this is so, then it confuses *locus standi* with the substantive merits of such an application, and issue to which I return below.

The second respondent's case

[16] The second respondent says that it and the applicant formed the first respondent as a corporate partnership to conduct the business of manufacturing steel petroleum storage tanks. The second respondent is an empowerment company, and the approach was initiated by the applicant, a Belgium company, for that reason. Venture capital of about R25m would be put up by the two corporate partners. Additional funding would be sourced from institutions.

[17]In time, the company was incorporated. It set up a factory, plant and equipment on leased premises in Gauteng. The lease ran from 1 April 2013 to 1 April 2018, renewable for five years. The second respondent says that it acquired an option to purchase the property during the currency of the lease; however, that must be a typographical error in the affidavit. It is the company, the first respondent, that acquired the option. The applicant lent R15m and the respondent R9.2m to the company.

[18]Subsequently the second respondent established that the applicant had surreptitiously purchased the property through the intercession of another company. This led to the second respondent applying urgently for an order declaring D'Hondt and Stadler, two of the applicant's directors on the company's board, as delinquent directors in terms of s.162(5)(c)(i), (ii) (iii) and (iv), read with s.162 (6)(b) of the Act. In the course of that application the second respondent alleged that D'Hondt and Stadler had acted mala fide. An interim order was agreed to, but the substance of that application pends.

[19]Thus far by way of background. Concerning the resolutions that the applicant wants passed at the intended shareholders' meeting, the second respondent recorded that it did not object to proposed resolutions 1 and 2, being respectively the removal of Mr Mabale as director and the substitution for him of Mr Thiers.

[20]The second respondent naturally opposes the passing of resolutions 3 and 4, those relating to the company demanding R1m of the second respondent and suing it upon non-payment. Its opposition is based on the argument that the company has no cause of action against the second respondent for payment of R1m. The agreement to provide seed capital was one between shareholders, not between the company and shareholders, contends the second respondent.

[21]Further, if the applicant had wished to engage the company in a legitimate process of suing the second respondent, it ought to have employed s.165 of the Act, which it has not done, according to the argument. The applicant's conduct is said to be vexatious. The second

respondent relies also on s.163(2) of the Act on the basis that the proposed resolutions are unfairly prejudicial to it, and it asks for an interdict restraining the applicant from proposing and passing them.

The contentious increase in the company's authorised shares

[22]The second respondent opposes also the passing of resolution 5. The opposition is founded on the argument that the MOU envisaged only 100 000 shares being issued, and these have been issued. The proposed resolution thus offends the MOU, according to the argument.

[23]The second respondent points to the manner in which the board resolution increasing the authorised shares from 1 000 to 1 000 000 came about. In an email by Stadler of the applicant at 15h49 on 28 March 2014, he wrote to the other four directors of the company about issues unrelated to the share capital. Towards the end of his email, he said (emphasis supplied):

"Please also note that it came to my attention that Petrotank is in breach of the Companies Act, in that more shares are in issue than have been authorised. In order to rectify this position, I attach hereto various documents (including a directors' resolution) aimed at putting the Company on the 'right side of the Companies Act'. ...
Therefore, please tend to signature and return of the attached resolution, in order for us to rectify the situation. As soon as we have return signatures from a majority of the board of directors, we will proceed with the required and relevant Companies Act procedures."

[24]This email attached the resolution which is attached to the founding affidavit, and which reflects three directors' signatures only, being the three directors nominated by the applicant to the company's board. The only date appearing there is 31 March 2014, and that is in fact the date on which the resolution became operative, according to the applicant.

[25] So, in effect, the applicant used its three directors on the board of the company to pass a resolution increasing the authorised shares of the company from the 100 000 it was supposed to have been were it not for the typographical error, to ten times more at 1 000 000 (one million). This was in the face of the fact that an error had been made before with the number of zero's required to describe the number of authorised shares.

[26]It is necessary to quote relevant portions of the resolution:

> *"**Whereas** the Company is, via its Memorandum of Incorporation, authorised to issue no more than 1000 (one thousand) ordinary no par value shares; and*
> ***Whereas** the current shareholders of the Company have agreed that 100 000 (one hundred thousand) shares will be issued amongst them (in a 60 000/40 000 split); and*
> ***Whereas** it is a legal requirement, to ensure compliance with the Act as relates to authorised and issued shares, that the Company's number of authorised shares be increased and the Company's Memorandum of Incorporation ne subsequently and accordingly amended;*
> ***Now therefore it is resolved that** ... the board herewith increases the Company's number of authorised shares to such extent that the Company is authorised to issue no more than 1 000 000 (one million) ordinary no par value shares..."*

[27]The second respondent replied to this letter on 4 April 2014, contending that there was a mistake; that the resolution ought to have provided for an increase in the authorised shares from 1000 to 100 000, and not 1 000 000; and that the proposed resolution needs to be amended accordingly. This letter was, unbeknown to the second respondent, too late, because by then the resolution had been passed, according to the applicant.

[28]Accordingly, when D'Hondt applied to CIPC on 5 June 2014 to amend the MOI to increase the authorised shares to 1 000 000 shares, he signed a document conveying that the board had agreed to amend the MOI to increase the authorised shares to 1 000 000.

[29]The second respondent was not informed of this increase until it received the current application. The second respondent contends that neither the board nor the shareholders had convened to decide and to vote the increase in authorised shares to 1 000 000, that it was in breach of the MOI and the Act, and that it was thus unlawful.

[30]The relief it seeks is an interdict restraining the applicant and the company from calling and holding a meeting of shareholders to propose and vote resolutions 3, 4 and 5. And it seeks a declaration that the amendment of the MOI to increase the authorised shares to 1 000 000 is invalid, and setting it aside.

Some responses to the other's case

[31]As was to be expected, there are in the affidavits much by way of argument and repetition, with the one accusing the other of improper and mala fide conduct. Much of that material may be set aside for current purposes, and it serves no purpose repeating it here.

[32]One point the applicant makes in reply, is that the second respondent, despite its proclaimed non-opposition to resolutions 1 and 2, have not been co-operating to procure them to be passed by round robin resolution in terms of s.74 of the Act, which expressly permits of such procedure. It asks that the second respondent be punished in costs.

[33]As regards the second respondent's objection to a meeting at which it will be proposed that the second respondent be sued for R1m (resolutions 3 and 4), the applicant says there is nothing prejudicial about it: all that it seeks, is for a meeting to be convened where the parties will discuss, debate and then vote the issue. It says the second respondent would be free to attend the shareholders' meeting and there attempt to persuade the applicant not to vote to sue the second respondent. There is no certainty, it says, as to whether these resolutions would be passed or not.

[34]As regards the increase in the authorised shares, the applicant contends that the resolution was lawfully passed. It accepts that the MOI reflected 1000 shares instead of 100 000 shares as a result of a patent and bona fide typographical error; and that the MOI should have stated that the authorised shares was 100 000 shares.

[35]Here too it says that all it asks is for a meeting to be called by the board at which the question whether the rights offer should be issued, would be considered. It says that should the company's board vote in favour of implementing the proposed rights offer, *"... one of the numerous potential results of a successful implementation ... would be that interest-bearing debts could be converted into equity."*

[36]The applicant says the parties agreed that the applicant would lend R15m and the second respondent R10m to the company. It goes on to say that the company accepted the benefit that was to accrue to it in terms of this agreement between the shareholders, obviously

making way for a *stipulatio alteri* legal construction. It says too that it has thus far provided 84% (or R16 693 480) of the shareholder capital to the company; the second respondent only 16% (or R9 000 000).[12]

[37]It accepts that the property on which the company conducts its operations was purchased by the intervening company, but says it was done subject to the company's option to purchase the property.

[38]It says it involved the second respondent in its venture in South Africa on the basis of its assurances and representations that it was well-connected in the local business community, and that it would be able to facilitate significant and substantial business growth for the company. But, it says, despite these assurances and representations, *"...not a single cent of Petrotank's income to date has been generated as a result of Amabubesi's intervention and/or mediation."*

Discussion

[39]Five salient background facts that need to be underscored are the following: first, these two shareholders have clearly fallen out, they are involved in other litigation against each other, and they do not trust each other; second, the applicant effectively controls the board and the general meeting; third, the applicant feels that the second respondent has made promises that have not materialised; fourth, the applicant feels that it has put up substantially greater capital than has the second respondent; and fifth, the applicant proposes that the general meeting meet to decide whether or not to sue the second respondent for its capital contribution.

[40]The applicant's assurances in these circumstances that it remains open to persuasion and that there is no certainty about the way the board and the shareholders' meeting would

[12] It is unclear to me how the applicant's arithmetic goes. If it contributed R16 693 480 out of R25 693 480, that is 64,9% of the aggregate shareholders' contribution.

vote, is not persuasive. But that is of course not the question that arises for determination in this application.

[41]The questions are, as indicated at the outset: whether or not the board should be directed to call a members' meeting so that the members can debate and decide whether to sue the second respondent; whether or not the authorised shares has been validly increased to 1 000 000; and whether or not the board should be directed to approve a rights offer of 98 835 of the company's authorised but unissued ordinary shares. I commence with the last two issues, and then return to the first.

The resolution of 31 March 2014 (resolution 5)

[42]The factual background to considering this aspect of the case has been referred to above, but may be summarised as follows. There is the MOU which provides that the shares in the company would be held by the applicant and the second respondent as to 60% and 40% respectively.[13] There is the applicant's declared position that the second respondent has not made good on its representations and has in any event not performed its side of their bargain, for which it wants the company to sue the second respondent. There is the applicant's evidence that it has contributed 84% of the shareholder capital and the second respondent only 16%. There is the applicant's argument that an increase in the authorised share would enable the company to convert debt to equity.

[43]And there is the applicant's letter covering the proposed resolution, saying the resolution was necessary to legitimise the share issue because the MOI erroneously authorises only 1 000, whereas 100 000 shares have in fact been issued. The introductory part of the resolution itself records as background to and need for the resolution, the fact that the two

[13] The MOU does envisage a potential increase in share capital, but then on shareholders' resolution: MOU, p26, para 5-3. It has been pointed out that the MOU is void to the extent that it is inconsistent with the Act or the MOI. The Act empowers the board in s.36(3) to increase the authorised shares unless the MOI precludes it; and in this case it does not. Consequently the board has the power in this case to increase the authorised shares, and the question is whether the exercise of that power in this case was lawful.

shareholders had agreed to issue 100 000 shares and split them 60 000/40 000 but the MOI erroneously authorises only 1 000 shares; and to ensure compliance with the Act, it was necessary to increase the authorised shares and to amend the MOI *"subsequently and accordingly."*

[44] It may be helpful to set out some general principles of company law before turning to specifics. First, courts generally decline to interfere in the running and management of companies unless there is lack of fair dealing or probity. Second, shareholders do not owe their company a fiduciary duty, and may thus vote their selfish interest, unless in so doing a majority acts in a way that is oppressive or unfairly prejudicial of the minority.[14] Third, board power must be exercised bona fide and in the best interest of the company as a whole, and if not, it will be set aside, even if technically speaking the power exists.[15]

[45]In our law, the previous Companies Act provided no power to directors to issue shares.[16] The new Act, which commenced on 1 May 2011, now provides for that power in s.38 (1),[17] but that power is capped by the number of shares authorised by the MOI. However now, as

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[14] See generally , De Sousa v technology Corporate Management (Pty) Ltd, 2017 (5) SA 577 (GJ).

[15] KE Lindgren, professor of Legal Studies, University of Newcastle, introduces his article, *"The Fiduciary Nature of a Company Board's Power to Issue Shares"*, published in the Western Australian Law Review, this way: *"The fiduciary status of a company's board of directors affects all their powers under the memorandum and articles of association. In the result, an act of a board, though within a literal construction of a power, may be vitiated by reference to limitations which spring from its fiduciary character."*

[16] S.221 of Act 61 of 1973 provided as follows:

***"221. Restriction of power of directors to issue share capital.**—(1) Notwithstanding anything contained in its memorandum of articles, the directors of a company shall not have the power to allot or issue shares of the company without the prior approval of the company in general meeting.*

(2) Any such approval may be in the form of a general authority to the directors, whether conditional or unconditional, to allot or issue any shares in their discretion, or in the form of a specific authority in respect of any particular allotment or issue of shares.

(3) If any such approval is given in the form of a general authority to the directors, it shall be valid only until the next annual general meeting of the company but it may be varied or revoked by any general meeting of the company prior to such annual general meeting.

(4) Any director of a company who knowingly takes part in the allotment or issue of any shares in contravention of subsection (1), shall be liable to compensate the company for any loss, damages or costs which the company may have sustained or incurred thereby, but no proceedings to recover any such loss, damages or costs shall be commenced after the expiration of two years from the date of the allotment or issue."

[17] ***"38. Issuing shares.**—(1) The board of a company may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation, in accordance with section 36."* Both the s.36(3) and s.38(1) have been described as *"radical departures"* from the previous position; Carl Stein, The New Companies Act Unlocked, SiberInk CC 2011, p155, p160.

we have seen, directors also have the power in s.36(3) to increase or decrease the authorised shares and so, in a sense, they are now able to pull themselves up by their own bootstraps. For the purposes of what follows, I regard the obligations of the board relative to increasing the number of authorised shares of a company, and relative to the issuing of new shares in a company, as of the same ilk.

[46]The exercise then of the power to issue shares, as with others, is constrained by s.76(3) which provides as follows (emphasis supplied):

*"76. **Standards of directors conduct**.—(1) In this section, "director" includes an alternate director, and-*
(a)a prescribed officer; or
(b)a person who is a member of a committee of a board of a company, or of the audit committee of a company,
irrespective of whether or not the person is also a member of the company's board.
(2) ...
(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—
(a)in good faith and for a proper purpose;
(b)in the best interests of the company; and
(c)with the degree of care, skill and diligence that may reasonably be expected of a person—
(i)carrying out the same functions in relation to the company as those carried out by that director; and
(ii)having the general knowledge, skill and experience of that director.
(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company—
(a)will have satisfied the obligations of subsection (3) (b) and (c) if—
(i)the director has taken reasonably diligent steps to become informed about the matter;
(ii)either—
(aa)the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or
(bb)the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and
(iii)the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and
(b)is entitled to rely on—
(i)the performance by any of the persons—
(aa)referred to in subsection (5); or

(bb)to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and
(ii)any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5)."

[47]These provisions are largely an echo of the common law, in respect of which there is of course a substantial body of authority.[18] The duty to act bona fide and in the best interests of the company, *"...is the fundamental duty which qualifies the exercise of any powers which the directors in fact have ..."*.[19] The concept of bona fides does not, as will appear, have a wholly subjective content: *"But in deciding whether the duty has been observed the Court may properly consider whether in the circumstances a reasonable man could have believed that the particular act was in the interests of the company."*[20]

[48]There are no judgements yet locally on how these provisions are to be applied in the context of directors issuing shares. But from early on courts in other jurisdictions have applied the constraint of *"bona fides for the benefit of the company as a whole"* on directors' power in the context of issuing shares, and it may be instructive to refer to some.

[49]In Punt v. Symons & Co.[21] Byrne, J said more than a century ago:[22]

"On the evidence I am quite clear that these shares were not issued bona fide for the general advantage of the company, but they were issued with the immediate object of controlling the holders of the greater number of shares in the company, and of passing a resolution and getting the necessary statutory majority for passing the special resolution, while not at the same time conferring upon the minority the power to demand a poll."

[50]With reference to this and other judgments, McKay, JA said in the Court of Appeal in Saskatchewan, in Canada in 1927:[23]

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[18] See generally, Henochsberg on the Companies Act, 71 of 2008, LexisNexis, p296 ff.
[19] Ibid.
[20] Ibid. Henochsberg refers too to the Teck Corporation case in Canada, to which I refer in more detail below.
[21] [1903] 2 Ch. 506, 72 L.J. Ch. 768.
[22] At 773.
[23] Smith v Hanson Tire Company Ltd, 1927 CanLII 162 (SK CA), at [42].

"I gather from the foregoing authorities that where shares are issued and allotted by the directors not bona fide for the general benefit of the company, but in order to get control of the voting power the Court will declare the same void."

[51]McKay, A quoted from Martin v. Gibson[24] for the following dictum, of particular relevance to this matter (emphasis supplied):[25]

"It may be that it was not in the immediate and direct contemplation of the directors to oust the minority from their place of vantage, but this was the inevitable effect of what was done; and, while this consideration helps to eliminate the element of fraud, if does not lessen the injurious effect of the partial allotment."

The precise content of the notion of absence of bona fides is therefore touched on in this paragraph. I return below to deal with it.

[52]Turgeon, JA wrote in a concurring judgment:

"[5] In the judgment in the New Jersey case to which I have referred the following statement occurs:
The power of distributing a new issue does not lie at the mere choice of directors. It is not a prerequisite which they may use for their private advantage. They may not overthrow or secure for themselves the control of the corporation by means of a new issue of stock. This is true whether as to a part of the stock authorized by the original incorporation which remains untaken or as to stock issued after incorporation on a subsequently authorized increase.
[6] I do not find this principle enunciated so clearly in any of the English or Canadian authorities which have been submitted to us, but I think it flows naturally from what they decide, and that the language in which it is expressed here indicates properly the limitations which bind the directors of a company, as trustees, when they proceed to an issue of the company's shares."

[53]In Teck Corporation Ltd v Millar et al[26]the British Columbian Supreme Court examined the question as to what the nature of the board's objective in issuing fresh shares would have to be to invite court interference. Berger J was urged to follow Hogg v Cramphorn Ltd[27] which held that even where the board had acted in good faith, believing they were serving the best interests of the company, an issue of shares would be set aside if they issued the shares in order to defeat an attempt to secure control of the company.

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[24] (1907) 15 O.L.R. 623,
[25] At [41].
[26] 1972 CanLII 950 (BC SC).
[27] [1967] Ch. 254, [1966] 3 W.L.R. 995, [1966] 3 All E.R. 420.

[54]The learned judge declined to follow that principle, but posed the following question (emphasis supplied):[28]

"How can the Court go about determining whether the directors have abused their powers in a given case? How are the Courts to know, in an appropriate case, that the directors were genuinely concerned about the company and not merely pursuing their own selfish interests?"

And then he answered it as follows:[29]

"I think that directors are entitled to consider the reputation, experience and policies of anyone seeking to take over the company. If they decide, on reasonable grounds, a take-over will cause substantial damage to the company's interests, they are entitled to use their powers to protect the company. That is the test that ought to be applied in this case."

[55]The facts in Otawara Co Ltd v Masuda and Others[30] decided in the Supreme Court of British Columbia in Canada, resonate with the present matter:[31]

"All of the foregoing was an attempt by Yamagishi to force the petitioner to inject more money into the Company. When the petitioner declined to increase its shareholders loan, the effect of the resolutions was to convert the debt of the Company to equity so as to improve the borrowing potential of the Company. By converting the debt to equity, there was a new share arrangement which no longer left the parties in a fifty-fifty position in the Company in accordance with their original bargain."

and[32]

"The narrow point is whether the drastic measures taken by the respondents to cause the petitioner to increase its shareholders loan can be supported. In my opinion it cannot."

and[33]

"In my opinion, the major difficulty faced by the respondents is that they have caused resolutions to be passed which are directly in breach of the shareholders' agreement. From a position of equality, contemplated by the parties, they have caused resolutions to be passed which create an inequality and which expose the Company to the potential for greater debt. The petitioner is unfairly prejudiced by the resolutions because he is now in a minority shareholders' position. I do not consider the offer of the respondents, to allow the petitioner

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[28] At 315.
[29] At 317.
[30] 1992 CanLII 947 (BC SC).
[31] At p 10.
[32] At p 11.
[33] At 13,14.

the opportunity to buy more shares in order to create equal holdings, to be any answer at all. It is simply a coercive action designed to get the petitioner to put up more money."

[56]In the article by Prof Lindgren referred to above, the author examines the concept of *"bona fide for the benefit of the company as a whole,"* and in particular the ostensible subjectivity that seems encompassed by the concept. He remarks (emphasis supplied):[34]

"A solution seems to be that there was always an objective element in 'bona fide for the benefit of the company as a whole,' namely that the directors must have 'truly and reasonably believed at the time that what they did was for the benefit of the company,' and it is not permitted for directors to say that they reasonably believed that it was bona fide for the benefit of the company for them to exercise a power for an improper purpose. Perhaps this is what Helsham, J had in mind when he said,
'. . . it is my opinion that the requirement of bona fides of a director must be considered in relation to the power and the exercise of it, not his belief or state of mind.'"

[57]In Australia, in the Court of Appeal of Western Australia appellate judgement of Westpac Banking Corp v The Bell Group,[35] two of the three judgments of the judges of appeal dealt with directors' conduct in issuing shares. In the judgment of Lee, AJA the following appears:[36]

"931 If the power of a director to allot shares of a company is a fiduciary power, as stated by Mason CJ, Deane and Dawson JJ in Whitehouse v Carlton Hotel Pty Ltd [1987] HCA 11; (1987) 162 CLR 285, 290, then it must be concluded, as his Honour found, that the power to dispose of, encumber or charge assets of a company is of a like nature and a fiduciary power.
932 And it must follow that the duty of a director not to exercise a power of a company for an improper or impermissible purpose is a fiduciary duty at least when the power being exercised is a fiduciary power. See Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd."

[58]The learned judge there too stressed that the question whether the director has exercised a power for an improper purpose, is an objective assessment, not determined by the subjective belief of the individual director.[37]

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[34] At 372.
[35] Westpac Banking Corporation v The Bell Group Ltd (In Liq) [No 3] [2012] WASCA 157.
[36] At para 931 ff
[37] Op cit, para 933

[59]Drummond, AJA dealt with the same issue in his judgment.[38] The learned judge said, in relation to the directors' power to issue shares, amongst other things:[39]

"A power vested in directors to issue shares has repeatedly been described in the High Court as a fiduciary power that must be exercised bona fide for the benefit of the company as a whole. For example: 'The power to allot shares conferred on the directors by article 4 is a fiduciary power to be exercised bona fide for the benefit of the company as a whole': Grant v John Grant & Sons Pty Ltd [1950] HCA 45; (1950) 82 CLR 1, 32 (Williams J, McTiernan and Kitto JJ concurring). The court in Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL [1968] HCA 37; (1968) 121 CLR 483 referred at (492) to 'the undoubted general proposition that a power vested in directors to issue new shares is a fiduciary power which the directors are not entitled to exercise otherwise than bona fide for the benefit of the company as a whole'."

[60]In relation to the duty to exercise powers for proper purposes, the learned judge founded its origin in the concept of the prohibition of a fraud on power.[40] He said:[41]

"These authorities show that in the context of the fiduciary relationship between directors and their company, the way the law gives meaning and content to a duty and a power of directors, once they are identified as fiduciary ones, is by requiring them to be exercised bona fide for the benefit of the company and for proper purposes."

[61]Fundamentally important for present purposes, where the s.76 duties are not a codification of the common law fiduciary duties, but rather an affirmation of them, the learned judge examined whether the duty to act bona fide in the best interests of the company are proscriptive; put differently, perhaps colloquially, whether they are only of the *"Thou shalt not"* kind. He held that they were not so limited:[42]

"In my opinion, until the High Court declares the law to be otherwise, long established authority requires the duties of company directors to act bona fide in the interests of the company and to exercise their powers for proper purposes to be accepted as fiduciary ones even though they may require the directors to take positive action. Further, that the directors' own interests may be involved or that they may be in a situation of conflict will not necessarily mean that they have breached their fiduciary obligations in taking such action, if their actions have benefited the company."

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[38] Op cit, para 1938 ff.
[39] Op cit, para 1947.
[40] Op cit, para 1952.
[41] Op cit, para 1954
[42] Op cit, para 1978.

[62] Finally, on the question whether these fiduciary duties are to be tested against subjective or objective standards, the learned judge held that the duty to act bona fide in the best interests of the company, and the duty to exercise powers only for a proper purpose, is conceptually different.[43]

[63]In relation to the first duty, that is to act bona fide in the best interests of the company, the learned judge held that despite the subjective language, there was still an objective element involved:[44]

"Brennan J in Wayde v New South Wales Rugby League Ltd [1985] HCA 68; (1985) 180 CLR 459, 469 – 470 considered that this proposition was justified by Shuttleworth v Cox Brothers & Co (Maidenhead) Ltd [1927] 2 KB 9, 23 - 24. Brennan J's statement that such a conclusion is the penultimate step to inferring that the directors did not make their decision in good faith for a purpose within the power does not, I think, alter the fact that this test enables the court to set aside a manifestly unreasonable decision even though the directors may in fact have honestly believed they were acting properly."

[64]The learned judge then concluded:[45]

"In my opinion, the duty of directors to act bona fide in the interests of the company is subjective in that whether it has been fulfilled depends on the directors honestly believing that their actions were in the interests of the company. However, the test for determining whether the duty of directors to exercise their powers for proper purposes has been complied with is an objective one for the court, not the directors."

[65]The learned judge then dealt with the directors' power to issue shares.[46] He subscribed to the notion that it was a fiduciary power,[47] and concluded in this context:[48]

"Whether there has been a proper exercise of such a power cannot be governed by whether the director exercising it honestly believes he has done the right thing. It is for the court to determine whether, in the circumstances of the case, the power has been exercised for a proper or improper purpose. The test is therefore an objective one."

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[43] Op cit, para 1979. Note, as one considers these passages, that in s.76 in our Act they have been rolled together. The duty to act bona fide is matched with proper purpose, and not best interests of the company; and best interests of the company stands alone, albeit conjunctively, with the earlier matched pair.
[44] Op cit, para 1983.
[45] Op cit, para 1988.
[46] Op cit, para 2005 ff.
[47]Quoting at para 2007 from an earlier judgment: *"But the powers conferred on shareholders in general meeting and on directors by the articles of association of companies can be exceeded although there is a literal compliance with their terms. These powers must not be used for an ulterior purpose."*
[48] Op cit, at para 2012.

[66]This far the reference to Australian authority. The takeaway for present purposes from these cases in Canada and Australia is that there is persuasive authority for the proposition that the director's power to issue shares is a fiduciary power that has to be exercised proactively; that the directors' belief that it was exercised in good faith in a given scenario is still subject to court control where there is no rational basis for that belief; and that the exercise of the power for a proper purpose is fully subject to an objective test.

[67]These cases and academic comments also articulate two principles that, I suggest, also fit our company law: that the tenets of the parties' agreement in their pre-corporation founding consensus, whether embodied in a written agreement or not, is a significant consideration in judging fair dealing and probity; and that the yardstick for measuring the exercise of a power against the purpose for which it was given in the first place, is objective. The statutory notions of *"good faith"*, *"proper purpose"*, and *"best interests of the company"* that appear in s.76(3) as underscored above, carry these principles forward.

[68]Applying these principles then to the board's conduct in the present matter, pertinently in proposing and passing the resolution of 31 March 2014, the starting and salient point in the relevant factual make-up is the dichotomy between the reason given as the ostensible need for the resolution; and against that, the resolution actually passed, plus the true reason now disclosed. The reason given for the resolution was to correct and legitimise a patent error which both parties recognised as such (only 1 000 shares authorised; should have been 100 000); the resolution actually passed went tellingly beyond that (ten times at 1 000 000 shares authorised).

[69] The applicant says[49] of course that to the extent that the resolution went beyond its proclaimed objective, this was deliberate but innocent, not mala fide; and it was clear and

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[49] It should be noted that the authors of the conduct surrounding this resolution was explicitly the applicant's director nominees on the second respondent's board; see for example the email of 28 March 2014, annexure PMP9 (p137) to the answering affidavit, by Mr Stadler, the managing director of the company, addressed to one of the second respondent's director nominees (Mr Moyo) and others, in this fashion: *"Dear Peter and*

evident as such also to the two directors nominated by the second respondent, as was borne out by their email of 4 April 2014.

[70]In my view this assertion must be rejected on the papers as not being credible, for the following reasons. First, both the covering letter explaining the need for the resolution, and the introductory part of the resolution itself, which explained the need for its being passed, present the correction of the error as the objective. It offers no other, additional or alternative, objective. In particular, the allegedly innocent by-product of an increased authorised shares float leaving the scope to convert debt to equity, was not mentioned. From this it must be concluded that the author of both the letter and the resolution wished for the reader to be persuaded by the stated objective – and no other - to vote in favour of the resolution. Such a resolution may not be untrue in any material respect,[50] or artfully framed.[51]

[71]Second, the MOU requires in clause 6-2 that a written notice of a board meeting, *"... shall be accompanied by an agenda of the meeting identifying in reasonable detail the matters to be discussed at the meeting ...".* Although this notice was intended as a round robin, the requirement of reasonable detail applied no less. Here of course reasonable detail was given; but not of the true intent of the resolution.

[72]Third, the second respondent's director nominees read and understood the proposed resolution in precisely the intended way. They drew specific attention to the dichotomy to which I have referred, and asked that it be corrected. The applicant's director nominees on the company's board, specifically Mr Stadler and Mr D'Hondt, did not respond to this letter; they did not correct what they must have viewed at that time as the clear misunderstanding evident from the letter. Instead, the applicant's director nominees likely considered that

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fellow directors". He was acting in his capacity as director of the company – the first respondent - and he addressed the email to the recipients in their like capacities.

[50] Sammel v President Brand Gold Mining Co Ltd, 1969 (3) SA 629 (A) at p412 B.

[51] Leslie Kosman, QC and Catherine Roberts, Company Meetings and Resolutions: Law, Practice and Procedure, 2nd ed, 2013, Oxford University Press, para 20.10.

since the applicant's three director nominees carried the resolution, they and the applicant had achieved their own objective: 1 000 000 authorised shares.

[73]Third, if the intended rights offer of 98 835 shares was taken up by the applicant but not the second respondent (who on the applicant's calculation is cash strapped), then the applicant would hold 119 301 shares out of 159 301, or 74.89%. It would be able to carry a special resolution.

[74]Fourth, the resolution, read in the light of its covering letter, was clearly calculated to present an innocent face to the resolution, and to remain silent about the – at best for the applicant – added objective of a hugely increased number of authorised shares. Notably absent from the explanation for the resolution, whether in the letter or in the preamble, was the fact that if the resolution was passed, it would have the effect of causing an amendment to the MOI without a special resolution.

[75]Even if the applicant's director nominees' true motive cannot be rejected on paper, it is suggested that – for the reasons just mentioned – there is no rational basis for the motive. The way in which the resolution was presented, and the proclaimed purpose for which it was presented, in other words the particular consensus that was expressly sought, is not rationally connected with the objective of having extra float on the number of authorised shares so as to able, for instance, to convert debt to equity.

[76]It follows that the subjective part of the test for motive is not legitimised; and, incidentally, that the constraints of Plascon-Evans[52] do not preclude the relief sought. The objective part of the test, that is whether the resolution was passed in the best interests of the company and for a proper purpose, is also not shown.

[77]Again, the resolution was not presented as being to increase the authorised share so as to establish a float of authorised shares; it was proposed to correct a common cause typographical error. That was a misrepresentation, it turns out, of the applicant's director

[52] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

nominees' motive, certainly on the applicant's own case. But the applicant and its director nominees cannot draw a benefit from a misrepresentation which was calculated to mislead,[53] by contending that the purpose which its director nominees designed to obscure from the two directors nominated by the second respondent was in fact, as it happens, legitimate and in the best interests of the company.

[78]In the result the resolution of 31 March 2014 cannot stand, and it must be declared void ab initio, and set aside. It follows from this conclusion that there is no scope for a rights offer, since all the authorised shares will have been issued.

Resolutions 3 and 4

[79]The issue here is whether the applicant has made out a case for the invocation of the court's power under s.61(12) to direct the company, by which is probably meant the board, to convene a members' meeting to debate whether the second respondent should be sued for R1m; and if so resolved, to institute such action.

[80]I have two difficulties in principle with the relief claimed. The first is this. Why is it sought to inveigle the court's power under s.61(12) if the board is able to itself to call such a meeting? The applicant nominates three directors to a board of five;[54] it has board power and is therefore able to carry a resolution to convene a shareholders' meeting.

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[53] In Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd" (759/2011) [2012] ZASCA 126 (21 September 2012).Van Zyl, AJA said in this context:
"*[12] The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. 'It is a fundamental principle of our law that no man can take advantage of his own wrong' and 'to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation'. The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, 'it has become nothing but an idle gesture'. This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences of the contract."*
[54] MOU cl 6-1, founding affidavit, p21.

[81]Apart from this consideration, I do not accept that court intervention in terms of s.61(12) is there for the asking. Conferring upon the court the power in terms of s.61(12) to direct that the board calls a meeting, is company law contra-intuitive, because the court generally declines interference in management of company affairs. It could hardly have been intended, in those circumstances, that the court should act as a mere rubber stamp of technical compliance by means of a prior statutory demand.

[82]Rather, the intention of the legislature must have been to invoke the oversight role of the court.[55] I suggest that a court would generally, unless special circumstances require otherwise, have to be satisfied that calling a members' meeting was bona fide intended, with a legitimate purpose, and in the best interests of the company. And an applicant for relief would have to put facts before the court that would justify the inference that that threshold has been met. In this case the applicant for relief did not do that, and it is not possible to infer a case for the applicant from the material that can otherwise be gleaned from the papers.

[83]For one, the ex post facto reliance on a *stipulatio alteri* in a subsequent affidavit does smack of afterthought. Rather, the impression is difficult to avoid that the object of forcing a meeting is to compel the second respondent to perform its side of the bargain. But of course, the applicant does not need the court to attain that end. If the board will not call a members' meeting to discuss suing the second respondent, that is the board's prerogative. The applicant, or on the *stipulatio alteri* case the company, is still free to decide whether or not to sue the second respondent; it does not need a members' meeting to authorise it.

[84]However, the court's disinclination to accede to the request to direct that a shareholders' meeting be called does not have the automatic corollary that the company and its board should be interdicted from convening such a meeting. In fact, the very considerations that

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[55] Compare Contemporary Company Law, Cassim et al, Juta & Co, 2nd ed, p 375.

persuade a court from keeping a distance from a company's internal management also apply against granting the interdict sought by the second respondent.

[85]If the applicant is right, and the second respondent has short-paid its agreed contribution, then it would be inappropriate, I suggest, asphyxiating the parties' debate on the issue, whether at board or members' level. The parties' differences on the question whether the second respondent owes seed money, coupled with the applicant's desire to exact performance in accordance with its view do not, in my view, amount to oppressive conduct in the company law, specifically s.163, context. The resolution purporting to increase the authorised share potentially does, but that issue has been disposed of above on a different basis.

Conclusion and relief

[86]The removal of the one director and his substitution has been dealt with in an order that was made by Van Oosten, J on 20 March 2017, and nothing more need be said about it, except the costs, which were reserved then. In this regard the second respondent was unnecessary obstructive about that proposed procedure, and thus, although the remainder of the relief sought in the main application must be refused, I do not make any costs order on the main application.

[87]It follows that in my view the main application must fail, and that the counter-application must succeed, to the extent that relief setting aside the resolution of 31 March 2014 and relief flowing from that consequence, are concerned. As to costs, it seems to me that the counter-application was substantially successful.

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

(a) The application in convention is dismissed.

(b) No order as to costs is made on the application in convention.

(c) No order as to costs is made in respect of the costs that were reserved by Van Oosten, J on 20 March 2017.

(d) Paragraphs 3.3, 3.4 and 3.5, and paragraphs 4.3, 4.4 and 4.5 of the demand dated 24 April 2015, addressed to the first respondent and its directors (annexure CDH5 to the applicant's founding affidavit), are hereby set aside.

(e) The resolution purportedly passed by the board of directors of the first respondent on 31 March 2014, purporting to amend the first respondent's memorandum of incorporation so as to increase the first respondent's authorised shares to 1 000 000 (one million) ordinary no par value shares, is declared invalid and is hereby set aside.

(f) The amendment of the memorandum of incorporation of the first respondent effected by the third respondent on or about 21 July 2014 in terms of which the authorised shares of the second respondent was purportedly increased to 1 000 000 (one million) no par value shares, is declared invalid and is hereby set aside.

(g) The first respondent is directed within 10 (ten) days of this order to take the required steps to amend and correct paragraph 2.1 (1) of its memorandum of incorporation registered with the third respondent to reflect that it is authorised to issue 100 000 (one hundred thousand) ordinary no par value shares.

(h) Failing the first respondent taking the required steps within 10 (ten) days of this order as aforesaid, the third respondent is authorised and directed to amend and correct paragraph 2.1 (1) of the memorandum of incorporation of the first respondent to reflect that the said company is authorised to issue 100 000 (one hundred thousand) ordinary no par value shares.

(i) The applicant is directed to pay the costs of the application in reconvention, such costs to include the costs of two counsel where employed.

WHG van der Linde
Judge, High Court
Johannesburg

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Date hearing: 26 and 27 October, 2017, with further written submissions by the second respondent on 2 November 2017
Date judgment: Friday, 17 November, 2017