IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 30354/2017

In the matter between:

COMMUNICATIONS SPECIALISTS (PTY) LTD	Applicant
and	
LINDA JOSEPH NYEMBE	First Respondent
COMSCIENCE (PTY) LTD	Second Respondent

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) ~~REVISED~~.

4 July 2018
DATE SIGNATURE

JUDGMENT

ELLIS, AJ:

(1) The applicant seeks an order declaring its own resolution dated 29 May 2014, null and void, to be set aside, with an additional order that first respondent repay applicant an amount of R1,736,285.70.

(2) The resolution dated 29 May 2014[1] reads as follows:

"IT WAS RESOLVED THAT:

- As the Board has formally accepted the restructuring of the company shareholding by mutual agreement between *inter alia* the shareholders of Comscience and also the shareholders in Communications Specialists (Proprietary) Limited - to the full and final effect that the shareholding in Comscience (Proprietary) Limited be reconstructed to the effective position with Linda Nyembe – 51% (fifty one percent) and Bushveld Trust – 49% (forty nine percent) all done retrospectively to the date Linda Nyembe had the 51% (fifty one percent) equity position in Comscience - as such will any and all dividends paid to and received by Communication Specialists (Pty) Ltd be regarded as monies received for and on behalf of Linda Nyembe;

- The Board unanimously agreed that these dividends received by Communications Specialists (Pty) Ltd for and on behalf of Linda Nyembe need to be repaid to Linda Nyembe from the funds on hand by Communications Specialists (Pty) Ltd - which all parties agreed are monies duly owed to him, and which will be reflected in the Financial Statements of Communication Specialists (Pty) Ltd as "dividends received on Linda Nyembe's behalf and now due and payable to Linda Nyembe" (pertinently stating that there will be NO INTEREST PAYABLE on these monies received on Linda's behalf).

- That the amount of dividends received by Communication Specialists (Pty) Ltd on Linda Nyembe's behalf and now due and payable to him amounts to R1,736,285.70 (one seven three six two eight five rand & seven zero cent) - which amount is confirmed by per email with attachments dated 13th of March 2013 (11h42) as received from the External Auditor of Comscience (Pty) Ltd Professor Chris Hattingh – see attached Appendix A to this Board Resolution."

(3) Appendix A, referred to in the last paragraph of the aforesaid resolution is neither attached to the applicant's papers, nor is there any explanation proffered by the applicant for its omission. During the hearing hereof, I also specifically requested applicant's counsel to hand up a copy of Appendix A to the resolution, whereupon I was informed that same is not at hand and in any event irrelevant for purposes of its application.

(4) In order to substantiate its relief, applicant avers the following:

(4.1) At all relevant times immediately prior to the resolution, first respondent held 30% of all the issued shareholding in the second respondent and the Bushveld Trust held the remaining 70% shares in the second respondent. The Bushveld Trust is not a party to these proceedings.

(4.2) On or about 14 January 2014, the first respondent and a Mr Shawn Boshoff, acting on behalf of the Bushveld Trust, entered into an oral agreement, in terms whereof it was *inter alia* agreed that the shareholding in the second respondent be reallocated to the effect that the Bushveld Trust would hold 49% of all the issued shares and the first respondent would acquire the remaining 51% shares. The applicant contends that Mr Boshoff had no authority to conclude the aforesaid oral agreement on behalf of the Bushveld Trust and consequently refers to this agreement as "*the fictitious agreement*."

(4.3) That the fictitious agreement was fraudulent, improper and invented and conceived by the directors of the then board of the second respondent, who at the time were also the directors of the applicant.

(4.4) On 2 September 2014, the Bushveld Trust instituted an urgent application in this court under case number

41186/2014, against the first respondent for a declaratory order to the effect that the former position be restored and that it be declared that the Bushveld Trust holds 70% (seventy percent) of all the issued shares in the second respondent and that the first respondent only holds the remaining 30% (thirty percent);

(4.5) The first respondent opposed the aforesaid urgent application, which was heard as an opposed motion on 10 November 2014 by Keightley AJ, who according to the applicant, "found in favour of the applicant" and issued an order declaring that the Bushveld Trust is a 70% shareholder of the second respondent and the first respondent is a 30% shareholder of the second respondent.[2]

(4.6) First respondent thereafter sought leave to appeal the order granted by Keightley AJ, which application was dismissed.

(4.7) According to applicant, the effect of the aforesaid order is that the fictitious agreement was unlawful and first respondent never obtained the 51% shareholding in the manner as set out in the resolution and the attempted restructuring of the company never transpired and

remained fictitious. As a result hereof, the resolution which purportedly acted on the implementation of the restructuring, is similarly fictitious and of no value.

(4.8) That the reference in the resolution to a "mutual agreement" is none other than the oral agreement referred to above, concluded on 14 January 2014.

(4.9) That the resolution was taken with unlawful and fraudulent intent, because first respondent did not declare his interest in this resolution as provided for in section 75 of the Companies Act[3] and that the resolution falls foul of every single aspect of section 76 of the Companies Act.

(4.10) The applicant then submits that the current board of directors has also subsequently rescinded the resolution, but however failed to attach any documentary proof thereof to the founding or replying affidavit.[4]

(4.11) Applicant then proceeds to submit hearsay evidence on the conduct of first respondent's co-directors after institution of this application, more particularly the apparent conduct of Mr Warwich Lamb, which evidence must be disregarded on this basis.[5]

(4.12) Applicant concludes by stating that the resolution is null and void; that there is no basis upon which the first respondent was entitled to payment from the applicant, nor is there any basis upon which first respondent may retain payment, wherefore applicant seeks restitution from first respondent in the amount of R1 736 285.70.

(5) The first respondent, in its opposition to the application first of all deals with the background facts to this application, which I do not intend to repeat herein. However, I will refer to certain aspects which I deem relevant to the issues at hand. In this regard, first respondent specifically submits the following:

(5.1) On 16 January 2014, first respondent, the Bushveld Trust and Second Respondent entered into a written shareholders agreement, duly signed by first respondent and by Shaun Boshoff on behalf of the Bushveld Trust and the second respondent. A copy of this agreement is annexed to the answering affidavit.[6]

(5.2) Clause 2 of the aforesaid agreement reads as follows:

"2. **INTRODUCTION**

2.1 During the subsistence of this Agreement it is the intention of the parties that the Company will have an authorised share capital of R4000-00 divided into 4000 ordinary shares of R1-00 each of which 100 shares will be issued as follows:

2.1(i) LINDA JOSEPH NYEMBE : 51% (THIRTY PERCENT)

2.1(II) BUSHVELD TRUST : 49% (SEVENTY PERCENT)

2.2 The purpose of this agreement is to regulate the relationship between the parties as shareholders in the Company should the parties be able to secure and maintain a constant flow of income to the Company to make it viable and profitable for all parties to this Agreement.

2.3 It is a pertinent condition of this Shareholders Agreement that the 30% of the equity held by NYEMBE may BE EARMARKED FOR HISTORIC DISADVANTAGED INDIVIDUALS CAN NEVER BE DILUTED. In the event that NYEMBE want to sell his equity stake:-

2.3.1 Bushveld Trust will hold the right of First refusal over any sale, ceding and or willing of shares by Nyembe of the full 51%.

2.3.2 any sale to a third party individual and/or group MUST BE APPROVED IN WRITING by the other shareholders of the company PRIOR to the commencement of such negotiations to sell the equity held."

(5.3) On 9 May 2014, first respondent was approached by Johan Louis Booysen with two documents. The first consists of a special power of attorney,[7] apparently signed by Helen Elizabeth Louw on 9 May 2014 in her capacity as trustee of the Bushveld Trust authorising Booysen to represent the Bushveld Trust in relation to the second document, an unsigned "Memorandum of Sale of Shares Agreement".[8]

(5.4) In terms of the draft memorandum of sale of shares agreement, the Bushveld Trust essentially offers to purchase first respondent's 51% shareholding in second

respondent at the value of R510 000.00, which first respondent declined to accept.

(5.5) First respondent also attaches copies of the share certificates of second respondent,[9] which clearly reflects the shareholding of first respondent (51 shares) and the Bushveld Trust (49 shares), apparently following the agreement reached between the parties on 16 January 2014.

(5.6) The next submission of relevance made by first respondent is that applicant's resolution made on 29 May 2014, specifically refers to a mutual agreement reached between the shareholders of applicant and second respondent and that it could never be a reference to the so-called oral agreement referred to by applicant.

(5.7) In an annexure to first respondent's complaint lodged in respect of the B-BBEE status of second respondent[10] (part of the various litigious proceedings discussed by first respondent in his answering affidavit, which I do not deem relevant to the real issues at hand), second respondent responded to first respondent's e-mail dated 19 November 2014, in respect of second respondent's BEE Verification. It is significant to note that the response is signed by the

deponent to applicant's founding affidavit, John Shapton Stanbury. Paragraph 1 of his response reads as follows:

> "The High Court, Pretoria made an order (copy attached as Annexure 1) on Monday 10 November 2014 declaring the agreement on 14 January 2014 as being ultra vires and thus restoring the status quo ante. The effect is that the shareholders of Comscience (Pty) Ltd would be that the Bushveld Trust holds 70% of the issued share capital of Comscience (Pty) Ltd and L J Nyembe 30%" [11]

(5.8) In addition, paragraph 13.5 of this response by second respondent, specifically deals with the breakdown of all dividends paid from inception to date. At the bottom of the table, the following is stated:

> "A(sic) you are aware the dividend for 2013 was declared on 18 February 2014 in the amount of R800 000. The balance, after dividend tax was paid to LJ Nyembe in two tranches of R100 000 and R246 800 on 25 March 2014 and 3 April 2014 respectively and to the Bushveld Trust in one payment of R333 200 on 3 April 2014. The payment was in the ratio 51:49."[12]

(5.9) First respondent also disputes the effect of the order granted by Keightly AJ, as contended for by applicant and proceeds by raising various defences to the relief sought by applicant.

(6) The relevant legal defences raised by first respondent are as follows:

(6.1) First, that the application is a nullity as a result of the fact that applicant's attorney of record had no authority to

institute the proceedings as provided for in Rule 7 of the Uniform Rules of Court.[13] Applicant thereafter filed a power of attorney, referred to in its replying affidavit, which clearly indicates that its attorney of record was authorised to act by virtue of a resolution adopted by applicant's Board of Directors on 13 February 2017, which is well before the application was launched. I am therefore of the view that this issue has no merit.

(6.2) Second, that applicant has no *locus standi* to reclaim payment of second respondent's dividends, because applicant is not a shareholder of second respondent. In this regard it is apposite to refer to the second respondent's response to first respondent's BEE Verification request dated 19 November 2014[14] (referred to above in paragraphs (5.7) and (5.8)). In paragraph 13.3 of the response, John Stanbury refers to the second respondent's share portfolio from inception to date in table format. It is quite apparent from the contents of this table that applicant was a shareholder in second respondent up to 25 April 2013. However, in paragraph 13.5 of this response, it appears from the column to the right, that applicant's total dividends received from second respondent is an amount of R1 736 285.70, the same

amount now being reclaimed by applicant. I will refer to the contents of this response from second respondent in more detail hereunder.

(6.3) Third, first respondent contends that applicant's founding affidavit does not contain the requisite averments necessary to sustain an order for payment. In short, first respondent submits that applicant's cause of action is founded on enrichment and that applicant's founding affidavit lacks the necessary averments to sustain a cause of action based on any recognised *condictio*. In my view, this defence raised by first respondent, if successful, will dispose of the whole application. Accordingly, I deem it irrelevant to deal with the further defences raised by first respondent.[15]

CONDICTIO:

(7) It is not apparent from the facts alleged by applicant that its claim for repayment of R1 736 285.70 is premised on an enrichment claim.

(8) A party who, owing to an excusable error, made payment to another in the mistaken belief that the payment was owing, may claim repayment from the recipient to the extent that the latter was enriched at the claimant's expense.[16]

(9) The essential elements of this cause of action is that the defendant (first respondent) must be enriched; the plaintiff (applicant) must be impoverished; the defendant's (first respondent's) enrichment must be at the expense of the plaintiff (applicant); and the enrichment must be unjustified or *sine causa*.[17] When the enrichment claim is based on an invalid (but not illegal) contract, the cause of action is the *condictio indebiti*.[18]

(10) The payment must have been made in the *bona fide* and reasonable but mistaken belief that it was owing[19] and *sine causa*, i.e. there must have been no legal or natural obligation to have made it,[20] and the error must be reasonable and excusable. This involves an inquiry into whether the conduct of applicant is excusable, with reference to the reasons for and the circumstances in which the payment was made.[21] The payment reclaimed must have been transferred or paid by applicant[22] and the enrichment must have been at the expense of applicant and not of some third party.[23]

(11) In evaluating applicant's averments against the aforesaid, it is clear that the crux of applicant's case, is the so-called effect of Keightley AJ's order on the "fictitious agreement" concluded on 14 January 2014. Applicant submit that in view of the said order, the "fictitious agreement" must be regarded as unlawful and invalid, wherefore the resolution is equally invalid and first respondent was not entitled to the payment provided for in the resolution.

(12) However, applicant's case as aforesaid presents the following difficulties:

(12.1) It is alleged that the so-called fictitious agreement concluded on 14 January 2014, was fraudulent, improper and invented and conceived by the directors of the applicant, who were at that stage also the directors of the second respondent. Moreover, it is merely alleged that Mr Shawn Boshoff, who purported to act on behalf of the Bushveld Trust, in concluding this agreement, had no factual or legal authority to do so. However, the applicant's proffer no evidence to support the latter contention.

(12.2) In this regard, it is trite that an allegation of fraud does not render a contract void, the contract must be declared void. In *Dalrymple, Frank and Feinstein v Friedman and Another*,[24] Ramsbottom J confirmed this by referring to the following:

> "Sir John Wessels in his *Law of Contract*, 2nd ed. p. 352 para. 1141, says:
>
> > 'As we saw, a contract based upon fraud is voidable at the instance of the defrauded party. This fact leads to important consequences. If the contract is *ipso jure* void, a third party can acquire no rights whatever under it, but if is merely voidable, third parties may, under certain circumstances, acquire rights, even though the contract upon which their rights are founded was induced by fraud. We may say that, as a general rule, the title to movable or immovable property acquired by an innocent third party by virtue of a contract based upon fraud, is indefeasible . . . Thus, if through the fraud of A, I am induced to sell my horse on credit, and to deliver it to him, then, if he in turn sells and delivers the horse to B, who is innocent of the fraud, I cannot recover it from B.'

The learned author then quotes the case of *Gous v de Kock*, (1887) 5 S.C. 405 at p. 413. He then proceeds:

> 'The reason is that I keep the contract open at my own risk, and until I elect to declare it void, the contract will support the transfer of movable property by delivery and of immovable property by registration. The delivery in such a case is based upon *justa causa*.'

And at para. 1146 the learned author says:

> 'It must not be forgotten that there is a great difference between obtaining goods from an owner by virtue of a fraudulent contract and obtaining them by false pretences without any contract. In the former case we have seen that, until the contract is avoided, the law considers that it is sufficient to confer a good title - a transfer following on such a contract is a transfer made with *justa causa*.'

These statements are amply supported by authority."[25]

(12.3) The order granted by Kneightley AJ, most definitely did not declare any agreement between first respondent, second respondent and the Bushveld Trust void or invalid. To simply accept that the oral agreement dated 14 January 2014 must be regarded as unlawful, void or invalid as contended for by applicant, is not permissible in law. I therefore cannot accept that the order granted by Keightley AJ on 10 November 2014, effectively declared the agreement dated 14 January 2014 invalid due to fraud.

(12.4) Moreover, resolution dated 29 May 2014, specifically refers to the fact that applicant's Board has formally

accepted the restructuring of the company shareholding by mutual agreement between *inter alia* the **shareholders** of second respondent and the **shareholders** of applicant.[26] This bears no reference at all to the oral agreement concluded between first respondent, the Bushveld Trust and second respondent on 14 January 2014, and I cannot accept applicant's contention that this mutual agreement refers to the "fictitious agreement". In any event, as I indicated above, Appendix A to the resolution, which applicant failed to disclose, could well have shed some light on the true purpose of this resolution and the mutual agreement.

(12.5) In this regard, it is necessary to discuss applicant's ostensible reliance on the provisions of sections 75 and 76 of the Companies Act in support of having the resolution declared invalid. Applicant specifically submits that section 75(7) of the Companies Act applies in this instance, which reads as follows:

> "**75. Director's personal financial interests.**
>
> ...
>
> (7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3) is valid despite any personal financial interest of a director or person related to the director, only if:
>
> (a) it was approved following disclosure of that interest in the manner contemplated in this section; or
>
> (b) despite having been approved without disclosure of that interest, it:

(i) has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest; or

(ii) has been declared to be valid by a court in terms of subsection (8)."

(12.6) I disagree with applicant. Section 75(7) cannot find application in this instance, more particularly in view of what I have said in paragraph (12.4) above regarding the contents of the resolution. The absence of the documentary evidence relating to the resolution also dictates against a finding for applicant premised on the provisions of section 75 of the Companies Act. In any event, section 37(5)(c) of the Companies Act may well have applied in respect of the 29 May 2014 resolution. This section reads as follows:

"**37. Preferences rights, limitations and other share terms**

...

(5) Subject to any other law, a company's Memorandum of Incorporation may establish, for any particular class of shares, preferences, rights, limitations or other terms that:

...

(c) entitle the shareholders to distributions calculated in any manner, including dividends that may be cumulative, non-cumulative, or partially cumulative, subject to the requirements of sections 46[27] and 47[28];

(12.7) Further, applicant does not deny the validity of the written shareholders agreement concluded on 16 January 2014, between first respondent, the Bushveld Trust and second respondent, referred to above.[29] Wherefore there appears to be yet a further valid agreement applicable to the facts

at hand. Incidentally, the provisions of clauses 9 and 10 of this agreement[30] specifically refers to dividends and the value of shares and claims.

(12.7) In this regard, clause 10.4 of the 16 January 2014 agreement specifically provides that *"[s]hould the shareholders fail to agree upon the value of the equity or should the time for such agreement applies have lapsed, then such value shall be determined by the auditors who shall attribute to the equity the net asset value of the shares in accordance with the ensuing provisions of this clause 10 and subject to the formula set out in clause 2.1.3 supra*." There is no clause 2.1.3 in this agreement, except for clause 2.1 referred to above.[31]

(12.8) However, it is in this regard significant to again refer to the "payment ratio" of 51:49 being made by second respondent on 19 November 2014,[32] which conforms with the formula in brackets adjacent to first respondent and the Bushveld Trust description in clause 2.1 of this agreement. In addition, it is also important to note that the absent Appendix A to the 29 May 2014 resolution, specifically relates to the *"...amount ...confirmed by email with attachments ... as received from the External Auditor*

of [second respondent] Professor Chris Hattingh ...", which may well indicate a legitimate basis for payment of the amount of R1 736 285.70 to first respondent, in accordance with the formula and clause 10.4 of the written agreement dated 16 January 2014.

(13) In view of the aforesaid, I am not convinced that applicant has satisfied the requirements of the *conditio indebiti* in this instance, nor the requirements of the *contitio sine causa* for that matter. Accordingly, applicant has also failed to prove that the 29 May 2014 resolution adopted by applicant was as a result of fraud and with the sole intention to unlawfully pay first respondent the amount of R1 736 285.70.

ORDER:

In the result I make the following order:

1. The application is dismissed with costs.

I. ELLIS
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

ON BEHALF OF APPLICANT: Adv J.H. Groenewald
APPLICANT'S ATTORNEYS: MACROBERT INCORPORATED

ON BEHALF OF FIRST RESPONDENT: Adv P. Lourens
FIRST RESPONDENT'S ATTORNEYS: GOODES & SEEDAT INC

Date of hearing: 23 March 2018
Date of judgment: 4 July 2018

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[1] Annexure "JS1" to the applicant's founding affidavit.

[2] Annexure "JS3" to applicant's founding affidavit.

[3] 71 of 2008.

[4] This averment is made in paragraph 30 of the founding affidavit.

[5] In this regard applicant did not request me to allow the evidence in paragraphs 34, 36 and 37 of the founding affidavit, in terms of the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, wherefore I disregard this evidence. The first respondent may have admitted the contention made in paragraph 37 of the founding affidavit, but this does not detract from the fact that it constitutes hearsay evidence.

[6] Annexure "AA1" to first respondent's answering affidavit.

[7] Annexure "AA2" to first respondent's answering affidavit.

[8] Annexure "AA3" to first respondent's answering affidavit.

[9] Annexures "AA4.2" and "AA4.2" to first respondent's answering affidavit.

[10] Annexure "C" of Annexure "AA9" to first respondent's answering affidavit (pages 196-200).

[11] Page 196 of the paginated papers.

[12] Page 198 of the paginated papers. It is clear that the total amount after dividend tax is R680 000. The amount of R 346 800 paid to first respondent equals 51% thereof, whilst the amount of R333 200 paid to the Bushveld Trust equals the remaining 49%

[13] First respondent on 13 June 2017served a notice in terms of Rule 7(1) on applicant.

[14] Referred to in paragraphs (5.7) and (5.8) above.

[15] For the sake of completeness, these defences are the material non-joinder of the Bushveld Trust and the material foreseeable disputes of fact.

[16] *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).

[17] *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 (3) SA 482 (SCA).

[18] *Legator McKenna and Another v Shea and Others* 2010 (1) SA 35 (SCA) at [28].

[19] *ABSA Bank Ltd v Leech* 2001 (4) SA 132 (SCA).

[20] *Bowman NO v Fidelity Bank Ltd* 1997 (2) SA 35 (SCA).

[21] *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) at [31].

[22] *Klein NO v SA Transport Services* 1992 (3) SA 509 (W).

[23] *McCarthy Retail Ltd v Shortdistance Carriers CC* supra [19] at 491I/J.

[24] 1954 (4) SA (W).

[25] *Darlymple, Frank & Feinstein v Friedman and Another* (1) 1954 (4) SA 642 (W) at 646H-647C.

[26] My emphasis added.

[27] Section 46 of the Companies Act 71 of 2008 reads as follows:

> "**46. Distributions must be authorised by board**
>
> (1) A company must not make any proposed distribution unless:
>
> (a) the distribution:
> (i) is pursuant to an existing legal obligation of the company, or a court order; or
> (ii) the board of the company, by resolution, has authorised the distribution;
> (b) it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and
> (c) the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.
>
> (2) When the board of a company has adopted a resolution contemplated in subsection (1) (c), the relevant distribution must be fully carried out, subject only to subsection (3).
>
> (3) If the distribution contemplated in a particular board resolution, court order or existing legal obligation has not been completed within 120 business days after the board made the acknowledgement required by subsection (1)(c), or after a fresh acknowledgement being made in terms of the subsection, as the case may be:
> (a) the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made pursuant to the original resolution, order or obligation; and
> (b) despite any law, order or agreement to the contrary, the company must not proceed with or continue with any such distribution unless the board adopts a further resolution as contemplated in subsection (1)(c).

(4) If a distribution takes the form of the occurrence of a date or other obligation by the company, as contemplated in paragraph (b) of the definition of 'distribution' set out in section 1, the requirements of this section:
(a) apply at the time that the board resolved that the company may incur that debt or obligation; and
(b) do not apply to any subsequent action of the company in satisfaction of that debt or obligation, except to the extent that the resolution, or the terms and conditions of the debt or obligation, provide otherwise.

(5) If, after considering the solvency and liquidity test as required by this section, it appears to the company that the section prohibits its immediate compliance with a court order contemplated in subsection (1)(a)(i):
(a) the company may apply to a court for an order burying the original order; and
(b) the court may make an order that:
(i) is just and equitable, having regard to the financial circumstances of the company; and
(ii) ensures that the person to whom the company is required to make a payment in terms of the original order is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(6) A director of a company is liable to the extent set out in section 77(3) (e)(vi) if the director:
(a) was present at the meeting when the board approved a distribution as contemplated in this section, or participated in the making of such a decision in terms of section 74; and
(b) failed to vote against the distribution, despite knowing that the distribution was contrary to the section."

[28] Section 47 of the Companies Act 71 of 2008, provides as follows:

"**47. Capitalisation shares**

(1) Except to the extent that a company's Memorandum of Incorporation provide otherwise:
(a) the board of that company, by resolution, may approve the issuing of any authorised shares of the company, as capitalisation shares, on a pro rata basis to the shareholders of one or more classes of shares;
(b) shares of one class may be issued as a capitalisation shares in respect of shares of another class; and
(c) subject to subsection (2), when resolving to award a capitalisation share, the board may at any time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment, at a value determined by the board.

(2) The board of a company may not resolve to offer a cash payment in lieu of awarding a capitalisation share, as contemplated in subsection (1)(c), unless the board:
(a) has considered the solvency and liquidity test, as required by section 46, on the assumption that every such shareholder would elect to receive cash; and
(b) is satisfied that the company would satisfied the solvency and liquidity test immediately upon the completion of the distribution."

[29] Paragraph (5.1) above.

[30] Pages 104 – 105 of the paginated pages.

[31] Paragraph (5.2) above.

[32] Referred to in paragraph (5.8) above.