

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: A157/2020

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 20 JUNE 2022

SIGNATURE

In the matter between:

JOHANNES FREDERICK GOUWS N.O.

First Appellant

WILLEM JACQUES GOUWS N.O.

Second Appellant

LYNETTE GOUWS N.O.

Third Appellant

ABRAHAM AARON ROUP N.O.

Fourth Appellant

JOHANNES PETRUS ERASMUS SWARTS N.O.

Fifth Appellant

JOHANNES PETRUS ERASMUS SWARTS N.O.

Sixth Appellant

ANETTE VAN ZYL N.O.

Seventh Appellant

BORN FREE INVESTMENTS 161 (PTY) LTD

Eighth Appellant

and

CHAPMAN FUND MANAGERS (PTY) LTD	First Respondent
DOUW GERBRANDT KRUGER N.O.	Second Respondent
JOHANNES NICOLAAS BELL N.O.	Third Respondent
ERIKA KRUGER N.O.	Fourth Respondent
ANETTE VAN ZYL N.O.	Fifth Respondent
PATRICK MPHEPHU N.O.	Sixth Respondent
ABIGAIL MPHEPHU N.O.	Seventh Respondent
PACIFIC COAST INVESTMENTS 121 (PTY) LTD	Eighth Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Ninth Respondent

JUDGMENT

MBONGWE J

INTRODUCTION

- [1] This is an appeal against the whole of the judgment of Makhuvele J that was handed down on 6 August 2019. In that judgment, the Court a quo dismissed an application by the shareholders in the first respondent seeking an order setting aside a resolution of the first respondent that had been amended without authorisation and registered by the ninth respondent. The original resolution was intended for the creation and allocation of a special class shares (Class B shares) to the BEE partners in the first respondent to afford them more dividends without the voting rights normally attached to ordinary shares. The unauthorised amendments have the effect that they gave voting rights to the 6th to 8th respondents.

- [2] A subsequent application for leave to appeal was dismissed by the Court a quo, but leave to appeal to the full bench of this division has since been granted by the Supreme Court of appeal.
- [3] The appeal is opposed by the eighth respondent who agrees with and supports the decision of the Court a quo that the appellants ought to have sought a review of the decision of the Registrar to register the amended resolution instead of the setting aside of the resolution itself. The eighth respondent contends further that the review procedure no longer avails to the appellants and had lapsed due to the effluxion of time.

FACTUAL SYNOPSIS

- [4] The appellants, who are shareholders in the first respondent, passed a special resolution on 1 December 2010 authorising the creation of Class B shares in the first respondent. These shares were to be transferred to the Sixth, Seventh and Eighth Respondents (BEE Partners in the first respondent) to facilitate their receipt of a better dividend without affording them voting rights normally attached to ordinary shares.
- [5] The second respondent, Kruger, then a director of the first respondent, was entrusted with the registration of the resolution by the CIPC in terms of Section 203 of the Companies Act 61 of 1973. Kruger initially submitted the MC26 form for registration on the 6 December 2010, but registration was refused by the Registrar due to non-compliance with the law. Without authorisation by the appellants, Kruger had amended the resolution and re-submitted same on 20 December 2010. The amended MC26 form was registered on 12 January 2011.

- [6] The appellants became aware of Kruger's actions during a meeting in January 2018, wherein they sought the removal of Kruger as a director, but the 6th, 7th and 8th respondents sought to exercise voting rights in terms of the Class B shares.
- [7] The applicants' investigations that followed revealed that Kruger had amended the terms of the special resolution to reflect that the holders of the Class B shares shall enjoyed voting rights and any other rights normally attached to ordinary shares.
- [8] The reason for the Registrar's refusal to register the original Form MC26 submitted on 6th December 2010 was that it was in conflict with the provisions of section 193(1) of the Act in terms of which *"every member of a company having a share capital shall have a right to vote in respect of each share held by him."*
- [9] The Registrar derives its authority to refuse registration from the provisions of section 200 of the Companies Act, 1973 which read thus:

"(1) Within one month from the passing of a special resolution a copy of such resolution together with either a copy of the notice convening the meeting concerned a copy of the consent contemplated in section 199(3A), as the case may be, shall be lodged with the Registrar, who shall subject to the provisions of sub-section (2), and upon payment of prescribed fee, register such resolution.

(2) The Registrar may refuse to register any special resolution so lodged with him, except upon an order of the court, if such

resolution appears to him to be contrary to the provisions of this Act or of the memorandum or articles of the company concerned”.

[10] Subsequent to the meeting of January 2018 the appellants launched an application to court seeking the following order:

10.1 Setting aside the amended Form MC26 lodged with and registered by the ninth respondent on 12 January 2011 on behalf of the first respondent;

10.2 Setting aside the Class B shares with voting rights in the first respondent created by the registration of the amended Form MC26.

[11] The gravamen of the appellants’ contentions, particularly on appeal, were that; the registration had occurred despite the amendments to the special resolution being in manuscript and the absence of written authorisation / further resolution confirming the amendment; that the resolution itself was signed by Kruger on 1 December 2010 and that the amended resolution is in conflict with the first respondent’s Articles of Association.

[12] For what it is worth, I deem it necessary to quote Kruger’s response to the appellants’ enquiry why he had amended the resolution. The response was that:

“It was a tacit term, alternatively an implied term, of my mandate that I will do all things necessary in order to comply with the legal prescripts of the Registrar and in order to give

effect to the share-issue of the ordinary B shares to the BEE partners”.

- [13] The Court a quo dismissed the application reasoning that the appellants ought to have sought the setting aside of the registration of the special resolution rather than the setting aside of the resolution itself.
- [14] The essence of the appellants’ contentions in paragraph 12, above, are that, in addition to the manuscript amendment not having been confirmed in writing, registration of the MC26 should also not have occurred as there was no compliance with section 200 of the Act which required that registration should occur within one month after the resolution had been taken. Registration of the amended MC26 occurred on 12 January 2011 whereas Kruger had signed the amended resolution on 1 December 2010. A further implied reason was that Article 3 of the first respondent’s Articles of Association provided for the creation of a category of shares without voting rights in respect thereof – a suggestion that the original special resolution ought to have been registered.
- [15] In support of the procedure they had followed and the relief sought in the court a quo, the appellants relied on the principle in *Seale v Van Rooyen N.O.* 2008 4 SA 43 SCA that the setting aside of the resolution will automatically lead to the cancellation of the registration thereof by the Registrar. A further contention by the appellants was that regardless of the reason for the refusal to register the original resolution, there was no special resolution passed by the members of the first respondent authorising the issuing of Class B shares with voting rights.

ANALYSIS

- [16] Unless determined by the Registrar to be compliant and, therefore, registered, a special resolution is of no legal consequence and does not alter the extant circumstances of the parties. It is the registration of the special resolution that brought about the harmful change to the circumstances of appellants. By law, the Registrar's decision to register the special resolution is an exercise of an administrative action as illustrated in *Nedbank Ltd v Mendelow and Another* NNO 2013 (6) SA 130 (SCA) in the following terms;

"[25] Administrative action entails a decision, or a failure to make a decision, by a functionary, and which has a direct legal affect on an individual. A decision must entail some form of choice or evaluation....."

- [17] It follows, in my view, that the action of the registration of a special resolution is a segmented chain- action that begins with the assessment of whether the documents submitted comply with the law, particularly sections 193 (1), 199 and 200, followed by a determination of compliance which results in the decision to either register, or not to register in the event of non-compliance. No registration of a special resolution can ensue unless a determination of compliance and the resultant decision to register has been made.
- [18] The eighth respondent correctly contended that the provisions of section 200 (2) enjoined the Registrar to ensure that the resolution did not appear to be contrary to the provisions of the Act or of the memorandum or articles of the company concerned. Thus the decision that the resolution

complied with the provisions of the Act preceded the stamping / physical registration of the MC26.

- [19] By their very nature, the facts forming the subjects of the criticism of the registration of the amended MC26 mentioned in paragraph 15, above, fall squarely within the process of assessment by the Registrar whether a special resolution complied with the law. They constituted pertinent ground for the reversal of the decision to register and the registration of the amended resolution.
- [20] The law recognises only one procedure for the reversal of an administrative decision – the procedure may be the legislative review procedure in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or be premised on the common law principle of legality.
- [21] It is immaterial, in my view, that the Registrar's decision was influenced by unauthorised amendments of the special resolution or any other cause, for that matter. Once the Registrar has taken the decision to register and registered a special resolution that causes harm, the relief lies in the institution of review proceedings to set aside the impugned decision – in the present matter, PAJA was the applicable procedure to have been followed by the appellants.
- [22] It would have been sufficient for the appellants to demonstrate that the decision of the Registrar was influenced as aforementioned and that it is harmful to the appellants so as to render it reviewable in terms of PAJA. The appellants' argument that the provisions of PAJA do not find Application in the present matter, consequently, lacks legal grounding.

[23] Similarly, it would be impermissible to apply the principle in the *Seale* matter to indirectly reverse the harm occasioned by the exercise of an administrative action. The appellants' arguments to the contrary are a mere attempt at circumventing the reality that they were well out of time in January 2018 for instituting review proceedings. The provisions of PAJA prescribe a period of 180 days, from the date of the registration of the special resolution, being 12 January 2011, for the institution of review proceedings.

CONCLUSION

[24] I find, in conclusion, that the decision of the Court a quo was well taken, correct and meritoriously supported by the eighth respondent. Following this finding, the appeal stands to be dismissed.


COSTS

[25] There is no reason for a deviation from the general principle that costs follow the outcome in the proceedings.

ORDER

[26] Consequent to the findings in this judgment, I would suggest that the following order be made:

1. The appeal is dismissed.
2. The appellants are ordered to pay the costs on an opposed scale.



M. MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

J U D G M E N T

DAVIS J

[1] Introduction

I have had the benefit of reading the judgment prepared by my brother Mbongwe J. Unfortunately, I find myself unable to agree with the conclusion reached therein. In my view, the appeal should be upheld and the decision in the court *a quo* be replaced with the one upholding the setting aside the resolution registered by the Registrar of Companies and Intellectual Property Commission (the CIPC).

[2] Summary of facts

2.1 The factual synopsis has been correctly and succinctly summarised by my learned brother Mbongwe J in paragraphs [4] – [10] of the judgment prepared by him and need no repetition.

2.2 I deem it however, necessary to engage with paragraph [12] of the judgment where my learned brother referred to Kruger's response to the enquiry as to how it came about that he amended the original typed resolution in manuscript. In this paragraph Kruger's contention that he

was tacitly or by implication authorised to amend the resolution is mentioned “for what it is worth”. In my respectful view the “worth” of such a contention should be evaluated before it finds its way into a court’s reasoning.

- 2.3 Kruger clearly had no authority to amend the resolution. He also did not revert to the appellants as other shareholders when the Registrar refused to register it (in its unamended form). That much is clear from Kruger’s own affidavit. He unilaterally proceeded to amend the resolution and re-submitted it. He did not inform the other shareholders of his actions and did so clandestinely. It was only many years later, when a vote had to be cast on his removal as a director, that his actions came to light. This was when he needed and relied on the votes of the other shareholders, votes which had been made possible by his clandestine action. For Kruger, once he had been caught out in this fashion, to *ex post facto* claim that it was a “tacit” or “implied term” of his mandate that he may amend a shareholder’s resolution to reflect something which the shareholders had not resolved, is patently opportunistic and should have been rejected at the hearing of the matter and should still be rejected. This exculpatory statement is, in my view, worth nothing.

[3] Further analysis

- 3.1 My brother Mbongwe J has referred to the Registrar’s authority in paragraph [9] of his judgment, with reference to Section 200 of the (old) Companies Act 61 of 1973 (which was the operative statutory provision at the relevant time).

- 3.2 In terms of this section, the Registrar has two functions: firstly, he has to evaluate the contents of a shareholder's resolution presented to him. If it does not comply with the provisions of the Act, he "may" refuse to register it. His second function, should the resolution comply with the provisions of the Act, is simply to register it.
- 3.3 The first of the aforementioned functions was performed when the original resolution, reflecting what the shareholders had actually resolved, was presented to the Registrar on 6 December. The evaluation and refusal to register might conceivably involve the exercise of a discretion and constitute an administrative act or "decision" for purpose of section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).
- 3.4 The second function, however, involves no decision-making. It is a purely clerical act. Even though the registration of a compliant resolution is administrative in nature, it is not an administrative act for purposes of PAJA. The Registrar has no discretion, exercises no decision-making powers and simply performs a registering function. It is for example analogous to the acceptance of a compliant application for an advertisement of a voluntary surrender in the Government Gazette. The Government Printer, if the advertisement complies with the prescribed format, has no option but to publish it. Here too, the Registrar, should the resolution be compliant, has no option but to register it. He does not perform an administrative act, but a clerical function.
- 3.5 With respect to the learned judge in the court *a quo*, to find that the appellants had to launch a review application, be it in terms of PAJA or a

legality review, would lead to an absurdity: no “reasons” could be furnished by the Registrar for his “decision”, simply because no “decision” had been taken. Upon receipt of a compliant resolution, by law the Registrar had to register it. Such a resolution is simply lodged and “stamped” as it were. It is a “mechanical” action.

3.6 The difference between the exercise of a discretionary power (which could constitute an administrative act) and a “mechanical power” (which would be a purely clerical function) has been considered and pronounced on by the Supreme Court of Appeal in *Nedbank v Mendelow NNO* 2013 (6) SA 130 (SCA). The instructive reasoning of this judgment is found at paragraph [26] thereof: *“A distinction must this be drawn between discretionary powers and mechanical powers. Professor Hoexter points out that a mechanical power involves no choice on the part of the holder of the power. A discretionary power, on the other hand, does impose such a choice. Whether the Master or the Registrar exercises a mechanical power or one that is discretionary involves an enquiry as to what he or she is called upon to do. There may be situations where the functionary is required to make genuine decisions whether to perform a duty. But where the requirements for registration have been met, no choice is given to the Registrar”*.

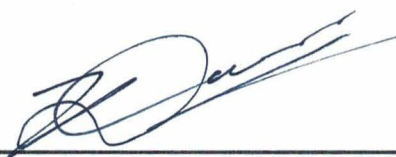
3.7 Not only do I find that the Registrar in this appeal was in the same position as the Registrar in the *Nedbank* – matter, but I find that this court is bound by the decision of the Supreme Court of Appeal. It follows that the provisions and procedures of PAJA are not applicable to the relief claimed by the appellants and neither could they have been compelled to launch a review application of any nature.

3.8 For sake of completeness of the reference in paragraph 3.6 above, the reference to Professor Hoexter is a reference to Hoexter, *Administrative Law in South Africa*, 2nd Ed (2012) at 46 – 48.

3.9 In conclusion, to refuse the appeal, would be to put this court's approval upon the registration of a resolution which had not been taken by the shareholders of the first respondent. In my view, that cannot be countenanced.

[4] Conclusion

I would therefore uphold the appeal, with costs, and replace the order of the court a quo with an order whereby the relief set out in paragraphs 10.1 and 10.2 of the judgment of my brother Mbongwe are granted.



N. DAVIS J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Order

I have read the judgments prepared by my brothers Mbongwe and Davis and I concur with the judgment of my brother Davis.

Accordingly, the following order is granted:

1. The appeal is upheld with costs, and replaced with the following;
 - 1.1 The amended Form MC26 lodged with and registered by the ninth respondent on 12 January 2011 on behalf of the first respondent is set aside.
 - 1.2 The Class B shares with voting rights in the first respondent created by the registration of the amended Form MC26 is set aside.



V. V. TLHAPI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing: 19 January 2022

Judgment delivered: 20 June 2022

APPEARANCES:

For Appellant:

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For the 8th Respondent:

Adv K Tsatsawane SC

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