

REPORTABLE



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 21395/2012

Before: The Hon. Mr Justice Binns-Ward

In the ex parte application of:

**AFENA CAPITAL (PROPRIETARY) LIMITED
NEWSHELF 1169 (PROPRIETARY) LIMITED
KHULEKANI MCWALLACE DLAMINI
THE TRUSTEES FOR THE TIME BEING
OF THE DOBS SHARE TRUST
GCINIKHAYA LOYISO GOBODO
ANDREW NICHOLAS JOANNOU
MILA UHLUME MAFANYA
TEBOGO TERENCE NALEDI
ZOLISWA NGONYAMA
BONGANI NGWANYA
ZAHIRA OSMAN
AMBER RAATH
SHOAIB AHMED VAYEJ**

**1st Applicant
2nd Applicant
3rd Applicant

4th Applicant
5th Applicant
6th Applicant
7th Applicant
8th Applicant
9th Applicant
10th Applicant
11th Applicant
12th Applicant
13th Applicant**

JUDGMENT BY	:	JUDGE A G BINNS-WARD
FOR THE APPLICANTS	:	ADV. M.J. Fitzgerald SC
INSTRUCTED BY	:	Cliffe Dekker Hofmeyr Inc
DATE OF HEARING	:	14 November 2012
DATE OF JUDGMENT	:	15 November 2012



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JUDGMENT: 15 NOVEMBER 2012

BINNS-WARD J:

[1] In this matter the applicants have applied for orders validating the irregular creation, allotment and issue of shares in the first applicant company. The irregularities occurred in 2005; that is before the repeal of the 1973 Companies Act (Act No. 61 of 1973). The relief

currently sought by the applicants could competently have been sought in terms of s 97 of the 1973 Act. Obtaining it was not subject to any time bar.

[2] The 2008 Companies Act (Act No. 71 of 2008), which is the currently applicable legislation - having come into operation with effect from 1 May 2011, contains no direct equivalent of s 97 of the earlier statute. The legislation currently in force provides for the regularisation of the unauthorised issue of shares by the company itself. However, this must be done within 60 business days after the date on which the shares were issued. See s 38 read with s 36 of the 2008 Companies Act. The effect of the 60 day time limit makes it clear that the remedy required by the applicants, and to which at least some of them had been entitled under the 1973 Act, is not available in terms of the currently applicable statute.

[3] In framing their application, the applicants sought to meet the absence of a remedy under the currently applicable legislation by invoking item 13(1)(c)(ii) of Schedule 5 to the 2008 Companies Act. Schedule 5 deals with transitional issues arising out of the repeal of the 1973 Act and its substitution by the 2008 Act. Item 13 provides:

Continued investigation and enforcement of previous Act

(1) Despite the repeal of the previous Act-

- (a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by the Commission;
- (b) any investigation or other matter being considered by the Securities Regulation Panel in terms of the previous Act and pending immediately before the effective date, may be continued by the Panel; and
- (c) for a period of three years after the effective date-
 - (i) the Commission may exercise any power of the Minister, the Registrar, or the Panel may exercise any power of the Securities Regulation Panel, in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the effective date, subject to sub-item (2); and
 - (ii) a court may make any order that could have been made **in the circumstances** by a court under that Act.

(emphasis supplied)

(2) In exercising authority under subsection (1), the Commission or Panel, respectively, must conduct the investigation or other matter in accordance with the previous Act.

[4] Item 13 is of no assistance to the applicants. It is not an all-embracing savings provision. The orders that a court may make pursuant to sub-paragraph (1)(c)(ii) thereof are limited to matters related to any investigation by the Minister, the Registrar of Companies or the Securities Regulation Panel in terms of the 1973 Act and certain resultant prosecutions. This much is evident when the item is read as a whole, as of course it should be. It is from that context that the qualification provided by the phrase '*in the circumstances*', emphasised in bold in the text quoted above, derives its meaning.

[5] The inapplicability of item 13 does not leave the applicants remediless. The repeal of the 1973 Act did not divest those applicants who could have approached the court before the repeal of the right they already enjoyed to seek the validation provided for in terms of s 97 of the Act. That much follows from the provisions of s 12(2) of the Interpretation Act 33 of 1957:

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

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

There is nothing in the 2008 Act to suggest that the provisions of s 12(2) of the Interpretation Act should not apply to an accrued right of any company or interested person to approach a court for relief in terms of s 97 of the repealed statute. The effect of s 12(2)(c) of the Interpretation Act in the circumstances is to preserve the legal status quo under the 1973 Companies Act in respect of the validation of the unauthorised issue of shares by a company

prior to the repeal of that Act; compare *Transnet Ltd v Ngcezula* 1995 (3) SA 538 (A) and *Chairman, Board on Tariffs and Trade v Volkswagen of SA (Pty) Ltd and Another* 2001 (2) SA 372 (SCA), [2001] 1 All SA 519, at para. 12-13.

[6] A proper case has been made out for the relief sought in terms of s 97 of the 1973 Act. Some of the relief sought, however, does not fall within the ambit of s 97 and is sought by some of the applicants who became interested parties only subsequent to the repeal of the 1973 Act. The affected relief is consequential upon that sought in terms of s 97 and because all the affected parties have joined in the application and it is in the interests of obtaining certainty and avoiding dispute I can see no reason not to grant it.

[7] The relief to be granted in paragraph 1 of the order will be effective only upon the registration of the order as contemplated in terms of s 97(3). The registration provided for in terms of s 97(3) fell to be attended to by the registrar of companies in terms of his capacity as chief executive officer of the Companies and Intellectual Property Registration Office. Those functions have been transferred to the 'Commissioner', as defined in s 1 of the 2008 Companies Act; see item 12 of Schedule 5 to Act 71 of 2008. The reference in the order to the 'Registrar of Companies' falls to be construed accordingly.

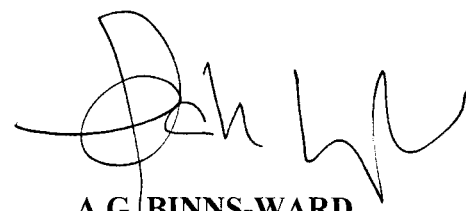
[8] The following order will issue:

- 1.1 The terms of the creation on 25 May 2005 by Afena Capital (Pty) Limited ('the Company') of an additional 9,000 authorised unissued ordinary shares in the authorised share capital of the Company with a view to increasing the authorised share capital of the Company consisting of 1,000 authorised ordinary shares with a par value of R1.00 each to 10,000 authorised ordinary shares with a par value of R1.00 each are validated and confirmed with retrospective effect from 25 May 2005;
- 1.2 The terms of the creation on 25 May 2005 by the Company of an additional 990,000 authorised unissued ordinary shares in the authorised share capital of the Company by a subdivision of the authorised ordinary shares of 10,000 with par value of R1.00 each into 1,000,000 authorised ordinary shares with a

par value of R0.01 each are validated and confirmed with retrospective effect from 25 May 2005;

- 1.3 The terms of the creation on 25 May 2005 by the Company of an additional 99 issued ordinary shares in the issued share capital of the Company by a subdivision of the one issued ordinary share with a par value of R1.00 into 100 issued ordinary shares with a par value of R0.01 each are validated and confirmed with retrospective effect from 25 May 2005;
- 1.4 The terms of the allotment and issue on 25 May 2005 by the Company of 99,900 ordinary shares in the Company are validated and confirmed with retrospective effect from 25 May 2005;
- 1.5 The dealings in the ordinary shares of the Company subsequent to the creations, allotment and issue referred to in paragraphs 1.1, 1.2, 1.3 and 1.4 above, ('the creations, allotments and issues') including the Sale of Shares Agreement entered into by certain of the applicants during 2012, annexure TTN10 to the founding affidavit, the Addendum to the Sale of Shares Agreements entered into by certain of the applicants during 2012, annexure TTN11 to the founding affidavit and the declaration, payment and receipt of dividends and/or distributions in respect of the ordinary shares of the Company are validated and confirmed to the extent necessary;
- 1.6 The cancellation and issue of shares certificates, as appearing on the schedule, annexure "TTN12" to the founding affidavit, pursuant to the transfer of ordinary shares of the Company subsequent to the creations, allotments and issues are validated and confirmed;
- 1.7 All other shareholders' resolutions adopted subsequent to the creations, allotments and issues are validated and confirmed;
- 1.8 The appointment of directors of the Company from time to time since May 2005 is validated and confirmed;
- 1.9 The creations, allotments and issues insofar as they may constitute the non-compliance by the Company of clauses 9 and 10 of its Memorandum of Incorporation are validated and confirmed to the extent necessary;
- 1.10 The securities register of the Company, annexure "TTN13" to the founding affidavit is validated and confirmed.

2. The provisions of paragraph 1 hereof shall be effective only upon the registration of a copy of this order as contemplated in terms of s 97(3) of the Companies Act 61 of 1973.
3. The applicants are directed in terms of s 97(2) of the Companies Act 61 of 1973 to lodge a copy of this order with the Registrar of Companies forthwith.



A.G. BINNS-WARD
Judge of the High Court