IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A342/12

Reportable

In the matter between:

SOHRAB BAVASAH **Appellant**

and

JAMES STIRTON **First Respondent**

SHOUT DIGITAL MEDIA (PTY) LTD **Second Respondent**

Court: HENNEY J et BOQWANA J

Heard on: 22 November 2013

Delivered on: 12 February 2014

JUDGMENT

BOQWANA, J

Introduction

[1] This is an appeal against the judgment of the Wynberg Magistrates Court dated 15 March 2012 which was granted in favour of the respondents with costs. The magistrate found that the appellant ('Bavasah') was not the shareholder and registered owner of the shares in the second respondent ('the company') due to formalities prescribed in the company's Articles of Association ('Articles') and the Companies Act, 61 of 1973 ('the Act') not

having been complied with, in respect of the allotment and issuing of the shares, and Bavasah's name not having been entered into the register of members as required by the Articles and the Act.

Background facts

[2] The brief facts relevant to this matter begin with the formation of a company known as Quickvest 417 (Pty) Ltd ('Quickvest') in 2006 which belonged to one Karen Oosthuizen. In 2007 all the shares in Quickvest were purchased by an entity known as Grapevine Interactive (Pty) Ltd ('Grapevine'). Nicholas Orton ('Orton') was the sole director of Grapevine. During that period the first respondent ('Stirton') was the owner of a digital media close corporation business known as Shout Outdoor CC. During the course of 2007 Quickvest changed its name to Grapevine Shout Digital Media (Pty) Ltd ('GSDM') which entity later became known as Shout Digital Media (Pty) Ltd ('the second respondent in these proceedings').

[3] On 19 November 2007, Bavasah, Stirton, Grapevine and GSDM entered into a Memorandum of Understanding ('the MOU') with effect from 01 September 2007. GSDM was at 01 September 2007 wholly owned by Grapevine, whilst Shout CC was 100% owned by the Stirton. GSDM had prior to the effective date of 01 September 2007 issued 1000 shares in favour of Grapevine. Grapevine also loaned to GSDM approximately R500 000 for the purposes of developing its business. Shout CC sold its assets at 01 September 2007 to the company for a net purchase price of R335 360. Shout CC's assets included its goodwill, intellectual property, notice and display boards, schools and media contracts, debtors, cash and any work in progress in respect of these boards. The company's business would be:

'...sourcing of media and display rights in locations such as schools, clubs and other points of assembly (known as "affiliates") by way of long-term contracts, and the corresponding packaging and sale of these rights to third party advertisers or media wholesalers and matters ancillary. The capture and onsale of these advertising display rights is enabled through the delivery of "display technology" to the Affiliates. '

[4] In terms of the MOU, Bavasah would apply his management skills in the digital media space and thus was desirous of becoming a shareholder and being employed by the company. It was envisaged by the MOU that Long Form Agreements could be drawn up and executed between the parties within 10 weeks of the effective date, i.e. 10 weeks from 1 September 2007. In the absence of the said Long Form Agreements the MOU would *'govern the relationships between the parties and all matters pursuant thereto'*.

[5] The Long Form Agreements would include a Share Subscription Agreement between GSDM, Grapevine, Stirton and Bavasah in which Bavasah and Stirton would subscribe for shares in GSDM (a company 100% owned by Grapevine at inception) on terms set out in the MOU and a Shareholders Agreement between the three parties. The Share Subscription Headline Items would be as follows:

'Transaction

GSDM will issue 2 fresh shares at par to Grapevine;

GSDM will issue 658 fresh shares at par to Stirton;

GSDM will issue 340 fresh shares at par to Bavasah;

all within thirty days of the execution of the Long Form Sale of Business Agreement.

All Shareholders will execute the Shareholder's Agreement coincident with the issue of the shares contemplated above.'

Terms

All shares contemplated in this transaction are to be issued at par.' (Own emphasis)

[6] Effectively, in terms of the above, 1000 fresh shares were to be issued. It must be borne in mind that 1000 shares had already been issued in Grapevine's favour prior to 01 September 2007 as mentioned earlier. The total shares issued in GSDM would then be 2000 shares.

[7] In terms of the MOU the Shareholders Agreement Headline Items would reflect Shareholding Proportions as follows:

'Assuming no further sale of shares or issuance of new shares except as contemplated in this MOU, and assuming that the Parties have fulfilled the conditions of this MOU, then the shares of the GSDM company would be owned in the following proportions:

Grapevine 50%

Stirton 32.9%

Bavasah 17.0%'

(Own emphasis)

[8] According to the MOU parties agreed that GSDM would provide an option to one Tim Allsop ('Allsop') to purchase 10% of the issued shares of GSDM, which option would expire two months after signature date of the MOU. Should the option be exercised the shareholding at GSDM would then be:

'Stirton 30.9%

Bavasah 16%

Allsop 10%

Grapevine 43.1%'

[9] From my calculations this means that from the 2000 shares issued, Stirton would hold an amount of 618 shares, Bavasah, 320 shares, Allsop, 200 shares and Grapevine, 862 shares. It is common cause that Long Form Agreements were never entered into between the parties.

[10] The MOU stipulated that Stirton and Bavasah would be responsible for the day to day management of GSDM employed as Sales and Managing Directors respectively. Stirton would be paid a gross management fee of R40 000.00 per month, reviewable on achievement of milestones, capital permitting. Bavasah would also be paid a gross management fee of R40 000 per month, reviewable on the achievement of milestones, capital permitting; he would further *'allow 50% of his gross monthly fee to be allocated to loan account until such time as the company achieves breakeven or until further equity capital is raised'*.

[11] Stirton and Bavasah began working together as contemplated by the MOU. It is evident that as early as February 2008, Stirton was unhappy with the way things were going in the business and particularly with his relationship with Bavasah which was getting strenuous. Again in April 2008, Stirton expressed his concerns about the business model followed by the company and the actual breakeven not being achieved. Stirton began talks of 'unwinding of the deal' between him and Orton. What is also clear from the correspondence is that by that time, all the parties in the MOU were referred to as 'shareholders' by both Orton and Stirton. Parties resolved to call a shareholder's meeting to resolve differences Stirton had with Bavasah.

[12] On 3 April 2008, Stirton enquired from Orton about the Long Form Agreements which had to be drawn up by 21 December 2007. In this email he stated as follows: *'[I]* (sic) *presume that the shares have not been issued, as the MOU states that this will be done after compilation of the longform? I need to be able to tell Allsop, as well as my bank.'*

[13] Orton responded the following day by stating that he had a draft which he committed to circulate at the end of the following week. He further mentioned that the 'issue' of shares was not with him anymore as the share

certificates were issued by CIPRO on application from the company secretary and this was applied for some time ago.

[14] On 5 May 2008, Stirton again enquired from Orton about the status of the Longform Agreements which were required to have been drawn up in order to formalise the MOU. Orton responded by saying: *'Yes, as mentioned the shares are issued anyway. Hows (sic) the business plan coming'*

[15] Stirton sought further clarity as to what 'yes' referred to and wanted to know who registered the shares as he had learnt from Dorian Esau ('Esau') (this was one of the individuals who was asked by Orton to assist with the issuing of the shares to Stirton, Bavasah and Allsop) that they did not have any share transactions in process or any pending. Orton did not address the concern raised by Stirton in his email response but rather asked, in a visibly irritated manner, for a business plan from Stirton.

[16] Grapevine resolved to exit GSDM and on 26 May 2008, an agreement was concluded between Grapevine, Stirton and GSDM. Stirton paid R550 000 to Grapevine for the transfer of shares that Grapevine held in the company. What is significant from this agreement are the shareholding amounts held by the various parties, which amounts are different to those set out in the MOU. Paragraph 2.1 of the agreement states as follows:

'The entire issued share capital in GSDM is held and beneficially owned as follows, by virtue of a Memorandum of Understanding executed between GSDM , Stirton, GVI and Bavasah, attached as Annexure 1 hereto, and by virtue of a Sale of Shares MOU executed between GSDM and Allsop, attached as Annexure 2 hereto:

Stirton 86 shares

Bavasah 45 shares

GVI 120 shares

Allsop 28 shares'

[17] The total of the shares issued above is 279. 45 shares are allocated to Bavasah and that indeed translates to 16% of the issued share capital. This change in shareholder apportionment apparently came as a result of a suggestion made by one Juanita Koster ('Koster') on 06 May 2008, who was also tasked with documentation pertaining to the issuing of the shares. Koster intimated that increasing shares would entail a lot of paper work. She then suggested authorised shares be utilised in such a way that they would come close to the percentages allocated (in the MOU). According to Koster GSDM had 1000 authorised shares of which 120 were apparently issued to Grapevine. This issue is important as it illustrates the difference between what was intended in the MOU regarding the issuing of the shares and what was recorded in the sale of shares agreement between Grapevine and Stirton on 26 May 2008. The MOU envisaged issuing of fresh shares which was an increase in a share capital whilst Koster suggested utilisation of authorised share capital.

[18] Koster drafted a backdated resolution for a meeting of directors that should have been held on 01 May 2008. A meeting adopting such a resolution never occurred and the resolution was never adopted and it remained unsigned. Koster further suggested that share certificates be issued which was duly done. Orton testified that he had given an instruction to Koster to issue shares by January 2008 already. This is evidenced by an email dated 21 January 2008 sent by Orton to Esau requesting him to assist Koster with documentation pertaining to, amongst others, issuance of the shares. This was followed up by another email to Koster dated 28 February 2008 seeking to know about where things were regarding the issuing of the shares. Koster stated that she could not recall why the changes did not take place in January 2008 but alleged that subsequent to being copied on the February 2008 correspondence by Orton, the next email she received from Orton was on 06 May 2008. In this email Orton advised Koster that: '*..something may have*

slipped through the cracks, i.e. the issue of fresh shares to the shareholders so that the shareholders are in the correct proportions.' He further attached a spreadsheet detailing shareholding as per the MOU. That is when Koster suggested that issuing new shares will entail a lot of paperwork and suggested that already existing authorised shares be utilised. Orton agreed to this. Stirton and Bavasah were however not made aware of these developments by either Koster or Orton. Orton conceded during cross examination that he neither informed Bavasah *nor* Stirton of the administrative 'glitches' he had unearthed and they assumed that everything was 'hunky dory'.

[19] Due to the fact that the issuing of shares was overdue, Koster was requested to issue those as at 01 December 2007. A CM 15 allotment was prepared for additional 159 shares in the company but was never lodged with CIPRO. Share Certificates were printed and issued to the respective Stirton, Bavasah and Allsop. Koster stated that although the minute (resolution) dated 01 May 2008 was not signed, the email sent to her in January 2008 by Orton with the shareholding showed the intent of the then 100% shareholder Grapevine, represented by Orton, to issue in December 2007 the additional 159 shares as detailed above. Koster acknowledged that an error was committed in failing to sign the minute and submit the CM 15 to CIPRO and that she had committed an oversight in failing to ensure this was done.

[20] On 16 May 2008 Orton resigned as a director of the company. Bavasah and Stirton were not copied on correspondence between Orton and Koster relating to the issuing of the shares. It appears that Stirton and Bavasah were appointed as directors of the company on 1 April 2008. Bavasah resigned as a director in May 2008. A security transfer form transferring 120 shares from Grapevine to Stirton was signed on 2 July 2008.

[21] During May 2008, Stirton and Bavasah had entered into their own discussions to sever their relationship. Various correspondences ensued between them outlining their differences. With the help of Neil McDonald ('Mc Donald'), a director at Grapevine, a deal was brokered between the two parties, culminating in the signing of a handwritten agreement on 27 May 2008, which is a subject matter of these proceedings. The agreement stated as follows:

> '(1) James the [first respondent] to pay R200 000 cash for Sohrab's [the appellant] 16 % of Shout Media ('the second respondent').
>
> (2) Shout Media to pay Sohrab R10 000 a month for 12 months from 1 June 2008. and then R17 000 a month for 6 months from 1 June 2009.
>
> (3) In the event of a sale of Shout Media at anytime in the 18 months period from 1 June 2008 the balance of the outstanding payments will be made in one lump sum to Sohrab before any other payments.
>
> (4) The balance of the 18 month payments will rank before <u>all</u> other liabilities in the business.
> i.e. in the event of Shout defaulting on any of these payments Sohrab has the right to liquidate the company
>
> (5) Clause (1) executed by close of business tomorrow 28Th May 2008
>
> Signed today 27 May 2008.'

[22] Terms of payment were later amended to state that the remaining R100 000 would be paid by Stirton to Bavasah over a period of 10 months.

[23] It is common cause that Stirton paid the sum of R120 000 in respect of the purchase price of the shares and two instalments of R10 000 each on 1 July 2008 and 1 August 2008 respectively leaving a balance of R80 000 still to be paid.

[24] In relation to its part of the agreement, the company paid to Bavasah three instalments of R10 000 each for the months of 1 June, 1 July 2008 and 1 August 2008, respectively. Although the agreement does not specify that payment was in respect of a loan, it is common cause that it was so. The

total agreed in terms of that agreement for the loan account appears to be R222 0000. With the payment of R30 000 already effected the balance would be R192 000.

[25] Bavasah instituted action against the respondents to claim the balances outstanding in terms of the agreement of 27 May 2008. The respondents alleged that Bavasah had certain obligations he needed to fulfil before further payments could be made. The respondents claimed further that Bavasah made representations that were false with the intention of inducing the respondents to act on them. They averred that Stirton would not have agreed to the R200 000 purchase price for the shares and the company would not have agreed to the repayment of a loan account in the sum of R180 000 and the appreciation fee of R42 000 had they known the true state of affairs.

[26] A considerable amount of evidence was led at the trial about these alleged obligations as well as misrepresentations. It however transpired during the cross examination of Orton that shares were never allotted, issued and registered in accordance with the Articles and the Act to Bavasah. In particular, there was a failure to comply with section 221 of the Act in that no resolution was passed in a general meeting to authorise the directors to issue shares to Bavasah (and others), which meant that shares were never issued to Bavasah. Furthermore, the company did not have a register of members and therefore Bavasah's name was never entered into a share register.

[27] This led to the respondents amending their plea and lodging a counterclaim against Bavasah. The respondents alleged in the amended plea that the agreement was entered into on the basis of a number of assumptions: that the shares had been duly allotted and issued to Bavasah and in this regard there had been full compliance with the formalities required by the Act and

the company's Articles; that Bavasah was the registered proprietor and in full control of the shares; and that Bavasah was a member of the company. All these assumptions were said to be vital to the conclusion of the agreement of 27 May 2008 by the respondents. The respondents submitted further that there was a common mistake between the parties, in view of the above assumptions being incorrect. It averred that the agreement of 27 May 2008 was void and should be found to be so by the trial Court.

[28] The magistrate found that Bavasah could not have transferred or sold any shares to Stirton by means of the agreement entered into between the parties on 27 May 2008 because that agreement was reached on the basis of an incorrect assumption held by both parties that 16% shares were allotted and issued to Bavasah, that Bavasah was the owner of those shares and that he was the member of the company. Due to those mistaken assumptions the agreement was held to be void. The magistrate accordingly ordered restitution of the monies already paid by Stirton and the company to Bavasah in respect of those shares and the loan account, being R120 000 and R30 000 respectively. These are the issues that form the subject matter of this appeal.

Discussion

[29] The issue before this Court is whether the magistrate was correct in finding that the agreement dated 27 May 2008 was void. The next issue to be determined is whether that agreement is severable in regard to the aspects dealing with the loan account.

[30] Upon realising that the shares may have not been issued, Bavasah took an about turn during the trial by stating that he never transferred his shareholding to Stirton but his rights. This theme seems to be carried through by his counsel, Mr Jethro, in his heads of argument. Mr Jethro submitted that Bavasah was selling his rights as set out in the MOU to the

respondents. He further submitted that the parties had unanimously and at all times referred to such rights or interest as 'shareholding' when the MOU was discussed.

[31] These submissions and new allegations are clearly an attempt by Bavasah to avoid the technical issue that arose during the trial. Unlike the respondents who amended their papers, Bavasah failed to amend his particulars of claim to reflect the new alleged cause of action (i.e. he transferred rights to shares in terms of the MOU) and not his shares to Stirton.

[32] The magistrate was correct in my view by finding that the subject matter before her was the sale of shares as opposed to the sale of rights to the shares created by the MOU. The case relating to Bavasah's contractual rights in terms of the MOU was not pleaded. Furthermore, the contract Bavasah relied on in the particulars of claim was the sale of shares agreement of 27 May 2008 and not the sale of the rights to the shares he acquired in terms of the MOU. That in my view is a separate issue altogether.

[33] Returning to the issue of whether Bavasah was a shareholder, the MOU is clear that the company was to issue 'fresh shares'. In terms of the Articles:

> '5. The company may in general meeting, without prejudice to any special rights previously conferred on the holders of existing shares, issue, or authorise the directors to issue subject to section 221 of the Act, the unissued shares, in such amounts and to such persons and at such process as the resolution shall prescribe.' (Own emphasis)

[34] In regard to the issuance of fresh or new shares the Articles provide as follows:

> 'the company may, by special resolution:

22.1 increase the share capital by such sum divided into shares of such amount, or may increase the number of its shares of no par value to such number, the resolution shall prescribe...' (Own emphasis)

[35] It is therefore clear that where issuing of unissued shares is contemplated a resolution prescribing such must be passed and most importantly where an increase in shares is envisaged, a special resolution is required.

[36] Section 221 of the Act states that:

'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.' (Own emphasis)

[37] It is common cause that no formal general meeting was held at which a resolution was passed to authorise the directors of the company to allot or issue the 'unissued shares', nor was any special resolution passed to increase shares.

[38] Allotment of shares entails offer and acceptance for subscription of shares. It was submitted by Mr Jethro on behalf of Bavasah that shares were allotted in terms of the MOU. Allotment in itself does not result in an applicant becoming a shareholder, this only occurs on shares being issued to the applicant.[1] Even if it would be accepted that the MOU represented allotment of shares, that in itself was not enough to make Bavasah a shareholder. Shares still had to be issued.

[39] Issuing refers to an act which completes the title of the applicant to whom shares have already been allotted.[2] In **Ambrose Lake Tin and Copper CO (Clarke's case)**[3] it was held that:

[1] See Law of South Africa Vol 4(1) (Second Edition) Companies at paragraph 157
[2] See Law of South Africa Vol 4(1) (Second Edition) Companies at paragraph 159
[3] 1878 8 Chd 635 (CA) at 638

'in as much as the term 'issue' is used, it must be taken as meaning something distinct from allotment, as importing that some subsequent act has been done whereby the title of the allottee becomes complete, either by the holder of the shares receiving some certificate (in the case of certificated securities) or being placed on the register of shareholders, or by some other step by which the title derived from the allotment may be made entire or complete.'

[40] The authors in **LAWSA**[4] and **Henochsberg on the Companies Act Act 71 of 1973** [5] seem to suggest that before a share can be considered issued there must at least be the placement of the subscriber on the share register and the mere issue of the certificates is insufficient.

[41] Mr Jethro referred us to the decisions of **Moosa v Lalloo and Another 1957 (4) SA 207 (N)** and **Moosa v Lalloo 1956 (2) 237 (D & CLD)** where the Court held that the procedural defects did not invalidate the sale of shares. The Court held as follows in the former at 219A-C:

'The answers to these aspects of the matter appear to me to stem from the fact that an allotment, by which shares are acquired from a company, is a contract. Although a share is created and comes into existence upon its original issue by the company, and not before issue (with the consequence that he who subscribes for it does not purchase it from the company), the right to it springs from offer and acceptance. No ceremonious ritual, nor any magic formula, is required for the process of allotting the share. It may be effected by way of offer on the part of the company to the allottee, accepted by him, or, as is more usual, by way of offer (an application for shares) by him, accepted on behalf of the company; a contract of allotment may be effected in any manner in which a contract may be concluded, even by implication from conduct..'

[42] The Court held further that:

'That he, Mohideen and Naicker met and decided upon the issue of shares to him and Mohideen cannot it seems to me, be denied; indeed, the share certificates were

[4] At para [159].
[5] At page 187

actually issued bearing the three signatures of the three of them, and this in the circumstances, is evidence of the contract to take and to allot shares. Even though there may have been some absence of formality, it is clear to me that the plaintiff, on the one hand, and the Company, represented by Mohideen and Naicker, on the other hand, agreed upon the creation of 2,500 shares to be issued to the plaintiff, and this was put into effect. There certainly was a de facto allotment (cf. Ex Parte Liquidator Curlewis Citrus Growers' Co-operative Co. Ltd., 1933 T.P.D. 389), and the Company acted upon it, functioned with the aid of the plaintiff's capital and treated him as a shareholder and as a director.' (Own emphasis)

[43] A key feature in the **Moosa** case is that 'a statutory meeting' was held. It seems that parties in that case met and decided on the issuing of the shares. That in my view could be a distinguishing factor which is material. Apart from the signing of the MOU no further meeting was held to issue shares in the present matter. Be that as it may, it does not seem like a special resolution was an issue in the **Moosa** case. Furthermore, in the **Moosa case** it seems parties were all aware of the transaction. In this case at one point fresh shares of a different number were to be issued in terms of the MOU, but that changed in May 2008 with Koster suggesting authorised shares to be used, leading to amounts that differed from what was stated in the MOU, even though an attempt was made to stick to the same percentages. Clearly, Stirton and Bavasah could not be said to have been aware of the transaction as it changed on 06 May 2008 or to have unanimously consented to it as they were informed that shares were issued already by then. In my view the **Moosa** decision is distinguishable from this case on many fronts. In **Moosa** directors met and decided. This did not happen in this case.

[44] The Court in **Moosa's** case observed that a share only comes into existence upon its original issue by the company and not before its issue.[6] Lack of membership in the **Moosa** case was not relevant as the Court had found that the shares were allotted and issued. Therefore **Moosa** had become a

[6] In this regard see paragraph 219B

shareholder. In this instance, the fact that there is a shareholder's certificate issued did not in itself make Bavasah a shareholder.

[45] The fact that there was no register of members and Bavasah's name was not in the register of membership did not impact on the validity of the sale of shares agreement either. That is, in my view, the kind of defect that could be condoned.

[46] Mr Jethro argues that Orton, who was the sole director of the company after the signing of the MOU, unilaterally made a decision to issue the shares informally so to speak. That argument is supported by Koster's statement that the email she received from Orton in January 2008 in fact showed the intent of the sole shareholder Grapevine as represented by Orton was that shares were to be issued as at 1 December 2007. Whilst the intent was there to issue, issuing did not take place. If one reads correspondence from Orton, it is clear that shares had not been issued even by May 2008. His email to Koster dated 06 May 2008 clearly shows that Orton's understanding was that shares had still not been issued.

[47] Even if it were to be accepted that Orton's instructions to Koster and others in January 2008 showed a decision had been taken by Orton, as sole Director of Grapevine, in a meeting called by himself the difficulty is that since the MOU contemplated issuing of fresh shares, a special resolution had to be passed authorising such. By virtue of sections 200 and 202 of the Act a special resolution is not effective unless it has been registered by the Registrar of Companies within a month of its passing.

[48] Mr Jethro argued that the Court ought to consider the 'substance over form' principle of unanimous assent. In **LAWSA**[7], the authors observe as follows:

[7] Vol 4(2) First Reissue at paragraph 40

'Although generally company decisions are arrived at by means of formal resolutions taken at properly constituted meetings of the company, the courts have recognised that the unanimous assent of all the members, when fully aware of what is being done, is an alternative method of passing valid company resolutions – despite the fact that the procedures prescribed by the articles have not been observed.' (Own emphasis)

[49] In **Gohlke & Schneider and Another v Westies Minerale Beperk and Another**[8] the Court said the following:

'After all, the holding of a general meeting is only the formal machinery for securing the assent of members or the required majority of them, and, if the assent of all the members is otherwise obtained, why should that not be just as effective?"

At 694 E:

"Because the principle, as applied in those cases, is a sound one, giving effect to the substance rather than the mere form of the members' assent, I think that we should accept it as being settled law. Consequently, the assent of all the members and Sarusas, as evinced by the agreement of 28th January, 1965, rendered clause 8 binding on all of them just as if they had approved it by ordinary resolution in general meeting.' (Own emphasis)

[50] In **Levy and Others v Zaltrust Investment (Pty) Ltd**[9] the Court said:

'I am hence of the opinion that the **unanimous consent** of the shareholders of a company to a specific transaction has the same effect and validity as the approval of such transaction by a general meeting of the company.' (Own emphasis)

[51] The difficulty that Bavasah has in this case is that the MOU sought the issuing of fresh shares which did not just require a general meeting to occur but a special resolution to be passed. Had it only been a general meeting that was required I would have had no hesitation in finding that Orton's instructions that shares be issued indicated that he was authorised as a director to issue or order issuing of the shares even though no general

[8] 1970 (2) SA 685 (A) at 693 G
[9] 1986 (4) SA 479 (WLD) at 485F

meeting passing a formal resolution was held. In this regard, I disagree with the magistrate's finding that Orton was not '*fully aware of what was being done*' by virtue of his being unaware of the formalities required by Articles. Being 'fully aware' for the purposes of unanimous assent does not necessarily mean being aware of the formalities required in the Articles as the magistrate found, but it means being aware that shares had to be issued to the relevant parties and acting on such awareness.

[52] There seems to be a strongly held view that unlike normal resolutions, special resolutions cannot be informally obtained by way of unanimous assent.[10] In **Quadrangle Investments (Pty) Ltd v Witind Holdings Ltd**[11] the Court held that in requiring a special resolution:

'the Legislature also bore the wider interest of the general public in mind in prescribing those formalities. A purported alteration by the unanimous assent of the shareholders, which can occur informally, even by conduct, would therefore not serve those purposes. A special resolution must therefore be regarded as being essential. (See on this aspect, too, the well-reasoned and useful article, "The Principle of Unanimous Assent," by Professor Beuthin, in 91 (1974) S.A.L.J. at pp. 11-15).'

[53] The difference in this instance though is that a special resolution is prescribed by the articles and not by statute, which might be a differentiating factor. The difficulty here though is that apart from the fact that the resolution was never passed, many other formalities were not complied with. There was also no attempt to comply with the required formalities.

[54] A further indicator that shares were not issued was that on 06 May 2008, Koster suggested that all the 1000 authorised shares of the company be used rather than new shares being issued. Orton was no longer the sole director

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[10] See LAWSA Vol (2) First Reissue at paragraph 40. The authors in LAWSA state that '...the unanimous assent of all the shareholders will not satisfy a requirement that something be effected by a special resolution'. Also see Hahlo's Company Law through the Cases – A Source Book – Sixth Edition at page 237 – pg 239 which refer to the opposing views on this issue.

[11] 1975 (1) SA 572 (A) at 581G-H.

on or after 06 May 2008. No general *or* informal meeting of the Company was held to issue the shares to the new shareholders during the tenure of the new directors and even the belated resolution remained unsigned. In fact the change in circumstances was not directly communicated to Bavasah and Stirton by Koster or Orton. Orton did not see the point of doing so. He was in direct communication with Koster. Both Bavasah and Stirton assumed that Orton would comply with all the necessary formalities and left everything in his hands.

[55] What seems to be clear from the evidence is that both Stirton and Bavasah would have learnt about the new individual shareholding amounts when they were issued with their share certificates after 06 May 2008 but before 27 May 2008. The question is whether the doctrine of unanimous assent finds application during the period of 06 May 2008 to 27 May 2008.

[56] Although the unanimous assent principle would ordinarily be applicable in circumstances such as these, at least during the May 2008 period, where no special resolution was required, the shareholders and directors could not have unanimously assented to the allotment and issuing of the shares to the new shareholders in this case as they could not have been '*fully aware of what was being done*'. Furthermore, Orton had stated already on 05 May 2008 that '*shares had been issued anyway',* knowing this not to be the case as evidenced by his email to Koster on 06 May 2008. No discussions took place between the directors regarding the allocation, allotment or issuing of the shares to Bavasah, Stirton and others. It would not be enough for Orton to suggest that he called a meeting with himself in these circumstances. Section 221 of the Act read with the Articles was clearly not complied with and the doctrine of unanimous assent could not come to Bavasah's rescue in these circumstances.

[57] Mr Jethro also referred to the decision of **Botha v Flick and Others**[12] where the Court found that provided that the parties had the required intention (consensus), cession of the share is complete without delivery of the share certificate and a signed transfer form, and regardless of whether or not the company knows of the cession.[13]

[58] It cannot be said in this case that the parties had the requisite intention to pass transfer of 45 shares to Bavasah and others as suggested by Koster, as no company meeting took place and both Bavasah and Stirton only became aware that 45 shares were allocated to him after 06 May 2008, or upon being issued with share certificates sometime before 26 May 2008. I do accept that the percentages remained unchanged, but those percentages in the MOU were based on different amounts of fresh shares that were to be issued and not based on already authorised shares. It does not seem that Bavasah and Stirton were part of the decision to issue the amount of shares that was suggested by Koster on 06 May 2008.

[59] The decision of **Botha v Fick** seems to suggest that the obligation to deliver share certificates and sign documents necessary to effect transfer does not affect the rights to the shares *inter partes*. It is required merely to enable the company to perform its statutory regulatory obligation to register the transfer of the shares in the name of Bavasah.[14] The hurdle that Bavasah must still overcome in this instance is that there was no issuance of shares. The wording used in section 221 of the Act is also peremptory, stipulating

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[12] 1995 (2) SA 750 (A)

[13] Also see **Barnard v Carl Greaves Brokers (Pty) Ltd and Others 2008 (3) SA 663 (C)** which concerns the principle that shares may be freely sold and assigned even though the original registration remains unaltered. They can pass from hand to hand and form the subject of many transactions without the original registration in the shares register being disturbed. In such instances, it is the mere naked registration that remains, and the fact that the original holder may still be in possession of the script or share certificates, makes no difference as such original holder no longer possesses any beneficial interest in the shares, or put differently, possesses no property in the rights of action which the shares represent. See **McGregor's Trustees v Silberbauer** [1891] 9 SC 36 at 38-9; **Randfontein Estates Ltd v The Master** [1909] TS 978 at 981-2; **Botha v Fick** *supra* at 778

[14] (at page 756).

that directors have no authority to allot or issue shares without prior approval at the general meeting.

[60] It is common cause that the company did not have a register of members as contemplated by section 103 (2) of the Act. Section 103(2) provided that: 'Every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.' It follows from this provision that Bavasah was not a member of the company. The Articles further provide that 'Every person whose name is entered as a member in the register of members shall be entitled to one certificate of all shares registered in his name...' Therefore before a share certificate could be issued a person's name should have been entered in the register of members.

[61] The magistrate held that the agreement between Stirton and Bavasah was void due to a common mistake shared by the parties. The authorities indicate that if such a supposition is "vital to the transaction" in that neither party would have concluded the contract had they known the true facts, a court can hold the contract to be void *ab initio.*[15] I am in agreement with the magistrate's finding that the parties were both under an incorrect supposition that shares had been issued and that Bavasah was the holder of the shareholding in the company. The contract entered into and signed on 27 May 2008 was therefore void.

[62] That brings me to the question of whether parts of the contract dealing with the loan account were severable from those that dealt with the shareholding. Bavasah holds that they are, because the loan account had to do with his employment and not his shareholding. Therefore, even though shares could

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[15] Dickinson Motors (Ptv) Ltd v Oberholzer 1952(1) SA 443 (A) at 450; and Van Reenen Steel (Ptv) Ltd v Smith N.O. & Another 2002(4) SA 264 (SCA) at 270-271).

not have passed on to him, he was still entitled to repayment of the loan account. Once his employment terminated he was entitled to repayment of a loan account.

[63] The respondents' view is that shareholding formed the heart of the transaction and if one had regard to the intention of the parties one would find that the company would not have agreed to the payment of the loan account if Bavasah was not a shareholder. Mr Cooke who appeared for the respondents argued that Bavasah's entitlement to shares was linked to his remuneration in that he had to earn his shareholding by working for 24-30 months.

[64] Whilst it is useful to look at the MOU and all the other instruments, the important issue is the intention of the parties at the time of entering the contract. The question is what the parties had in mind when they entered the agreement of 27 May 2008. The first point is that they wanted a deal that could make Bavasah 'go- away' as it were. It also seems to me the salary sacrifice was made by Bavasah on the basis that he was a shareholder. For that reason the finding that he was not a shareholder of the company invalidates the whole contract.

[65] Bavasah's claim was based on the agreement of 27 May 2008 and not on his entitlement to be paid the loan account by virtue of his employment relationship with the company having been terminated. This distinction is quite important as it may be that Bavasah does have a claim but his claim cannot be based on the agreement of 27 May 2008 alternatively on the pleadings as they stand.

[66] For these reasons, I find no misdirection on the part of the magistrate warranting this Court's interference.

[67] In the circumstances, I would make an order dismissing the appeal with costs.

N P BOQWANA

Judge of the High Court

I agree, and it is so ordered

R HENNEY

Judge of the High Court