REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2025-040248

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

8 April 2025

DATE SIGNATURE

In the matter between:

ABT ANGAZA (PTY) LTD	Applicant
and	
MPSA PROJECTS (PTY) LTD	First respondent
K2022570124 (SOUTH AFRICA) (PTY) LTD	Second respondent
ROBIN CLINT WHEATLEY	Third respondent
TAKUNDA JINDA	Fourth respondent
LEBASHE INVESTMENT HOLDINGS (PTY) LTD	Fifth respondent

JUDGMENT

HA VAN DER MERWE, AJ:

[1] On 3 April 2025 I made the following order:

(a) The matter is enrolled as an urgent application;

(b) It is declared that, as at the date of this order, the shares in the first respondent are held as follows: (a) the applicant: 300 shares; and (b) the second respondent: 700 shares;

(c) The first respondent is ordered to rectify its share register to delete any reference to the second respondent holding any shares other than the 700 shares referred to in paragraph 2 above;

(d) Judgement in respect of the orders sought by the applicant, other than as is disposed of by the orders set out above, is reserved.

[2] The reasons for my order follow below. I also deal with the orders sought in the notice of motion that were not disposed of by the order I made on 3 April 2025.

[3] This is an urgent application in which the applicant seeks the following relief (together with urgency and costs):

> "(a) Declaring as unlawful and setting aside the Third and Fourth Respondent's resolution to authorise and issue 290 additional shares of the First Respondent.
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> (b) Declaring as unlawful and setting aside the subscription agreement between the First Respondent and the Second Respondent in terms of which the First Respondent authorised and allotted 290 (two hundred and ninety) additional ordinary shares of the First Respondent to the Second Respondent.
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> (c) Alternatively to prayer [a] and [b], [d]eclaring that the dilution of the Applicant's shareholding in the First Respondent is abusive, oppressive, unfairly prejudicial to and unfairly disregards the interests of the Applicant as a minority shareholder and be set aside.
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> (d) Declaring the Third and Fourth Respondents as delinquent directors and placing them under probation in terms of the Companies Act No. 71 of 2008. That the contemplated special resolution for the disposal

of all the assets of the First Respondent scheduled on the 4th April 2025, be interdicted."

[4] The applicant (ABT) is a shareholder of the first respondent (MPSA). MPSA's other shareholder is the second respondent (K2022). The third respondent (Mr Wheatley) and fourth respondents (Mr Jinda) are directors of MPSA.

[5] On 19 March 2025 Mr Wheatley sent an email to ABT, to which was attached a share certificate that indicates that on 17 March 2025, 290 shares in MPSA were issued to K2022. An updated share register was also attached to Mr Wheatley's email, that reflected that ABT held 300 shares in MPSA and K2022 held 990 shares. Before the 290 shares were issued (or purportedly issued) to K2022 it held 700 shares in MPSA.

[6] If 290 shares were issued to K2022, then the veto vote that ABT had, so far as special resolutions are concerned, would be eliminated. Before the issuance (or purported issuance), ABT held 30% of the issued shares and K2022 held 70%. As a special resolution requires a 75% majority vote, ABT could veto any special resolution. If 290 shares were issued to K2022, ABT's proportional shareholding would drop to 23.26% and K2022's proportional shareholding would be 76.74%.

[7] Mr Wheatley also made it known on 19 March 2025 that on 4 April 2025, a special resolution would be put to a vote of MPSA's shareholders, that provides for MPSA to sell its assets to a third party for an amount of R8 132 198.

[8] These are the immediate events that brought ABT before the urgent court. Mr Wheatley's email of 19 March 2025 prompted ABT to bring this application and as it sought to interdict the meeting to be held on 4 April 2025, a clear case for urgency is made out, at least for that part of ABT's case that is concerned with the shareholding in MPSA.

[9] ABT contends that the issuance of 290 shares to K2022 is open to attack, on two grounds. MPSA's memorandum of incorporation (MOI) authorised only 1 000 shares – all of which had been issued as set out above. A special resolution is required to amend the MOI to authorise additional shares and no such resolution was adopted. Second, ABT's case is that the issuance of 290 shares to K2022

is oppressive or unfairly prejudicial to ABT, in the sense meant by section 163 of the Companies Act 71 of 2008 (the Act) and is therefore liable to be set aside.

[10] If ABT is correct that MPSA's MOI authorised only 1 000 shares, and that no special resolution was adopted to authorise additional shares, it must mean that MPSA could not issue 290 shares to K2022, because there were no such authorised shares to issue.

[11] The respondents' case is that the MOI of MPSA on which ABT relies is not authentic. The real MOI authorised 1 000 000 shares. The 290 shares were issued to K2022 after 30% of those shares were offered to ABT, but since ABT declined the offer, it was at liberty to issue all 290 to K2022.

[12] It is not in dispute that 30% of the 290 shares were offered to ABT and that it declined the offer, but of course ABT could not take up that offer so long as it maintained the position that only 1 000 shares were authorised.

[13] It therefore makes logical sense to first consider the question as to the true MOI of MPSA. However, there are profound factual disputes on this question. The document on which the respondents rely as being MPSA's true MOI, on the face of it, is drawn from the records kept by the Companies and Intellectual Property Commission (CIPC). This document provides a space for the signature of the "incorporator" (Mr Sylvester Taku), but there is no signature. A space is also provided for a date, but that space is also empty.

[14] Mr Ferreira (who appeared for the respondents) argued that the version of the MOI on which it relies, trumps the one on which ABT bases its case, in terms of section 18(2) of the Act. Section 18(2) provides that an MOI endorsed by CIPC prevails over any other "purported version" of a company's MOI, if there is a conflict between the two. Mr Meijers' (who appeared for ABT) counter to that argument is that section 18(2) is concerned with MOIs that are properly signed and dated. These arguments require careful consideration as it concerns the proper interpretation of section 18(2) of the Act. The proper interpretation of the Act is notoriously difficult – as is evident from the multiple conflicting judgements on the proper meaning of other sections of the Act. There are no reported (or unreported) judgements on section 18(2) that either Mr Meijers or Mr Ferreira

could find. The urgent court is poorly suited to this enquiry. What is more is that the interpretive question can only be properly considered once the facts have been established. The factual disputes on the affidavits are not such that it can safely be decided on motion. The provenance of the version of the MOI on which the respondents rely, for instance, is not dealt with in the answering affidavit. To an extent that is understandable, since K2022 became a shareholder of MPSA after its formation and so its directors do not have personal knowledge of the circumstances of MPSA's incorporation. The fact that the respondents were compelled to draft the answering affidavit under urgent conditions does not help either.

[15] ABT's case on the real MOI is not without difficulty. The version of the MOI on which it relies is dated after the date of MPSA's incorporation. This poses a significant problem for ABT, perhaps an insurmountable one, since a company requires an MOI to be incorporated. I make no finding on this matter however. Even if it could be taken for granted that the version of the MOI on which ABT relies is not MPSA's true MOI, it does not, in and of itself resolve the factual dispute. Saying that the MOI on which ABT relies is not MPSA's true MOI does not imply that the one on which the respondents rely, is the true one. It is possible that neither version of the MOI is the true one. I repeat that I make no finding on this topic, but I make these remarks merely to illustrate why the determination of MPSA's true MOI is not a matter that should or could be dealt with in urgent court.

[16] On the assumption that the true MOI of MPSA authorised 1 000 000 shares, as the respondents have it, I turn to ABT's cause of action based on section 163.

[17] When a company issues shares, it must be for value. In terms of section 40(1), in relevant part:

> " The board of a company may issue authorised shares only-
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> *(a)* for adequate consideration to the company, as determined by the board;
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> …."

[18] In the founding affidavit ABT alleges that MPSA's board of directors did not determine that R1 560 000 represents adequate consideration for 290 of MPSA's shares. Mr Wheatley contended at the time that the value of MPSAs' assets was R32 750 000 – a significant reduction in value, compared to what it was before. Yet, even if one were to assume that the value of MPSA's assets was R32 750 000, leaving all else aside, the value of each of the issued shares in MPSA was R32 750. Assuming that to be a fair indicator of the value of all MPSA's shares, R1 560 000 would be representative of only 47.63 shares, not 290 (the number of shares in a private company is an integer, so it could have been rounded to 48 shares). ABT's back-of-an-envelope calculations are not perfect for a number of reasons. For one the calculation ought to be done with reference to MPSA's net value, not just the value of its assets. Even then MPSA's net asset value may not be the proper measure of its true value. However that may be, for present purposes the important point is that the founding affidavit set out a version on "adequate consideration" as meant by section 40(1)(a) that calls for a response. ABT's calculations, although imperfect, nonetheless is an approximation of the value of MPSA's shares. The founding affidavit squarely puts the respondents on guard to meet the allegation that the issuance of 290 shares to K2022 was for inadequate consideration, that had the effect of diluting the value of ABT's 300 shares in MPSA.

[19] As set out above, the consideration determined by MPSA's board for the 290 shares it issued to K2022 was R1 560 000. That amount represents, according to the respondents, MPSA's capital requirements for purposes of the envisaged sale of MPSA's assets I referred to above. (The assets are under attachment by the sheriff. The amount of R1 560 000 is required to settle the judgement debt pursuant to which the assets were attached).

[20] During 2023, Mr Wheatley had in mind to issue 290 of MPSA shares, at that time against a consideration of R6 300 000. At that time, R6 300 000 was the amount required by MPSA to continue business as a going concern.

[21] As mentioned above, an additional 290 shares issued to K2022 is just enough to deny ABT its veto on special resolutions.

[22] Notionally, it might be that the value of MPSA declined so significantly from 2023 to March 2025 that the reduced consideration for 290 of MPSA shares is justified, but it would make for the most remarkable coincidence that the decline in MPSA's value happened to match the difference between MPSA's capital requirements to continue business as a going concern in 2023, and the amount required to release MPSA's assets from the attachment in 2025. This especially so as the amount required in 2023 to continue MPSA's business as a going concern has nothing to do with the quantum of MPSA's judgement debt in 2025.

[23] Coupled with the fact that 290 shares are just enough to deny ABT its veto on special resolutions, the respondents have some explaining to do on how MPSA's board of directors determined that "adequate consideration" for 290 of MPSA's shares was R1 560 000.

[24] The answering affidavit does not engage on this matter. One would have expected the respondents to explain how MPSA's board of directors went about determining "adequate consideration" for 290 of MPSA's shares, at the very least. The answering affidavit explains why the amount of R1 560 000 was required, but, in order to show that the board determined "adequate consideration", the respondents should have explained why R1 560 000 is adequate consideration for 290 shares, as opposed to for any other number of shares.

[25] Therefore, the answering affidavit does not raise a bona fide dispute of fact and I am to decide the matter on ABT's version that the board did not properly determine adequate consideration as section 40(1)(a) requires (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634H - 635C). For the same reason I am also to decide this matter on the basis that ABT established as a fact that the issuance of 290 shares to K2022 had the effect of diluting the value of ABT's 300 shares in MPSA.

[26] Section 163 is engaged when a shareholder is the victim of the kind of conduct that is described in *Grancy Property Ltd v Manala and other* 2015 (3) SA 313 (SCA) at para 22 – 23:

“There is a substantial body of case law on the import of s 252 of the Companies Act 61 of 1973, which, in material respects, is the previous equivalent of s 163 of the Act. In my view there is a benefit to be derived from considering the jurisprudence developed over the years as to what constitutes oppressive or unfairly prejudicial conduct. To determine the meaning of the concept of 'oppressive' in s 163 it is apposite to refer to *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) which held (at 525H – 526E):

> 'I turn next to a consideration of what is meant by conduct which is oppressive, as that word is used in sec 111 *bis* or sec 210 of the English Act. Many definitions of the word in the context of the section have been laid down in decisions both of our Courts and in England and Scotland and as I feel that a proper appreciation of what was intended by the Legislature in affording relief to shareholders who complain that the affairs of a company are being conducted in a manner oppressive to them is basic to the issue which presently lies for decision by me, it is necessary to attempt to extract from such definitions a formulation of such intention. Oppressive conduct has been defined as unjust or harsh or tyrannical . . . or burdensome, harsh and wrongful . . . or which involves at least an element of lack of probity or fair dealing . . . or a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely. . . . It will be readily appreciated that these various definitions represent widely divergent concepts of oppressive conduct. Conduct which is tyrannical is obviously notionally completely different from conduct which is a violation of the conditions of fair play.
>
> . . .
>
> "(T)yrannical" conduct represents a higher degree of oppression than conduct which is "harsh" or "unjust". *The Shorter Oxford Dictionary* defines "tyrannical" as "severely oppressive; despotically harsh or cruel. For reasons which I shall now set out I do not think it is necessary for an applicant to have to go to the lengths of establishing conduct of such a nature before he is entitled to relief under sec 111 *bis*.' [Citations omitted.]

> [23] There is also the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 ([1958] 3 All ER 66 (HL)) at 342 which is to the effect that the concept of 'oppressive' denotes conduct that is 'burdensome, harsh and wrongful' and that such conduct would include lack of probity or good faith and fair dealing in the affairs of a company, to the prejudice of some portion of its members." (underling added)

[27] Here the issuance of 290 shares was wrongful, as it was done contrary to the obligations on MPSA's board of directors in terms of section 40(1)(a) of the Act. It is also lacking in probity and good faith. The prejudice to ABT is manifest. It lost its veto vote on special resolutions. Moreover, for the reasons set out above, on the facts, the value of its 300 shares in MPSA was diluted as a result of the issuance of 290 shares to K2022.

[28] The orders that a court can make in terms of section 163 are extensive. Among the orders that a court can make are "…an order varying or setting aside a transaction or an agreement to which the company is a party..." (section 163(2)(h) and "… an order directing rectification of the registers or other records of a company…"

[29] As I set out above, I am not in a position to decide the issues concerning MPSA's true MOI. If that issue is decided in ABT favour, then the issuance of 290 shares to K2022 never happened, in law, in the first place. Orders in the terms sought by ABT (referred to in paragraph [2](a), (b) and (c)) would then not be appropriate, because such orders would take it for granted that there was an issuance of 290 shares in the first place. However, if the respondents' version on the true MOI is assumed, then section 163 applies and then the consequence is as set out above. In either event, the effect is that ABT has 300 shares in MPSA and K2022 has 700 shares. In order that the adjudication on the issues on the true MOI is not affected by the orders that I make, I made the orders in the terms as set out in paragraph [1] above.

[30] ABT failed to make out a case for urgency on the orders it seeks for the third and fourth respondents to be declared delinquent. I therefore make no order on the orders sought by ABT that are referred to in paragraph [2](d) above.

[31] There is no reason why costs should not follow the event.

[32] In the result I make the following orders, in addition to those I made on 3 April 2025:

(a) I make no order on the orders sought by the applicant that are concerned with declaring the third and fourth respondents to be delinquent directors;

(b) The respondents are liable for the applicant's costs, jointly and severally, on scale C

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H A VAN DER MERWE

ACTING JUDGE OF THE HIGH COURT

Heard on: 2 April 2025

Delivered on: 8 April 2025

For the applicant: Adv G V Meijers instructed by Besong Attorneys

For the respondents: Advv N Ferreira and T Ramogale instructed by Nicqui Galaktiou Inc