



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 110/2019

In the matter between:

SEKEPE INVESTMENTS (PTY) LTD **FIRST APPELLANT**

THE ALCHAMY (PTY) LTD **SECOND APPELLANT**

MAROBALO INVESTMENTS (PTY) LTD **THIRD APPELLANT**

And

**GOVERNMENT EMPLOYEES
PENSION FUND** **FIRST RESPONDENT**

**MAGAE MAKHAYA HOUSING
(RF) (PTY) LTD** **SECOND RESPONDENT**

Neutral citation: *Sekepe Investments (Pty) Ltd and Others v
Government Employees Pension Fund and Another*
(110/2019) [2020] ZASCA 183 (23 December 2020)

Coram: CACHALIA, MOCUMIE and MAKGOKA JJA and
POYO-DLWATI and UNTERHALTER AJJA

Heard: 3 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 23 December 2020.

Summary: Specific performance – standing – claims made to enforce rights of shareholders – no derivative action required – conditions for the advance of the loans satisfied – shareholders' agreement to fund company arises from shareholder resolution.

ORDER

On appeal from: Gauteng Division of High Court, Pretoria (Rabie J sitting as court of first instance): judgment reported *sub nom Sekepe Investments Pty Ltd and Others v Government Employees Pension Fund and Another* [2018] ZAGPPHC 785.

- 1 The appeal is upheld with costs, including the costs of two counsel, where so employed.
- 2 The order of the high court is set aside and replaced by the following order:
‘The application succeeds with costs and prayers 1-17 of the notice of motion are granted.’

JUDGMENT

Unterhalter AJA (Cachalia, Mocumie and Makgoka JJA and Poyo-Dlwati AJA concurring)

[1] The appellants and the first respondent, the Government Employees Pension Fund (GEPF),¹ are the shareholders of the second respondent, Magae Makhaya Housing (RF) (Pty) Ltd (MMH). MMH was incorporated to develop low-cost housing projects. The shareholders of MMH concluded a shareholders’ agreement. Clause 10 of the shareholders’ agreement provides for the financing of MMH. It states that

¹ The Government Employees Pension Fund is a pension fund established in terms of the Government Services Pension Act 57 of 1973. It is represented by its investment arm, the Public Investment Corporation SOC Ltd, a state-owned company created in terms of the Public Investments Corporation Act 2004.

the funding of the company was to be from the profits of the company, by way of loans on commercial terms, and, only insofar as may be agreed by the shareholders, by way of shareholder loans to the company, provided that the shareholders were given timeous notice of the request for funding. The shareholder loans to MMH are stipulated to be in proportion to the shareholders' shareholdings. The first appellant, Sekepe Investments (Pty) Ltd (Sekepe), holds 55%, the GEPF 25%, and the remaining shareholders 10% each of the shares in the company.

[2] The GEPF concluded separate loan agreements with the appellants. In terms of these agreements, the GEPF agreed, subject to conditions, to lend considerable sums of money to the appellants to enable the appellants to meet the calls made by MMH to its shareholders for funding. The GEPF thus undertook to lend money to the appellants so that they, together with the GEPF, would fund MMH. The loan commitments made by the GEPF under the loan agreements amounted to R500 million, inclusive of the amount it would itself be advancing to MMH by way of shareholder loan.

[3] In September 2017, the board of MMH resolved that it required shareholder funding for various projects. The GEPF was represented at the board meeting by two directors. Pursuant to the resolution, MMH issued utilisation notices to the GEPF calling upon it to advance sums to the appellants, under the terms of their loan agreements with the GEPF, so that the appellants, in turn, could make shareholder loans to MMH.

[4] The GEPF did not make the loans available to the appellants. In October 2017, the appellants' attorneys sent letters to the GEPF, demanding that the GEPF make payment of the shareholder loans that it

was liable to pay to MMH, as a shareholder, being 25% of the shareholder loan call. In addition, the appellants called upon the GEPF to advance the loans to them pursuant to the utilisation notices, so that the appellants, in turn, could meet their obligations to fund MMH.

[5] These demands went unheeded. The appellants launched an application in the high court. The relief sought was specific performance. First, the notice of motion sought the payment of shareholder loans to MMH under the shareholders' agreement. Second, the appellants sought to enforce the payment of the loans allegedly due by the GEPF to the appellants under the terms of the loan agreements and the utilisation notices.

[6] In its answering affidavit, the GEPF, in essence, advanced the following defences. First, it raised the issue of standing, contending that if its failure to advance the sums sought (both in terms of the shareholders' agreement as well as the separate loan agreements) was a wrong done to MMH, then the application should have been brought by MMH. And, if that was not possible because the GEPF would not consent to MMH doing so, then the appellants, as shareholders, were required to bring proceedings under s 165(2) of the Companies Act 71 of 2008 (the Companies Act) to protect the legal interests of MMH.² This, so went the argument, the appellants had failed to do.

² That is, by means of a derivative action. S 165(2) of the Companies Act provides that:

'A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person—

- (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
- (b) is a director or prescribed officer of the company or of a related company;
- (c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
- (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.'

[7] Second, the GEPF contended that the conditions of clause 7 of the loan agreements had not been satisfied, nor had the GEPF been provided with the documents required under the terms of clause 7, and hence the GEPF had no obligation to advance the loans sought of it. Furthermore, it was said that the appellants had failed to comply with clause 16 of the loan agreements in that there had been no production of financial statements, nor quarterly environmental, social and governance reports.

[8] Third, the GEPF contended that it was not in breach of its obligations to make loans to MMH as a shareholder. Clause 10 of the shareholders' agreement required that shareholder loans be made simultaneously. The GEPF contended that the appellants were in no position to do so, which meant, as a result, that the GEPF had no obligation to extend 25% of the funding sought by MMH as a shareholder loan in terms of the shareholders' agreement.

[9] The high court dismissed the application. Rabie J found that the defences advanced by the GEPF were sound, save that he considered it unnecessary to resolve the standing defence raised by the GEPF.³

[10] With the leave of the high court, the appellants appeal to this court.

Standing

[11] The GEPF contended that the appellants brought the application in the interests of MMH and sought relief on behalf of MMH. The appellants, as a consequence, lacked standing to do so. MMH was

³ See *Sekepe Investments Pty Ltd and Others v Government Employees Pension Fund and Another* [2018] ZAGPPHC 785, especially para 41.

required to bring the application in its own legal interest for the relief sought in the notice of motion. If MMH was not able to bring the proceedings because the GEPF directors of MMH declined to give their consent, so the submission went, then the appellants should have brought a derivative action on behalf of MMH under the procedures set out in s 165 of the Companies Act. This the appellants failed to do.

[12] There are passages in the founding affidavit that state that the application is brought in the interests of MMH and that, under its Memorandum of Incorporation, MMH cannot initiate litigation without the unanimous resolution of its shareholders. In addition, the notice of motion is formulated on the basis that the GEPF is directed to pay amounts to MMH, these amounts being the advances on the loans due by the GEPF to the appellants. The notice of motion also seeks to compel the GEPF to pay amounts to MMH in accordance with the GEPF's obligations under the shareholders' agreement. The GEPF relies upon these passages in the founding affidavit, and the relief sought in the notice of motion, to contend that the application is brought in the interests of MMH; and that, absent compliance with s 165 of the Companies Act, the appellants lack standing to bring the application.

[13] The agreements between the GEPF and the appellants are unusual. The appellants appear to be nominal shareholders in MMH. The loans are advanced by the GEPF to the appellants solely for the purpose of the appellants, in turn, advancing the same amount as loans to MMH under the shareholders' agreement. Why the GEPF should wish to use the appellants as a conduit through which to fund the MMH indirectly, in addition to doing so directly (as a party to the shareholders' agreement), was not explained. But none of the parties contended that the

shareholding of the appellants, nor the shareholders' agreement or the loan agreements were sham transactions. We must therefore proceed on the basis that these agreements are valid.

[14] Once this is so, the issue of standing is properly considered by asking whether the appellants' application was predicated upon the rights of the appellants or the rights of MMH.

[15] The loan agreements were concluded between the GEPF and each of the appellants. Under those agreements, the GEPF agreed to advance amounts to the appellants as loans. The appellants, subject to the terms and conditions of the loan agreements, enjoyed the right to the advances promised to them by the GEPF. The appellants were obliged to apply the amounts advanced to the capital calls of MMH. But those obligations do not derogate from the appellants' rights, in the first instance, to the advances lent to them by the GEPF. It is true that the ultimate recipient of the advances is MMH. Accordingly, the enforcement by the appellants of their rights to the advances will, in turn, benefit MMH and be in its interest. That flows from the fact that MMH triggered the capital call upon its shareholders and the advances under the loan agreement were the chosen means by which the capital was to be made available by the appellants.

[16] None of this derogates from the fact that the appellants asserted their rights to have the GEPF make the advances to them. Nor should it be forgotten that the assertion of these rights and securing the advances burdens the appellants under the loan agreements with the respective obligations to pay interest and repay the advances as indebtedness owing to the GEPF, albeit on terms that few commercial lenders would accept.

That is, that the appellants would pay interest and capital when and if they received dividends from MMH. However, once the appellants seek the specific performance of the obligations owed to them under the loan agreements, they plainly have standing to do so. That the proceeds of the advances will accrue to MMH does not alter the standing of the appellants to enforce their rights.

[17] The relief sought by the appellants in the notice of motion, that seeks to direct the GEPF to make payments to MMH in terms of the shareholders' agreement, stands on a somewhat different footing. The parties to the shareholders' agreement are the shareholders and MMH. Clause 10 of the shareholders' agreement regulates the funding of MMH. The shareholders agree to fund MMH by way of shareholder loans in proportion to their shareholding. True enough, MMH must request this funding. But if the shareholders agree to this request, then the shareholders become obliged to fund MMH by way of shareholder loans, proportionate to their shareholding, and to do so simultaneously.

[18] These stipulations give rise to rights as between the shareholders. Once the shareholders agree to fund MMH, the funding takes place according to agreed proportions and by way of the simultaneous duty on each of the shareholders to make the funding available. Each of the shareholders owes a duty to make the funding available. That is a duty owed by each shareholder to MMH and also to every other shareholder. It follows that the appellants enjoy the right under the shareholders' agreement to exact compliance with the duty to fund resting upon all shareholders, and hence upon the GEPF. Here, too, the appellants as shareholders are enforcing their rights to specific performance. MMH is the recipient of the funding, but the duty to fund is not only owed by each

shareholder to MMH. It is also owed to every other shareholder, and, for this reason, it is enforceable by the shareholders *inter se*. That being so, the appellants enjoy standing to seek to compel compliance by the GEPF with its funding obligations under the shareholders' agreement.

[19] Accordingly, the standing defence fails.

The requirements to advance the loan amounts

[20] The GEPF contends that the appellants failed to meet the requirements of the loan agreements and, absent compliance, there was no duty resting upon the GEPF to advance the loans to the appellants.

[21] In its answering affidavit, the GEPF largely contented itself with a repetition of the provisions of the loan agreements to advance its position that there had been non-compliance by the appellants, rather than deposing to the facts as to what documents were in the possession of the GEPF and what was missing. A defence cannot be made out simply by reproducing the terms and conditions of an agreement and asserting that the conditions have not been fulfilled. This is most especially the case, as I shall explain below, when the GEPF had received relevant documents from the appellants and failed to reflect these in its answering affidavit.

[22] Ultimately, the GEPF's complaint was this. Clause 6 of the loan agreements made the advances subject to clause 7. Clause 7 stipulated for various conditions, one of which is that the documents must be provided as required by the further conditions of utilisation contained in clause 7.3. Clause 7.3 states that the lender, that is the GEPF, will only be obliged to advance the loans if, in its opinion, on the date of the utilisation notice and the utilisation date, the repeating representations (a defined term) are

correct in all material respects. The repeating representations are defined to mean the warranties and representations in clause 15. Among the warranties and representations listed in clause 15 is the warranty that the appellants had prepared their financial statements in accordance with generally accepted accounting principles or in accordance with IFRS,⁴ as consistently applied ('the financial standards warranty'). This, the GEPF contended, had not been done by the appellants, and hence no advances were due to them.

[23] What occurred was this. In October 2017, the appellants' attorneys sent letters to the GEPF referencing the utilisation notices, stating that the appellants had complied with the loan agreements, and demanding payment of the advances under the loan agreements. No response was forthcoming, and the appellants launched the application they had threatened. The GEPF's answering affidavit was deposed to by its then Chief Executive Officer, Dr Daniel Matjila, on 16 February 2018.

[24] What the answering affidavit did not reference was the correspondence that had passed between the GEPF's attorneys and the attorneys of the appellants. In the GEPF's attorneys' letter dated 26 January 2018, it was stated that the appellants were in breach of their obligations in terms of clause 16 of the loan agreements in failing to provide audited financial statements as at the end of the financial year. It was further stated that the appellants had not provided the GEPF with quarterly management accounts or quarterly environmental, social and governance reports, as clause 16 required. Mention was also made of a failure to comply with the information undertakings, a tautologous reference to clause 16. Nothing was said about any failure to comply with

⁴ International Financial Reporting Standards.

clauses 7.3 and clause 15 as the basis upon which the advancement of the loans was declined.

[25] The appellants' attorneys replied on 9 February 2018. With some indignation, they pointed out that compliance with clause 16 had never been raised by the GEPF prior to the launch of the appellants' application. However, the management accounts for the 11 months ending 31 January 2018 were attached, as also the financial statements for the 14 months ended 28 February 2017. The letter also observed that, save for some small amounts, the loans from the GEPF to the appellants flowing to MMH constituted the financials of the appellants. Further, it was said that the GEPF had never prescribed for quarterly management accounts. Nor would it make sense, given that the purpose of the appellants was to channel money to MMH, not for the appellants to provide environmental, social and governance reports. The broader point made in the letter is that the GEPF was opportunistic in its endeavour to find a basis not to advance the loans.

[26] No proper explanation has been furnished as to why the GEPF failed to reference and deal with this correspondence in its answering affidavit. The correspondence and its attachments form part of the replying affidavit.

[27] What is plain, however, is that the financial standards warranty was satisfied, as evidenced by the financial statements and management accounts attached to the letter of the appellants' attorneys. The only documents that the GEPF identified that it had not received, pertinent to clause 7.3 and the repeating representations, were the financial statements and the management accounts. And these it now had.

[28] As to the alleged breach of clause 16, this clause does not set out conditions that must be met before the GEPF is obliged to make the loans. Those conditions, as indicated, are stipulated in clause 7.1 and 7.3, read with clause 15. There the GEPF's only factual complaint concerned the financial standards warranty, which had been met. As to clause 16.2 and 16.3, the GEPF was provided with the audited financial statements. If they were out of time, the GEPF may claim for breach, but it is hard to see what of consequence could be claimed. The quarterly management accounts and environmental, social and governance reports had to be prescribed by the GEPF. There is nothing to show that it did so. Nor has it responded to the invitation made by the appellant's attorneys as to whether there is reason to do so.

[29] It follows that the GEPF has failed to make out a defence that it was not obliged to advance the loans to the appellants for the reason that the antecedent conditions required to claim specific performance had not been fulfilled.

Loan payments to MMF

[30] The GEPF relied upon the provisions of clause 10 of the shareholders' agreement to contend that it was not obliged to pay the loans. Clause 10 requires that if MMH was to be funded by shareholder loans, that must be agreed by the shareholders. The agreement must be separate from the shareholders' agreement. In addition, the agreement must include the interest any loan will attract and when the loan is repayable. The GEPF submitted that such an agreement did not take place, and that in the absence thereof, there could be no obligation on it to advance loans to the appellants. The only point of such advances was to

place the appellants in a position, in turn, to lend these monies, as shareholders, to MMH. Finally, it was said that clause 10 required the shareholders to make the loans to MMH simultaneously. Since the appellants were in no position to make loans to MMH, the GEPF was excused from doing so.

[31] These submissions are unavailing. A round-robin resolution was passed by the shareholders of MMH,⁵ drafted on 4 November 2016. Although something was made of the fact that the copy of the resolution does not bear the signatures of the GEPF's representatives, in its answering affidavit the GEPF does not deny it agreed to the resolution. The resolution stipulates the maximum amounts that may be advanced to MMH by way of shareholder loans, and that the loans are to be interest free. The shareholders therefore did, by separate agreement, decide to fund MMH by way of shareholder loans and agreed the interest rate to be zero. Clause 10 of the shareholders' agreement states that the shareholders' loans shall 'only be repayable when the shareholders agree'. This means that, until the shareholders agree, the loans are not repayable. Accordingly, the absence of agreement in the resolution as to when the loans would be repayable did not invalidate the agreement that the shareholders would make loans to MMH. It simply meant that the loans were not repayable until the shareholders agreed to this.

[32] Finally, as to the requirement of simultaneous payment, the only reason the appellants could not make good their loans as shareholders to MMH was that the GEPF had declined to advance loans to the appellants. Given that it is always understood that the GEPF was to lend the appellants the money, to enable the appellants to make their shareholder

⁵ See s 60(1)(b) of the Companies Act.

loans to MMH, the GEPF cannot rely upon its own failure to make the required advances to contend that the appellants are not in a position to make the shareholder loans simultaneously with the GEPF. In any event, the orders sought by the appellants in the notice of motion will ensure that the shareholder loans are made to MMH simultaneously.

Conclusion

[33] The GEPF's defences to the grant of specific performance cannot prevail. The appellants are entitled to the relief sought in the notice of motion. Costs should follow the result, including the costs of two counsel.

[34] The following order is made:

- 1 The appeal is upheld with costs, including those of two counsel.
- 2 The order of the high court is set aside and replaced by the following order:
'The application succeeds with costs and prayers 1-17 of the notice of motion are granted.'

D N Unterhalter
Acting Judge of Appeal

APPEARANCES

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