THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 267/2018

In the matter between:

NEO DOREEN MOSALAKAE	**FIRST APPELLANT**
KHOLOFELO MOSALA	**SECOND APPELLANT**
SEDIMOZA (PTY) LTD	**THIRD APPELLANT**
NTOMBISI CC	**FOURTH APPELLANT**
GUNDO INVESTMENTS (PTY) LTD	**FIFTH APPELLANT**

and

NOMSA MATLALA	**FIRST RESPONDENT**
ESTER MAPHANGWE	**SECOND RESPONDENT**
MARIAM MOTSHABI SEKATI	**THIRD RESPONDENT**
SUZAN NELUHENI	**FOURTH RESPONDENT**
TSHIMBILUNI INVESTMENT HOLDINGS (PTY) LTD	**FIFTH RESPONDENT**
PEMBALANI INVESTMENT HOLDINGS (PTY) LTD	**SIXTH RESPONDENT**
KOTULO-NALA CC	**SEVENTH RESPONDENT**
ISENZO ESHILE CONTRACTORS CC	**EIGHTH RESPONDENT**
BINDI J-ZEE TRADING ENTERPRISES CC	**NINTH RESPONDENT**

Neutral citation: *Mosalakae & others v Matlala & Others* (267/2018) [2019] ZASCA 125 (27 September 2019)

Coram: Navsa, Plasket and Dlodlo JJA and Tsoka and Weiner AJJA

Heard: 22 August 2019

Delivered: 27 September 2019

Summary: Section 115 of the Companies Act 1973 – respondents applying to rectify the share register of a company to reflect the fifth to ninth respondents and the third and fourth appellants as equal shareholders – third and fourth appellants relying on an agreement in terms of which their shareholding was increased – whether the terms of such agreement were proved.

ORDER

On appeal from: Gauteng Division of the High Court Pretoria, De Klerk AJ, (sitting as a court of first instance):

The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

JUDGMENT

Weiner AJA (Navsa, Plasket and Dlodlo JJA and Tsoka AJA concurring):

[1] This appeal concerns the shareholding in the fifth appellant, Gundo Investments (Pty) Ltd (Gundo). The fifth to ninth respondents (hereinafter referred to as Tshimbiluni, Pembelani, Kotulo-Nala, Isenzo Eshile and Bindi J-Zee or 'the respondent entities') applied in terms of s 115 of the Companies Act 61 of 1973 (the Act) for an order that they, together with the third and fourth appellants (hereinafter referred to as Sedimoza and Ntombisi or 'the appellant entities'), were equal

shareholders in Gundo. The Gauteng Division of the High Court, Pretoria (De Klerk AJ), upheld the application. This appeal is with the leave of the court a quo.

[2] In 1997, groups of black women belonging to societies and clubs were offered the opportunity to become involved in certain Black Economic Empowerment (BEE) ventures. The women were advised to register each group as a company or close corporation. These entities would hold shares in a BEE company which would act as the vehicle for such business ventures. At a meeting held in June 1997, approximately 28 groups and 225 individuals were in attendance. Each group was required to pay a membership fee of R2 000, which would entitle them to one share each.

[3] On 25 August 1997, six directors were appointed in order to facilitate the registration of the proposed BEE company. The first directors were the first and second appellants (Ms Mosalakae and Ms Mosala) and the first to fourth respondents (Ms Matlala, Ms Maphangwe, Ms Sekati and Ms Neluheni). A shelf company, New Shelf 271(Pty) Ltd was acquired as the envisaged BEE company. On 8 December 1997, the name was changed to Gundo.

[4] About 15 women's groups initially bought into the initiative. As Gundo failed to secure any investments over the next five years, all but the seven entities involved in this litigation, withdrew. It is common cause that the initial R2 000 investment was paid by these seven entities. The intention was that each entity would hold an equal shareholding in the BEE company.

[5] One of the opportunities which arose was for Gundo to acquire an indirect shareholding in Phumelela Gaming and Leisure Ltd (Phumelela), through a company to be formed as the vehicle for its participation in Phumelela. The company which was formed was Dihla Investments (Pty) Ltd (Dihla). Phumelela's shares would be listed on the Johannesburg Stock Exchange (JSE). Gundo was selected by Phumelela as one of the companies which would have a shareholding in Dihla, which would consist of several BEE entities (including Gundo), that had been granted this opportunity. It was proposed that 7,5% of the issued share capital of Phumelela would be offered to the shareholders of Dihla on the basis that each of the shareholders would participate in equal proportions in that 7,5% shareholding. Dihla would hold the shareholding on behalf of such shareholders. A representative of each member company would serve

on the board of directors of Dihla. Ms Matlala was nominated as Gundo's representative.

[6] On 15 May 2002, Dihla informed its members that Phumelela would be listed on the JSE on 7 June 2002 at a price of R0,50 per share. In order to invest in Phumelela through Dihla, each of the shareholders in Dihla was required to pay a total amount of R525 000 for the shares. An amount equal to 10% of the value of the shares allocated, in the sum of R52 500, was to be paid as a deposit by 25 October 2002. The balance of the amount owing was to be financed by the dividends declared by Phumelela. Gundo was also informed that a company styled Nafcoc Investment Holding Co Ltd (Nafhold) had offered a 'share swap' to all members of Dihla in terms of which Nafhold would raise the sum required to pay the deposit on certain terms and conditions.

[7] On 5 June 2002, at a meeting of the board of directors of Gundo, it was recorded that certain of the directors had resigned. The remaining directors were Ms Matlala, Ms Mosalakae, Ms Mosala and Ms Makutu. It was resolved that Gundo would not accept the share swap, but would raise the deposit itself. Ms Matlala was mandated by the board to inform Dihla of such decision, which she did in a letter dated 7 June 2002. In subsequent correspondence, Ms Matlala informed Dihla that the deposit was required six months after the effective date i.e by 15 November 2002. This seems to have been accepted.

[8] The raising of the funds, however, became problematic. On 22 August 2002, Ms Matlala informed the board of Dihla that she wished to reconsider Gundo's position in regard to the share swap offer from Nafhold. She had accordingly withdrawn the letter dated 7 June 2002, in which the offer was declined.

[9] The appellants were apparently unaware of this decision. On 23 September 2002 a memorandum (the September memorandum) from Ms Mosalakae was transmitted by Mr Don Qwelane (Mr Qwelane) to the members of Gundo, giving notice of a meeting scheduled for 5 October 2002. It is common cause that Ms Mosalakae appointed Mr Qwelane, an attorney, without the knowledge or consent of the directors representing the respondent entities, to assist, inter alia, with administrative duties. The September memorandum reads as follows:

'Re: Gundo Investments (Pty) Ltd ("Gundo") payment of outstanding money to Dihla Investments (Pty) Ltd

1 . . . .

2 Gundo members are aware that Gundo have to pay approximately R60 000 . . . on or before 15 November 2002 to Dihla Investments . . . . The amount constitutes 10% of the value of Phumelela shares as at the date of listing of Phumelela.

3 A meeting will therefore take place on the 5 (Saturday) October 2002 . . . to resolve the above issue. . . .

4 Please confirm your attendance prior to 30 September 2002.'

[10] The only members of Gundo who attended the meeting were Ms Mosalakae, Ms Mosala and Dr Seoka. All three of them were members of Sedimoza. Dr Seoka was also a member of Ntombisi. On 9 October 2002, a memorandum (the October memorandum) was sent to members by Mr Qwelane. On Ms Mosalakae's instructions, Mr Qwelane had formulated what was envisaged as a 'rights offer', which was set out in the memorandum. It recorded that, at the meeting of 5 October 2002, it was resolved that:

'3.1 the amount of R60 000 was required on or before 15 November 2002 being 10% of the value of Gundo's shares in Phumelela at the date of listing of Phumelela plus Dihla's administration costs be raised by issuing of new shares in Gundo, that will be offered to present shareholders;

3.2 that such offer be sent to each shareholder stating that the offer is for a specific period of 2 weeks from date of this letter;

3.3 that there should be no limit to the amount of shares a group/shareholder can subscribe to, but that allocation will be as follows:

3.3.1 if fully subscribed, each offeree will be allocated full quota of shares applied for;

3.3.2 if oversubscribed, the amount will be reduced proportionally such that each offeree is allocated a proportional amount of shares and any extra amount will be refunded; and

3.3.3 if any shares remain unsubscribed, these will be offered to any shareholder(s) able to take them up.

3.4 that all the other groups will still remain shareholders of Gundo based on their subscription of R2 500 paid by each group in 1997. It should however be noted that this will change the ultimate shareholding in Gundo.'[1]

[11] The appellants relied upon the September memorandum to demonstrate that notice of the meeting to be held on 5 October 2002 was given to shareholders and that the respondents did not respond. There was much argument put up by the respondents on the way in which notices were communicated and whether they were communicated to all shareholders. There was also some dispute as to whether a special resolution was required to alter Gundo's shareholding. In view, of the decision to which I have come, I will, for the purposes of this judgment assume, as the court a quo did, that proper notices were sent to all concerned and that all statutory requirements were complied with.

[12] In evidence, Ms Mosalakae stated that, on the basis of 'the understanding' reached at the 5 October 2002 meeting, she and Ms Silimela resolved to raise the R52 500 and pay it to Dihla before the closing date. In her answering affidavit, however, she referred to a 'resolution' by her and Ms Silimela. However, Ms Silimela was not a director of Gundo at the time. There appear to have been no shareholders' meetings between 5 October 2002 and 12 November 2002, when the cheques were presented. There are no minutes of the meeting of 5 October 2002 and Ms Mosalakae was unable to clarify in evidence exactly what was discussed.

[13] On 22 October 2002, Ms Silimela on behalf of Ntombisi informed Mr Qwelane that it would take up shares to the value of R30 000. No indication was given as to how many shares it would take up for such sum, as the share price was not indicated either in the October memorandum or in the alleged acceptance.

[14] On 25 October 2002, Dihla, ostensibly through Nafhold, made payment of the deposit to Phumelela. On 12 November 2002, Ms Mosalakae and Ms Silimela,

[1] It is common cause that the initial contribution was R2 000 not R2 500.

representing Sedimoza and Ntombisi, apparently being unaware of such payment, attended at the offices of Dihla, to each present a cheque for the amount of R26 250. They had prepared a letter on Gundo's letterhead, which stated that Ntombisi and Sedimoza, being shareholders of Gundo, had raised an amount of R52 500 as payment for their shares in Phumelela.

[15] On the same day, Ms Mosalakae addressed a memorandum (the November memorandum), to Ms Makutu, Ms Mokoena, Ms Matlala, Ms Maphangwe, Ms Silimela and Ms Mosala. They represented Bokang (which later withdrew as a shareholder of Gundo), Women in the Liquor Trade (which changed its name to Isenzo Eshile), Tshimbiluni, Phembalani, Ntombisi and Sedimoza respectively. The memorandum stated that the R52 500 deposit was paid to Dihla and that '[t]he shareholding within Gundo will as a result change, in that Sedimoza and Ntombisi's shareholding will increase. All the other groups who had not been in a position to raise the R52 000, would still remain shareholders of Gundo, based on their subscriptions of R2 500 paid by each group in 1997.'

[16] The secretary of Dihla, Mr Leonard Makhanda (Mr Makhanda), did not accept the cheques as Sedimoza and Ntombisi were not shareholders in Dihla. He informed Ms Matlala of this and she agreed that the payment should not be accepted as being paid on behalf of Gundo. In any event, payment had already been made by Nafhold on 25 October 2002. The cheques were not deposited. According to Mr Makhanda, he informed Ms Mosalakae of this.

[17] On 14 November 2002, at the instance of the appellants, notice of an emergency shareholders meeting to be held on 16 November 2002, was sent by Mr Qwelane to Gundo's members. Various resolutions were proposed at this meeting. Firstly, Dr Seoka proposed that the shareholding in Gundo be adjusted in proportion to the financial contribution made by each shareholder, such that Ntombisi and Sedimoza hold 282,5 shares each and the remaining groups hold the initial 20 shares each, based on the initial contribution. Secondly, it was proposed that the minority shareholders who did not take up the initial share offer be given a further opportunity to raise their shareholding in Gundo, if they so wished, by further allotment of shares in Gundo at R4.14 per Gundo share, based upon the value of Phumelela's shares at the close of the JSE on 15 November 2002. The payments had to be made by no later

than 31 March 2003. A further readjustment of shareholding in Gundo would then be effected.

[18] There appears to be no further explanation at the meeting as to what the basis of this offer was. There was also no disclosure as to whether the price of the further shares, purportedly allocated to Sedimoza and Ntombisi on 12 November 2002, was based upon the value of Phumelela's shares on the JSE on that date. It is common cause that the closing date for the share offer was 15 November 2002, a day before the proposal was made. In addition, the time for the payment of the deposit to Dihla had come and gone. How this offer was thus to be implemented is not explained. None of the resolutions were passed. It was recorded that the next meeting of shareholders would be held on 30 November 2002.

[19] At the 30 November 2002 meeting, it was recorded that the minutes of the previous meeting should be amended to reflect that Mr Qwelane 'was not appointed as a lawyer but by Sedimoza to facilitate/co-ordinate communication with Gundo shareholders.' It was further recorded that Nafhold had paid the required deposit on behalf of the members of Gundo. Dihla had not deposited the cheques tendered by Sedimoza and Ntombisi. The next meeting was to take place on 22 February 2003.

[20] By this time, it had become apparent that there were two opposing factions within Gundo, the appellants on the one hand and the respondents on the other. Sedimoza and Ntombisi consulted attorneys to deal with the impasse. On 18 December 2002, Moss Cohen Attorneys (Moss Cohen) addressed a letter on behalf of Sedimoza and Ntombisi to Dihla enquiring why the cheques had not been deposited. In reply, Dihla stated that, on 21 October 2002 Ms Matlala had agreed, on behalf of Gundo, to accept Nafhold's offer to make payment for the shares.

[21] On 22 February 2003, a further meeting of members of Gundo was held. It was proposed that Sedimoza and Ntombisi should be reimbursed by all other members of Gundo and that a dispute would be declared if the proposal was not accepted. This resolution also failed to pass.

[22] In about September 2003, Nafhold was putting pressure on Dihla to repay the loan. On 3 October 2003, Mr Makhanda and Sedimoza and Ntombisi arranged a

meeting and confirmed that Dihla would accept the cheques previously tendered, which cheques were stale and were to be replaced. A direct deposit was made by Sedimoza and Ntombisi into Dihla's bank account on 15 October 2003. In November 2006, Dihla was liquidated. Over the next few years the animosity between the parties escalated.

[23] A round table meeting was held on 22 May 2007 between the two factions and their attorneys. Moss Cohen represented the appellants and Edelstein-Bosman represented the respondents. On 28 May 2007, it was proposed by Moss Cohen in a letter to Edelstein-Bosman that steps had to be taken to determine exactly who the shareholders of Gundo were and what their respective entitlements were. It was reiterated that the shareholders should be the BBE entities and not the individuals representing them. It was accepted that the appellant entities together with the respondent entities were shareholders based upon the initial R 2 000 investment. What remained in dispute was the respondent entities' asserted status as equal shareholders, as opposed to the claim by the appellant entities of their entitlement to an increased shareholding.

[24] In an apparent attempt to resolve this dispute, Ms Mosalakae, despite being fully aware that the seven entities had paid their R2 000 contribution and were entitled to be regarded as shareholders, decided to cause a notice to be published in *The Sowetan* on 22 November 2007, calling upon all shareholders of Gundo to furnish proof of their shareholding in order to 'regularise Gundo's shareholding'. Her evidence that this was necessary because 'all contact was lost' can only be described as untruthful. Not only was she still in possession of the contact details of all the respondents, which she had previously relied upon to communicate with them, but attorneys were involved on both sides. Her evidence that she cannot recall if Moss Cohen was still acting for the appellants offers no excuse. A simple phone call to them and/or to the respondents' attorneys to find a proper means of communication was all that was needed. Why the notice in *The Sowetan* was necessary is not adequately explained and lends credence to the respondents' contention that from 2002, the appellants had embarked upon a scheme to 'hi-jack' Gundo and sought to legitimise their increased shareholding.

[25] Only Sedimoza and Ntombisi responded to *The Sowetan* notice. Ms Mosalakae approached an auditor's firm to 'regularise the shareholding' in Gundo. At that stage, the original shareholder, Mr Lederman, was still the only registered shareholder of Gundo. The share register had never been updated. It is common cause that the entries in the share register were backdated by Ms Mosalakae in December 2007. The share register presently reflects that Lederman transferred his one share into Ms Mosalakae's name on 25 August 1997. She, in turn, transferred this share to Sedimoza on the same day. On 12 November 2002, a further 99 shares were issued to Sedimoza which transferred 50 shares to Ntombisi. The share register reflected that Sedimoza and Ntombisi each held 50% of the shares. The directors who were then nominated represented only Sedimoza and Ntombisi.

[26] Ms Mosalakae testified that this 'regularisation' was on the advice of one Mariette, who was employed by the auditor, Johann Swart. She also stated that she was not aware that the CM42 was backdated, but could not explain the date that appeared with her signature. What is clear is that Ms Mosalakae knew that the respondent entities were entitled to shares based upon their contribution of R2 000. This had never previously been in dispute. Yet, she would have this court believe that she blindly accepted Mariette's advice that those contributions could be ignored. Both legally and morally, this was wrong. This version is also contrary to the evidence in Ms Mosalakae's answering affidavit, in which she failed to mention that Mariette gave her this advice. If this advice was given, and the R2 000 contributions were not to be taken into account, one wonders how Ms Mosalakae and/or Sedimoza could be reflected as the shareholders in 1997.

[27] The respondents submitted that the appellants' failure to call Mariette to confirm this advice is not explained by the appellants. Having regard to the different versions proffered by the appellants, Mariette would have been a material witness in regard to the 'regularisation process'. The respondents contended that a negative inference should be drawn in this regard.[2]

[2] *Pexmart CC v H. Mocke Construction (Pty) Ltd* [2018] ZASCA 175; [2019] 1 All SA 335 (SCA). *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 624B-F.

[28] On 31 March 2008, the representatives of the respondent entities removed the representatives of the appellant entities as directors and replaced them with Ms Matlala, Ms Maphangwe, Ms Sekati and Ms Neluheni.

[29] On 7 August 2008, at a shareholder's meeting, initiated by the respondent entities, it was resolved unanimously, by both the appellant and respondent entities, that Gundo's shareholding should be corrected and that ownership should be registered in the names of the seven entities. However, at a later meeting on 19 November 2008, also initiated by the respondent entities, Dr Seoka stated that the appellants did not recognise the present meeting, nor the meeting of 7 November 2008. Furthermore, they did not recognise any of the respondents as shareholders or directors. The representatives of Sedimoza and Ntombisi then left the meeting.

[30] Sedimoza and Ntombisi had held a meeting on the previous day and had appointed new directors of Gundo. On 20 November 2008, in a letter from Edward Nathan Sonnenberg Attorneys (ENS), acting for the appellants, the respondents were informed that Sedimoza and Ntombisi each held 50% of the shareholding in Gundo.

[31] In August 2010, the respondents launched an application in terms of s 115 of the Companies Act 61 of 1973 (the 1973 Act). The application was referred to trial on 21 November 2011. Before this court, it was accepted that the court has wide powers in terms of s 115 of the Act. The section reads:

'Rectification of register of members . . .

(3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members between members or between alleged members on the one hand, and the company on the other hand and generally may decide any question necessary or expedient to be decided for the rectification of the register'.

[32] In *Gafoor & another NNO v Vangates Investments (Pty) Ltd & others*[3] this court held:

> 'As indicated above, the court's jurisdiction under s 115 of the Act has been described as unlimited and the exercise of its discretion based on what equity requires. So too, in *Botha v Fick,* Howie JA stated that–
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> 'Die Hof het 'n wye diskresie by 'n aansoek ingevolge hierdie artikel [s 115] om toe te sien dat billikheid en geregtigheid geskied. En dit is "to make it reflect the state of affairs which the appellant is entitled to claim that it ought to reflect" (*Orr NO and Others v Hill* 1929 TPD 885 te 892) en, soos dit in die saak van *In re The Contributories of the Rosemount Gold Mining Syndicate in Liquidation* 1905 TH 169 te 188 gestel is,
>
> "to fix with the obligations of membership those persons and those persons only upon whom such obligations should justly and equitably rest".
>
> In determining whether to grant or refuse an application for rectification, the court makes a judgment in the light of all the relevant considerations. As with s 344*(h)* of the Act, which provides that '[a] company may be wound up by the Court if – *(h)* it appears to the Court that it is just and equitable that the company should be wound up', there is nothing about the power conferred by s 115 of the Act which results in the court of first instance having any special advantage that would enable it to exercise the power any more appropriately than a court of appeal. The power is one that the court of appeal is in as good a position as the court of first instance to exercise. That being so, and bearing in mind the equitable nature of the court's discretion in terms of s 115, this discretion can rightfully be described as a discretion in the broad sense. This court is therefore empowered to re-examine all the relevant material and, if satisfied that the discretion has not been appropriately exercised, to substitute its own opinion for that of the court of first instance. It is not necessary to show that the exercise of its discretion by the court below was flawed in one of the respects mentioned . . . above'

[33] As appears from what is set out above, it was initially contended by the appellants that only Sedimoza and Ntombisi were the shareholders of Gundo. During the course of the trial, it was conceded by the appellants that Tshimbiluni, Pembelani, Kotulo-Nala, Isenzo Eshile and Bindi J-Zee were also shareholders (the concession).

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[3] *Gafoor & another NNO v Vangates Investments (Pty) Ltd & others* [2012] ZASCA 52; 2012 (4) SA 281 (SCA) para 40-41.

They persisted with their claim that they were entitled to a larger shareholding by virtue of the ‘rights offer’.

[34] Prior to the concession, the appellants relied on the CM42 referred to above. It was contended that as only Sedimoza and Ntombisi accepted the ‘rights offer’ and each paid an amount of R26 250 to Dihla on behalf of Gundo, they were the only shareholders. The appellants relied for this submission upon the resolution of 5 October 2002, which is recorded in the October memorandum. That memorandum, however, also recorded that the respondent entities, none of which had subscribed for additional shares, would remain shareholders of Gundo based on the subscriptions of R2 000 paid in 1997. Sedimoza and Ntombisi countered this by submitting that their present claim for a larger shareholding is based upon the statement in the memorandum that the shareholding would change as a result of parties taking up the additional shares.

[35] The respondents submitted that the version pleaded by the appellants cannot be reconciled with the CM42 form. It is clear that at the time the deposit was required to be paid to Dihla during November 2002, Ms Mosalakae was not the sole shareholder as reflected in the CM42. No resolution was taken by Gundo that the payment would be made by Sedimoza and Ntombisi alone. No basis is set out for the issuing of the additional 99 shares and/or the transfer of 50 shares to Ntombisi on 12 November 2002. There are no resolutions of Gundo authorising these transactions. The CM42 does not reflect the issue of any further shares allegedly acquired pursuant to the resolution of 5 October 2002, nor does it reflect a transfer of the issued shares to Sedimoza and Ntombisi, which increased their pro rata shareholding. The respondents contended that the shareholding of Sedimoza and Ntombisi was never validly increased; further that Ms Mosalakae, without the knowledge and consent of the other members, attended to the so-called ‘regularisation process’ and unlawfully changed the shareholding to reflect only Sedimoza and Ntombisi as 50% shareholders each.

[36] At the meeting held on 7 August 2008, when it was agreed that the shareholding needed to be regularised, no mention was made by any of the appellants that the share register had already been amended in December 2007 to reflect only Sedimoza

and Ntombisi as shareholders. At that stage, all of the entities were recognised as shareholders by all parties and it was unanimously agreed that the Gundo shareholding and ownership be rectified to reflect this. It was only at the subsequent meeting held on 19 November 2008, that the appellants changed their stance.

[37] The respondents submitted that the various versions of the appellants are factually and legally untenable. The initial version of the appellants is contained in Moss Cohen's letter dated 28 May 2007, when it was acknowledged that the respondent entities were shareholders. In the answering affidavit, the first version appeared to be that Sedimoza and Ntombisi were the only shareholders by virtue of the payment of the deposit on 12 November 2002. The second version in such affidavit was that Sedimoza and Ntombisi were the only entities that could prove that they had acquired the shares. According to the appellants, 'it was a misconception' that the seven entities had paid their joining fee. At the trial, they persisted with their stance, that they were the only shareholders. Only after the trial had been running for some time, was the concession made. Their claim then mutated to one for the increase of their shareholding and the dilution of the shareholding of the other shareholders.

[38] The onus was on the appellants to show that the shareholding of Sedimoza and Ntombisi was subsequently validly increased in the manner alleged. The question in this case is whether the onus has been discharged. It became common cause through the concession that all parties claiming to be shareholders of Gundo paid the R2 000 joining fee and were therefore entitled to have their shareholding reflected in the share register. By 30 November 2002, at the latest, the appellants knew that their payment to Dihla on 12 November 2002 had not been accepted. Thus, as at that date, they had no right to consider Sedimoza and Ntombisi as the only shareholders. Yet, in December 2007, they backdated the change in shareholding to 12 November 2002. None of the appellant's witnesses could explain this.

[39] The court a quo correctly found that it was desirable that it first decide the question as to whether a valid rights offer was made and accepted. Put differently, the question is whether a contract was concluded between Gundo, Sedimoza and Ntombisi to take up the further shares in Gundo. It found that the appellants had failed to prove this.

[40] Sedimoza and Ntombisi's claim to a larger shareholding is solely dependent on the 12 November 2002 payments having been accepted, which they were not. It was only on 15 October 2003 that Sedimoza and Ntombisi paid Dihla the sum of R56 200. The respondents contended, correctly, that at best, the two entities have a loan account in Gundo but no entitlement to increase their shareholding purely on the basis that they made this payment. It is of note that when they made payment in October 2003, they did so without the knowledge and consent of the respondents, or the approval of Gundo, in circumstances where they knew that they were not the only shareholders. Thus, any decision they took in relation to this payment in October 2003 was not taken on behalf of Gundo and is accordingly invalid.

[41] The judge a quo decided the matter on a very narrow basis. She found that there was no valid contract entered into between Sedimoza and Ntombisi and Gundo. The appellants submitted that the court a quo erred in three respects. Firstly, the court a quo decided the matter through the perspective of 'purchase and sale'. They argued that the contracts in the present matter are for the subscription or allocation of shares; thus the test is different. Secondly, the court failed to consider the offer and the acceptance in its context. Thirdly, the court failed to adopt a sensible commercial interpretation of the contract. The agreement was not vague and it had been partially executed.

[42] It is clear that a rights offer requires the same certainty as to its terms as any other contract. In *Moosa v Laloo & anther*,[4] the court held:

'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 an 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.'

[4] *Moosa v Laloo & another* 1957 (4) SA 207 (D)at 219B-D.

[43] The appellants submitted that the established approach in our law is that an agreement seriously entered into between two parties, especially when such agreement has been partially executed, will not be struck down.[5] It is trite that in a contract of sale, the purchase price and merx must be agreed upon. With a rights offer, as with any contract, the parties must either 'fix the amount of the price in their contract or agree upon some external standard by the application whereof it will be possible to determine the price without further reference to them'.[6] None of this is present in this case. Neither Dr Seoka nor Ms Mosalakae were able to give an answer as to how many shares were on offer and what the price per share was. Ms Mosalakae testified that there were 1 000 shares at R1, 00 per share. She added 'you do the maths and divide'. On her version, however, only 100 shares were issued when Sedimoza and Ntombisi allegedly became equal shareholders.

[44] Ms Mosalakae could also not give clarification as to what extent the other shareholders' shareholding would be diluted and to what extent Sedimoza and Ntombisi's shareholding would be increased. It is clear that the 'rights offer' lacked the material terms required in relation to the number of shares offered and the price payable in respect of each share. There is further no evidence that such offer was authorised by Gundo.

[45] In regard to whether the acceptance by Sedimoza and Ntombisi of the 'rights offer' was communicated to Gundo, the appellants rely on Ms Silimela's email of 22 October 2002 as conveying that Ntombisi accepted the offer from Gundo. The alleged acceptance was sent to Mr Qwelane and Ms Mosalakae, not to Gundo. They were not authorised to act on behalf of Gundo in concluding the agreement. In regard to Sedimoza, Ms Mosalakae testified that Sedimoza would subscribe for as many shares as were not subscribed for by the other shareholders. Thus, when only Ntombisi responded, Sedimoza took up the balance of the shares. As Ms Mosalakae was the 'responsible director' who sent out the share offer, communication of Sedimoza's acceptance of the offer to Gundo was communicated by her on behalf of Sedimoza and to her on behalf of Gundo. She does not state the basis upon which she alone

[5] *De Beer v Keyser & others* 2002 (1) SA 827 (SCA) para 12-14.
[6] *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W) at 670C-E.

was authorised to act on behalf of Gundo in this regard. This version cannot assist the appellants in proving the conclusion of an agreement.

[46] The submission that the agreement had been partially executed cannot be accepted. There was no valid agreement and therefore, any purported execution thereof was invalid. Sedimoza and Ntombisi had no entitlement to the sole shareholding in Gundo, as the payment upon which their purported allotment was based, had not been accepted. Even on a benevolent interpretation, as contended for by the appellants, a court must guard against making a contract for the parties and going outside the words they have used.[7] The benevolent interpretation must not be taken too far. A court cannot find 'consensus ad idem by mere conjecture'.[8] On the affidavits and the evidence, this court cannot find that he appellants have discharged the onus upon them to prove that an agreement was concluded between Gundo and Sedimoza and Gundo and Ntombisi.

[47] The appellants submitted that whatever the result of the appeal, they should not be mulcted in costs in relation to the full record which was placed before this court. They contended that the respondents did not agree to a limited record being filed. I find that the record was extremely useful in determining the issues and can see no reason to deprive the respondents of their costs in relation thereto.

[48] Accordingly, the following order is made:

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

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S E Weiner

Acting Judge of Appeal

[7] See *Burroughs (*fn 8) at 671A–B, citing with approval *Hillas & Co Ltd v Arcos Ltd* 147 LTR 503.
[8] *Viscount Maugham in Scammell & Nephew Ltd v Duston* (1941) AC 251-255.

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