

SOUTH AFRICA / JUDGMENT

Aesthesis Holdings (Pty) Ltd v Eksteen Administration Holdings (Pty) Ltd and Others (2024-010596) [2025] ZAGPPHC 77 (20 January 2025) [2025] ZAGPPHC 77

COURT

North Gauteng High Court, Pretoria

BEFORE

E van der Schyff

CASE / FILE NUMBER

2024-010596

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO.: 2024-010596

(1) REPORTABLE: NO

(2) OF INTEREST TO

OTHER JUDGES: NO

(3) REVISED: NO

DATE:

20 January 2025

E

van der Schyff

In

the matter between:

Aesthesis
Holdings (Pty) Ltd
Applicant
and
Eksteen
Administration Holdings (Pty) Ltd
First
Respondent
Eduard
Christiaan Le Roux
Second Respondent
Izak Andries van Niekerk
Third
Respondent
Intelligentsia
Holdings (Pty) Ltd
Fourth Respondent
Sibu
Beleggings (Pty) Ltd
Fifth
Respondent
Speso
(Pty) Ltd
Sixth
Respondent
Beraca
Accountants & Auditors Inc.
Seventh Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] This is an application to rectify the securities register of the first respondent, Eksteen Administration Holdings (Pty) Ltd (hereafter Exah), by removing the name of the sixth respondent, Speso (Pty) Ltd (hereafter Speso), as a shareholder of 10% shares and restoring the applicant (hereafter Aesthesis Holdings) as the holder of a 40% shareholding in Exah.
- [2] The application is brought in terms of the common law or section 161 of the Companies Act, 71 of 2008. To invoke the common law, Aesthesis Holdings relies on spoliation.

Background

facts

- [3] The deponent to the founding affidavit, Mr. LK Eksteen (Mr. Eksteen), is a director and shareholder of Aesthesis Holdings, previously known as Eleusinian Holdings (Pty) Ltd ("Eleusinian"). Mr. Eksteen was also the founding member of Exah and its managing director until his resignation on 31 January 2024.
- [4] The parties to this litigation and the dispute are connected to Exah. Mr. Eksteen founded Exah in January 2015 and held 100 shares in Exah. Mr. Le Roux, the second respondent, and Mr. Van Niekerk, the third respondent, were employed by Exah since November 2016. Mr. Marais joined Exah's employ in March 2017.
- [5] Messrs. Le Roux and Van Niekerk subscribed for shares in Exah, and each received 75 shares in February 2019. No consideration was paid for these shares. As a result, 250 shares were issued in total, and the shareholding in Exah was as follows: Mr. Eksteen - 40%, Mr. Le Roux - 30%, and Mr. Van Niekerk- 30%.
- [6] Mr. Marais did not, at the time, receive any shares in Exah, but Mr. Eksteen, in his capacity as managing director of Exah, gave Mr. Marais an undertaking to procure a 10% shareholding in Exah for Mr. Marais, on condition that he assist in growing the company. Messrs. Le Roux and Van Niekerk were aware of this undertaking and did not take issue with it.
- [7] I pause to highlight Mr. Eksteen's averments in the founding and replying affidavits regarding the undertaking since they have a bearing on the findings made. On the one hand, Mr. Eksteen acknowledges that he made the undertaking. He states, inter alia, in the founding affidavit:

'During the same time in 2019 I, in my capacity as managing director of Exah, undertook to procure for Mr. Marais, in his capacity as employee of Exah, a 10% shareholding in Exah on condition that he assists us in growing the company.'

'In about 2019 in my capacity as managing director of Exah, at a time when I still held a shareholding in Exah in my personal capacity ... I have undertaken to Mr. Marais, in his personal capacity as an employee in Exah, that he too would receive shares in Exah in recognition of the contribution he would make to the success of Exah. At all times, Mr. Le Roux and Mr. Van Niekerk were aware of this undertaking and did not object to it.'

'Other than recognising that Mr. Marais would also deserve a shareholding in Exah in recognition of the contribution it was thought he was likely to make in the company, the specifics of the transaction including the timing and structure thereof were not discussed at the time. As will appear, no final agreement relating to such future shareholding has ever been reached.'

- [8] In the replying affidavit, Mr. Eksteen avers, among others:

'It was merely an informal discussion between two colleagues on the way to work. There was no firm offer that was certain and definite in its terms but rather an expression of gratitude and assurance that Mr. Marais, should he continue to build the business of Exah, would be rewarded accordingly.'

'I considered the promise I made in 2019 to be binding on my conscience, but that discussion, without more, did not constitute a complete contract between us. At best, it was a proposal in principle- the implementation would be left over for later discussion and agreement.'

'In that conversation, I stated that I had intended to give Mr. Marais 10% of my shareholding in Exah, but it was clear to both me and Mr. Marais at the time that I was not bound to any contract reached without further thought and discussion on the matter. ...[T]he point that bears emphasising is that when I expressed my intention of rewarding Mr. Marais for his efforts with shares in the business one day, we were not yet clear on the precise terms of the agreement and no contract was therefore concluded.'

- [9] Returning to the timeline, Mr. Eksteen transferred his 40% shareholding in Exah to Eleusinian, Mr. Le Roux transferred his 30% shareholding to Intelligensia (Pty) Ltd, the fourth respondent, and Mr. Van Niekerk transferred his 30% shareholding to Sibubeggings (Pty) Ltd, the fifth respondent, during September 2020. Mr. Marais was still employed by Exah but had still not received any shares at this point in time. Exah's shareholders subsequently concluded a Shareholders Agreement and a Memorandum of Incorporation.
- [10] Despite no longer holding shares in Exah in his personal capacity, Mr. Eksteen felt morally obliged to honour the February 2019 undertaking to reward Mr. Marais for his role in building Exah's business. Mr. Eksteen and Mr. Marais engaged in discussions during November 2022 or January 2023, when Mr. Marais reminded Mr. Eksteen of the undertaking and asked when he would receive the shares. Mr. Marais indicated that he wanted the shares transferred to Speso, the sixth respondent, a company wherein he was a shareholder. Mr. Eksteen informed Mr. Marais that the 10% shares would be transferred but that he did not want to incur any tax liability.
- [11] Mr. Eksteen approached Mr. Stokes from Beraca Accountants and Auditors Inc. ("Beraca"), the seventh respondent and Exah's auditors, for advice and was advised that the transfer should be structured as an Asset for Share Agreement. Mr. Stokes drafted the necessary resolution to give effect to Mr. Eksteen's intention to transfer 10% of the shares held by Eleusian (now Aesthesis Holdings) to Speso, the company of which Mr. Marais was the sole shareholder.
- [12] On 25 January 2023, a resolution was taken by Exah's three directors, Messrs. Eksteen, Le Roux, and Van Niekerk, in the following terms:

'RESOLUTION ONE- TRANSFER OF SHARES

WHEREAS the below specified shareholders of the Company ("Transferors") each concluded an Asset for Share Agreement in terms of Section 42 of the Income Tax Act, wherein each shareholder shall sell their shareholding in the Company to the below specified companies ("Transferees"); and

WHEREAS each respective transferee shall allot shares to each respective transferor in exchange for the shares received; and

WHEREAS the Company wishes to-

- approve the transfer of the specified shares from the Transferors to the Transferees on the terms and conditions set out in the respective Asset for Share Agreements;
- authorize the amendment of the securities register of the Company to reflect the transfer of the Shares from the Transferors to the Transferees; and
- authorize the issue of a new share certificate to the Transferors.

NOW THEREFORE BE IT RESOLVED THAT the following transfer of 25 Shares in the Company by way of an asset-for-share transaction as contemplated in terms of section 42 of the Income Tax Act and in accordance with the Asset for Share Agreements concluded between said Transferors and Transferees

each, be and is hereby accepted and approved with effect from 25 January 2023:

Transferor Transferee Number of Ordinary Par Value Shares ELEUSINIAN HOLDINGS (PTY) LTD (2020/693597 /07) SPESO (PTY) LTD (2012/170636/07) 25

ORDINARY RESOLUTION NUMBER 2 - AUTHORITY

BE IT RESOLVED THAT:

- any two directors of the Company issue such new share certificates in favor of the Transferees; and
- make the requisite entries in the securities register of the Company and receive on behalf of the Company any duly executed instruments of transfer in respect of the share transferred; and

BE IT FURTHER RESOLVED THAT any one Director of the Company be and is hereby authorised to sign all such documents and do all such things as are necessary to

give effect to the aforementioned resolutions, and generally to do or cause to be done all such things as may be necessary or expedients in the premises in order to give effect to the aforementioned resolutions.'

All three directors signed the resolutions.

[13] Beraca, Exah's auditor and accountant, had been tasked with maintaining its securities register. New share certificates were issued, and the register was updated. I pause to note that Mr. Eksteen was one of the directors who signed the share certificate issued to Speso, and he handed it over to Mr. Marais.

[14] A conundrum arose, however, when Exah's Financial Manager, almost 6 months later, and after the securities register was amended, advised that no Asset for Shares Agreement was signed by or on behalf of Eleusinian and Speso. He wrote an email to Mr. Eksteen dated 28 July 2023 wherein he stated -

'Jy en Elicus [Mr. Marais] het nooit die sale of share agreement geteken nie. Sal jy asb. die kontrak teken en vir my terugstuur. Ons gaan dit nodig he vir die oudit.'

['You and Elicus [Mr. Marais] never signed the sale of share agreement. Will you please sign the contract and return it to me. We will need it for the audit.] (My translation.)

[15] The financial manager sent a draft agreement, that Mr. Stokes had previously drafted, to overcome the problem. However, Mr. Eksteen replied that the agreement was incorrect as he did not sell any shares to Mr. Marais. He states in the email dated 28 July 2023 -

'Ek het die shares aan Elicus geskenk na afloop van 'n belofte wat ek gemaak het en by gehou het.'

['I donated the shares to Elicus following a promise I made and kept.']

(My translation.)

[16] I pause to note that the communication with Mr. Stokes reflects that Mr. Stokes drafted the Asset for Share Agreement in accordance with discussions he had with Mr. Eksteen in the past. He stated in an email dated 1 August 2023:

'Soos bespreek in die verlede, is die voorgestelde struktuur die mees belasting vriendelike struktuur vir almal aangesien daar reeds in die verlede aan Elicus [Mr. Marais] die aandele aangebied is en dit was toe Exah se waarde steeds of baie na aan negatief was.

...

Verder was die intensies om die aandele aan Elicus toe te ken verskeie jare terug en nou, soos al die ander aandeelhouders, is daar 'n Artikel 42 herstrukturering transaksie gedoen waar die aandele aan sy maatskappy oorgedra word vir bate vir aandele transaksie. Dus is dit vanaf die oorspronklike intensies oorgedra na sy houermaatskappy waar Elicus nuwe aandele kry vir sy Exah aandele.'

['As discussed in the past, the proposed structure is the most tax friendly structure for everyone as Elicus [Mr. Marais] has already been offered the shares in the past and this was when Exah's value was still or very close to negative.

Furthermore, the intentions to allocate the shares to Elicus were several years ago, and now, like all the other shareholders, a Section 42 restructuring transaction has been done, where the shares are transferred to his company for an asset-for-shares transaction. So, it has been transferred from the original intentions to his holding company, where Elicus gets new shares for his Exah shares.] (My translation.)

- [17] Mr. Eksteen started to feel uncomfortable about the underlying agreement being structured as an Asset for Share Agreement in the terms it was coached because of the possible tax implications and the effect that it might have on the future value of his shares in Exah.
- [18] Mr. Marais acknowledged that no Asset for Share Agreement was initially signed, although he later signed the agreement provided by the accountant. This agreement provided, amongst others, that R25 would be paid for the 25 shares. Mr. Marais's view is that the parties never agreed that the underlying agreement to the transfer of shares would be an Asset for Share Agreement, sale, or donation. He insists that the shares were payment for years of loyal service to Exah, where he actively assisted in growing the company, as per the undertaking made by Mr. Eksteen in February 2019.
- [19] It must be mentioned that the remaining directors and shareholders of Exah confirmed that they were aware of the undertaking regarding the 10% shares, that they do not object thereto, and that they waive their pre-emptive rights.
- [20] Mr. Marais instituted a conditional counterclaim. In light of the findings I have come to set out herein below, it is not necessary to deal with this counterclaim.

The parties' respective submissions

- [21] In summary, Aesthesis Holdings submits that it did not provide any 'proper instrument of transfer' to Exah to transfer the securities as required by s 51(6)(a) of the Companies Act. Mr. Eksteen averred that on Mr. Marais's version, the initial agreement as the underlying agreement for the transfer of the securities was replaced by a new agreement in November 2022, this new agreement entailed an Asset for Sale agreement as Mr. Eksteen did not want any tax liability and Mr. Marais wanted the shares to be transferred to Speso. Thus, Aesthesis Holdings submits that no final and binding underlying agreement exists to transfer the securities. In addition, Aesthesis Holdings avers that the provisions of Exah's Memorandum of Incorporation as it relates to rights of pre-emption were contravened, as were certain provisions of the Shareholders Agreement.
- [22] In regard to what Aesthesis Holdings' counsel refers to as the 'initial agreement', it was submitted in the heads filed and during oral argument that Mr. Eksteen lacked animus contrahendi when he gave the undertaking in 2019.

- [23] The second to sixth respondents submit that Aesthesis Holdings should stand and fall by the allegations in the founding affidavit. They hold the view that Aesthesis Holdings failed to make out a case that the securities register needs to be rectified in terms of the common law with reliance on spoliation, or section 161 of the Companies Act.
- [24] In considering this application I am bound to the relief sought by Aesthesis Holdings on the grounds set out in the founding papers. The relief sought by Aesthesis Holdings is very specific - the rectification of the securities register because Aesthesis Holdings was spoliated of its shares or, alternatively, in terms of section 161 of the Companies Act.
- [30] Cession is a method of transfer, and although it is brought about by agreement, it is not in itself a contract.[3] The agreement that brings about the cession is the obligatory agreement. It obliges the cedent to transfer the right and constitutes the underlying reason for the cession.
- [31] In *Botha v Fick*[4] the Appellate Division confirmed that the cession of a right exists independently of the document embodying the agreement. A document embodying a cession is mere evidence of the agreement. The duty of a registered shareholder selling his shares to deliver a share certificate and completed transfer form to the purchaser of the shares is not a requirement for the validity of the cession whereby the right and title to the shares are transferred but a duty arising from the obligatory agreement. Thus, there are no formalities for the cession of a share.
- [32] The facts before me support and justify a finding that Mr. Eksteen (the cedent) had the intention to transfer 10% of Eleusinian's incorporeal movable property (the shares) in Exah to Mr. Marais (the cessionary) - who elected to receive the said incorporeal movable property through Speso, the company of which he was the sole shareholder. Mr. Marais had the intention to become the right holder of said incorporeal movable property and ensure its immediate transfer to Speso. The underlying obligatory agreement was Mr. Eksteen's undertaking to procure 10% shares in Exah for Mr. Marais as a reward for his contribution to growing Exah's business. Mr. Eksteen did not expect any consideration or quid pro quo in return since Mr. Marais actively participated in growing Exah's business and fulfilled the condition attached to the undertaking given in 2019.
- [33] Whether this undertaking was meant to constitute a donation or an obligation flowing from an employment agreement and whether the agreement was subsequently structured as a sale of shares is immaterial for this litigation.
- [34] The argument that Mr. Eksteen's undertaking was made without the necessary animus contrahendi is belied by the evidence provided by Mr. Eksteen. Mr. Eksteen clearly felt morally obliged to honour the undertaking, and he acted accordingly. He went so far as to state in an e-mail dated 24 November 2023:

'Met 'n potensiele transaksie nou op die tafel is my tax exposure op daardie 10% skenking te groot. Ek hou steeds by my woord, want ek glo 100% dat Elicus [Mr. Marais] net soveel effort aangegaan het deur die jare... as iemand my destyds gewaarsku het dat ek 'n 20% tax liability [opdoen] op 'n skenking aan Elicus, sou ek dit anders benader.'(sic)

['With a potential transaction now on the table, my tax exposure on that 10% donation is too great.... I still stand by my word, because I believe 100% that Elicus [Mr. Marais] has put in just as much effort over the years ... if someone had warned me back then that I would [incur] a 20% tax liability on a donation to Elicus, I would have approached it differently.(sic)J (My translation.)

[35] The evidence further supports the inference that both Mr. Eksteen and Mr. Marais were satisfied with structuring the agreement as an Asset for Share Agreement after Mr. Eksteen and Mr. Stokes' discussion, solely for taxation purposes, despite the fact that Mr. Eksteen did not, in turn, expect any consideration or quid pro quo. The value of R25 ascribed to the shares that had to be paid by Mr. Marais was merely nominal.

[36] Section 51 of the Companies Act regulates the registration and transfer of certified securities. Section 51(6) provides that:

'A company may make an entry contemplated in subsection (5) only if the transfer-

- (a) is evinced by a proper instrument of transfer that has been delivered to the company or
- (b) was effected by operation of law.'

[37] It is common cause that no CM 42 was completed and signed and that neither Mr. Eksteen nor Mr. Marais signed the Asset for Share Agreement. The question raised by Mr. Eksteen is whether the absence of a 'proper instrument for transfer' in itself is sufficient to order that Exah's securities register be amended to reflect the status quo ante.

[38] After careful consideration, I am of the view that this is not a question that this court is called on to answer at this juncture. Even if such an instrument was not provided, the question is whether the absence of 'a proper instrument for transfer' is sufficient reason to grant the relief sought in the factual context of this case, as all findings made in this case are strictly bound to the factual matrix of the case.

[39] Mr. Eksteen approached the court for specific relief- that is, the rectification of the securities register in terms of the common law or section 161 of the Companies Act. He did not seek the review and setting aside of the two resolutions dated 25 January 2023, and understandably so. It was no secret that Mr. Eksteen proposed to transfer 10% of Eleusinian's shares to Speso, and all the directors knew about the undertaking granted to Mr. Marais in 2019. It was common cause that Exah's financial manager and Mr. Stokes were involved in drafting the resolution and, thus, ostensibly, the said Asset for Shares Agreement. Mr. Eksteen would have had to give some serious explanation of issues he carefully avoided in the founding affidavit if he sought the resolutions to be reviewed and set aside.

- [40] Mr. Eksteen joined Exah's accountant and auditor, Beraca, to the litigation, but did not seek any relief against Beraca. Since Beraca was tasked with maintaining Exah's securities register, one would have expected Beraca to be called upon to explain on what basis and on whose instruction the securities register was amended to indicate the transfer of 10% of Eleusinian's shareholding in Exah to Speso.
- [41] Mr. Eksteen did not join Mr. Marais in his personal capacity to these proceedings. He also does not repudiate the undertaking or promise, and he confirms his view that Mr. Marais earned the 10% shareholding in Exah that he undertook to procure for him. He also does not claim that Mr. Marais would have been obliged to perform in any other manner before becoming entitled to the 10% shareholding, in fact, he confirms that Mr. Marais earned the shares and did good work for Exah.
- [42] Mr. Eksteen's sole concern is the manner in which the transaction was to be structured since he became aware after the securities register was already amended and the share certificate issued and delivered to Speso, that a possibility exists that he might attract a tax liability because of the transfer of the shares.
- [43] Although the founding papers indicated reliance on spoliation as a remedy through which the securities register could be amended, this angle was not proceeded with vigour, and correctly so. Mr. Eksteen's intricate involvement in the process culminating in the share certificate being issued to Speso, and the amendment of the securities register belie any averment of unlawful conduct on the company's part towards Mr. Eksteen.
- [44] That leaves section 161 of the Companies Act. The learned authors of the often-cited Henochsberg on the Companies Act 71 of 2008 state that section 161 aims to provide securities holders with a means to protect their rights, in addition to other remedies that may be available under the Act. The protection afforded allows a holder of securities to apply to the court for a declaratory order to determine the rights of the securities holder, an order to protect such rights, or an order to rectify the harm done to the securities holder. The learned authors explain that the mere commission or omission of an act described in this section would not result in the remedy under section 161 (1) (b) (ii) becoming available - actual harm for the securities holder should flow from the particular act. Any possible tax liability that might flow from the transfer of the shares can hardly be regarded as harm suffered in the context provided for by section 161. Tax liabilities are consequences of the manner in which agreements are structured, it is neither an aspect that impacts the essentialia of an agreement, nor is it harm done by the company.
- [45] It suffices to state that Aesthesis Holdings failed to make out a case that any actual harm is or was suffered through the impugned entries in the securities register. Even if an order was to be granted that the impugned entries in the securities register be reversed and the status quo ante restored as far as the securities register goes, it does not change the fact that Speso became the beneficial owner of 10% of Eleusinian's shares in Exah when Mr. Eksteen undertook to transfer the shares in fulfillment of his undertaking to Mr. Marais in February

2019.

[46] Whether Mr. Eksteen is correct in considering the agreement to procure a 10% shareholding in Exah for or to Mr. Marais's benefit as a donation is not relevant to this litigation. What is relevant is that Mr. Eksteen undertook and offered to procure a 10% shareholding for Mr. Marais in Exah if he contributed to Exah's business. Mr. Marais accepted the undertaking and offer and actively worked towards growing Exah's business. In January 2023, Mr. Eksteen, convinced that Mr. Marais performed by actively participating in growing Exah's business, honoured the undertaking and commenced with the transfer of the shares. The parties' agreement that the shares be transferred to Speso and not to Mr. Marais personally is neither here nor there for purposes of this application.

Costs

[47] The principle that costs follow success applies. Both parties argued for costs on scale C if they were successful. I agree that the complexities in this matter justify costs on scale C.

ORDER

In the result, the following order is granted:

1. The application is dismissed with costs on scale C.

Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on Caselines.

For the applicant: Adv. H Van Eeden SC With: Adv. C de Witt Instructed by: AJ Venter and Associates For the second to sixth respondents: Adv. R F de Villiers Instructed by: Deney Zeederberg Attorneys Inc. Date of the hearing: 19 November 2024 Date of judgment: 20 January 2025

[1] Inland Property Development Corporation (Pty) Ltd v Cilliers 1973 (3) SA 245 (A) at 251.

[2] Sand Grove Opportunities Master Fund Ltd and Others v Distell Group Holdings Ltd and Others

[2022] 2 All SA 855 (WCC), 2022 (5) SA 277 (WCC) para 31.

[3] E.M. da Silva Restriction of Rights of Transfer of Securities Unpublished LLM Dissertation 2018 University of Pretoria, 15.

[4]

[1994] ZASCA 184; 1995 (2) SA 750 (A).

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