

SOUTH AFRICA / JUDGMENT

Kaps and Others v Seripe and Others (Appeal) (A137/2024)

[2025] ZAWCHC 228 (15 May 2025)

[2025] ZAWCHC 228

COURT

Western Cape High Court, Cape Town

BEFORE

Allie, Da Silva Salie, Ralarala

CASE / FILE NUMBER

A137/2024

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IN

THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case number: A137/2024

In the matter between:

GERRIT
DEON KAPS
First
Appellant
SOPHY
MAPHOSA
Second
Appellant
MARLIEN
DE BONT
Third
Appellant
MOSAIC
FUNERAL GROUP OF COMPANIES (PTY) LTD
Fourth
Appellant
And
MORAPEDI
DONALD SERIPE
First
Respondent
SAMUEL

SELLO MANGANO
Second
Respondent
MAYIBONGWE
CAROLINE MAGANO
Third
Respondent
Coram
:
Allie J et Da Silva Salie J et Ralarala J
Date of
Hearing
:
22 January 2025
Written Judgment
delivered
:
15 May 2025
Counsel for
Appellants
:
Adv. J S Griessel
Instructed
by
:
Messrs VFV Attorneys
Counsel for
Respondents
:
Adv. M H Masilo
Instructed
by
:
Messrs Ntsamai Attorneys Inc.

JUDGMENT

ELECTRONICALLY DELIVERED ON 15 MAY 2025

DA SILVA SALIE J:

Introduction:

- [1] This is an appeal against the judgment and order granted in the above matter on 31 October 2023, in which the first appellant's ownership of the shares in the fourth appellant Mosaic Funeral Group of Companies (Pty) Ltd, ("MFG") was declared unlawful and set aside. The appellants were also ordered to pay the costs of the application under Part B of the Notice of Motion.

- [2] At the heart of the matter is the dispute which centres around the incorporation of MFG by the first appellant, Mr. Gerrit Kaps (“Kaps”) the 100% shareholder, who had registered the company and allotted the full shareholding to himself at the time of the incorporation of the company. The subsequent misrepresentation of the company’s B-BBEE status was a central issue which the respondents relied upon as the basis upon which to prove that Kaps’s acquisition or ownership of the shares at the time of allotment was fraudulent and/or unlawful.

Factual background:

- [3] MFG is a private company which holds the intellectual property and trademarks for the Mosaic Funeral Group. Independent funeral parlours who wish to conduct business under the name Mosaic Funerals, enter into License Fee Agreements with MFG, in terms of where they are entitled to make use of MFG’s intellectual property and trademarks against payment of an agreed license fee. On 28 November 2017, Kaps attended to the incorporation and registration of the company as sole incorporator and allotted to himself 100% of the issued shares. Kaps was the sole director of MFG at the time of incorporation. The respondents were appointed as co-directors of MFG a few months later, during February 2018.
- [4] Following their appointment as directors in February 2018, but not shareholders, Kaps submitted documentation through the company appointed auditor, Mr. Bampa, asserting that the company qualified as a Level 2 B-BBEE contributor. This is so despite the respondents holding no economic interest or shareholding in the company. A Level 2B-BBEE contributor refers to a business that has achieved a high score on the Broad-Based Black Economic Empowerment (“B-BBEE”) in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003 (the “B-BBEE Act”). The B-BBEE Act is designed to advance economic transformation and enhance the economic participation of the black population in South Africa, defined in the Act as African, Coloured and Indian persons who are citizens of South Africa. Its objective is to promote economic participation by black South Africans and aims to redress historical inequalities caused by apartheid, encourage inclusive growth and equitable access to the economy.
- [5] The representation and listing of MFG as a Level 2 B-BBEE contributor, represented that the company was 51% black-owned, just one level below the highest level (Level 1). This status represents and illustrates a strong commitment to empowerment. For companies with less than R10 m per year turnover, as in the case of MFG, the shareholding had to be at least 51% black owned.
- [6] It is not disputed that no formal shareholders’ agreement had been concluded at the time of incorporation, nor were any shares transferred or allotted to the respondents thereafter. It is not in dispute that MFG has 1 000 authorised ordinary shares which were issued and allocated to Kaps upon incorporation on 28 November 2017.

- [7] The respondents, however, drew particular attention to the circumstances which had led to the incorporation and registration of MFG in November 2017. MFG was sought to be incorporated when dissatisfaction brew amongst several business owners and franchisees of Martin's Funerals. The latter is a funeral service provider with a nationwide network of franchise locations. Certain of the franchisees had unsuccessfully attempted to re-negotiate the renewal of their franchise agreements with Martin's Funerals. It was understood amongst them and other interested business owners in the industry that a new association of independent funeral parlours would be incorporated and formed under the name Mosaic

Funerals. Kaps attended the incorporation and registration of MFG. However, the respondents only became aware in June 2020 that Kaps owns 100% of the shares in MFG. This is so as the respondents were appointed as directors a few months after the incorporation of the company and because since their appointment as directors, no regular board meetings, if any, were held over the ensuing period until tensions mounted in June 2020. Kaps called a disciplinary meeting against the respondents in his capacity as director and sole shareholder in June 2020. The respondents were removed as directors during this meeting.

- [8] In proceedings for urgent interdictory relief (Part A) and for the relief as set out in Part B (the subject of this matter), the respondents only took issue with the fact in its replying affidavit that due to lack of non-compliance with Section 51 of the Companies Act 71 of 2006 (the "Companies Act"), the certificate of shares was only signed by Kaps and that the share allocation was unlawful for want of compliance with section 51(1)(b). The nub of the respondents' grievances was set out in its founding papers that the share allocation to Kaps was tainted by fraud and was unlawful.

Submissions on appeal:

- [9] Counsel for the appellants submitted that the allotment of shares to Kaps at the time of incorporation was legally permissible under section 36 of the Companies Act, as he was the sole incorporator, and no contrary agreement existed which barred him from doing so.
- [10] It was further submitted on behalf of the appellants that although the respondents were appointed as directors, they had no vested or contractual right to shareholding, and their reliance on alleged verbal understandings of future shareholding of MFG was legally insufficient.
- [11] The appellants conceded that the representation of MFG as a Level 2 B-BBEE contributor was unlawful and wrong, however it was submitted on their behalf that it had no retrospective effect on the validity of the company's foundational structure or the initial share allocation.

- [12] The respondents argued that the incorporation and allocation of shares to Mr. Kaps was a breach of an oral agreement whereby all parties would be shareholders once professional restraints upon them to hold shareholding had terminated. Stated differently, the respondents contended that the 100% share allotment to Kaps was contrary to a prior understanding that they would join as shareholders upon the expiry of their professional obligations elsewhere.
- [13] The second bow in the respondents' arrow was in the argument that their exclusion from shareholding, while simultaneously using their association with the company as directors or former directors, to secure a Level 2 B-BBEE status (as 51% black owned), amounted to exploitation and fronting, violating both the Companies Act and B-BBEE legislation. The misrepresentation was relied upon as an illustration that the shareholding could not have been a correct reflection with Kaps being 100% shareholder.
- [14] On these grounds the respondents sought an order invalidating the initial share allotment and a declaration of equal shareholding, or alternatively, referral to regulatory bodies for further action.

Findings of the Court a Quo:

- [15] The Court a quo found in favour of the respondents, accepting that a tacit agreement existed between the parties for equal shareholding. It held that the appellant's sole allotment of shares was contrary to this understanding.
- [16] The Court a quo also found that the B-BBEE misrepresentation tainted the incorporation and supported the finding of unlawful conduct warranting intervention. In the result it ordered that the shareholding be restructured to reflect the original understanding and referred the matter for further investigation by the B-BBEE Commission. The respondents' submissions that the issue of shares did not comply with Section 51 of the Companies Act found favour with the Court a quo. I shall deal with this later in more detail.

Issues in dispute:

- [17] The following questions arise for determination:
- (a) Was the allotment of 100% shareholding to the appellant at incorporation valid and lawful?
 - (b) Does the subsequent misrepresentation of the company's B-BBEE status render that allotment invalid or tainted?
 - (c) What consequences flow from the February 2018 declaration of Level 2 B-BBEE status?

The allotment of shares:

- [18] In terms of section 36 of the Companies Act 71 of 2008, a company may issue shares as determined by its board of directors, subject to any limitation in the Memorandum of Incorporation (MOI). Where the incorporator is the sole director at inception, it is legally permissible to allot all shares to oneself, provided no prior agreement prohibits such action.
- [19] Shares in a company can indeed be allotted at the time of incorporation and registration and thereafter the certificate of securities, must be signed by two persons, authorized by the Board, in terms of section 51(1) (b) of the Companies Act. The latter statutory provision is applicable after the incorporation of the company. The Companies Act contemplates two distinctly different positions, that being: where no formal allotment is required at time of incorporation, since the initial shareholding is part of the formation process. The Companies and Intellectual Property Commission (CIPC) will reflect these shareholders upon registration. In other words, when a company is incorporated, the Companies Act contemplates that the founding shareholders may subscribe to shares as part of the initial incorporation documents, the Memorandum of Incorporation or MOI.
- [20] The other manner of share acquisition occurs through uncertificated securities recorded in a register by the CIPC.
- [21] Whilst there is no specific section in the Companies Act which expressly states that shares are issued upon incorporation, the authority for the initial issue of shares at incorporation is implied through sections 13 (incorporation with MOI), section 36 (authorised shares) and the filing process with the CIPC that includes details of initial subscribers. It is common practice that the CIPC accepts incorporation documents which list the initial shareholders and their shareholding. These shares are treated as being issued upon registration and reflected in the company's securities register as provided for in Section 50.
- [22] The position that prevailed when Kaps had all the shares issued to him on incorporation, is different to that which could occur after incorporation, when the company issues further shares. In that instance, it must issue share certificates in terms of section 51(1)(b) and it must be recorded in the securities register as proof of registration of shareholding.
- [23] Having considered the provisions of the Companies Act in the allotment of shares above, Counsel for the respondents, submitted that the share allotment was unlawful for lack of compliance with Section 51(1)(b), failing that argument, that, the shareholding was unlawful because Kaps allotted to himself, the 100% shareholding allegedly, fraudulent. Firstly, this contention does not take into consideration that the form and method of allocation by Kaps, at the time of incorporation, is permissible and acceptable. In any event, the non-compliance with Section 51(1)(b) argument was not relied upon by the respondents in their founding affidavit. It is trite that in motion proceedings the founding affidavit constitutes the pleadings and the evidence in support thereof. An applicant must accordingly stand or fall by its founding affidavit. It needs to be stated that the respondents' case in its founding is not that the share certificate is invalid due to non-compliance with Section 51(1)(b) of the

Companies Act. The founding papers were primarily focused on submissions to support Part A for interdictory relief, and apropos Part B (the subject of this hearing before the Court a quo) was more broadly contended as being fraudulent and/or unlawful in contravention of the alleged agreed terms concerning respondents becoming shareholder. The argument that the allocation of shares was irregular for lack of compliance with Section 51(1)(b) was subsequently raised and became a central feature of the finding of the judgment a quo. For the reasons set out below, the findings are misguided.

[24] Secondly, the respondents' case was framed and based on the averment that the first appellant's acquisition of the shares as reflected in the share certificate, is fraudulent and unlawful. Insofar as the argument is that the allotment was tainted by fraud, it must be proven and cannot be stated baldly without proper substantiation. The fact that the respondents had asked Kaps to attend to the registration of the company does not and cannot mean, without further ado, that the terms of this request or "mandate" was to the effect that he was to only register the company with the

minimum 1% share allocation to him with the bulk of the share allocation to be made at a later stage. The onus to prove that such an agreement existed and the specific terms in relation thereto, rests upon the respondents once proven, the

allegation of fraud would have had to be proved by the respondents. There is no onus on the appellants to prove that the first appellant's acquisition or ownership of the shares was not fraudulent. The onus rests on the respondents (applicants in the Court a quo) to prove that the first appellant's acquisition or ownership of the shares was fraudulent and/or unlawful. In its reasoning however, the Court a quo approached the matter on the basis that there is an onus on the appellants to prove that Kaps's ownership of the shares was valid and thus lawful. This approach creates a reverse onus on the appellants to prove that there was no fraud or unlawfulness and it is misplaced.

[25] The party who is brought to Court, cannot be expected to figure out what is meant by fraudulent and/or unlawful. If the case is that the ground of unlawfulness is based on the non-compliance or breach of a mandate or agreement between the parties that the shares had to be allocated in a certain apportionment, that alleged agreement had to be proved by the respondents being the applicants a quo. In *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) the Court confirmed that rights of shareholding arise not from informal or moral understandings but from formal legal acts of allotment and registration on the share register. The reasoning of the Court in *Gihwala* underscores the position in our law that it is necessary that a formal process supported by a shareholder's agreement of Memorandum of Incorporation, is used in establishing shareholding rights.

[26] The respondent did not tender any evidence of a contractual or fiduciary obligation that prohibited the appellant from allotting shares solely to himself. In the absence of that proof, the allotment must be regarded as valid and binding.

[27] In considering whether a tacit term ought to be read into the request or agreement between the parties that Kaps was to attend to the registration of MFG, I am guided by the seminal authority in *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 526 (A) at 532A–533A, where the Appellate Division held:

“The court does not readily import a tacit term. It cannot make contracts for people. It cannot supplement the agreement of the parties merely because it thinks it would have been reasonable to include such a term. A term can only be imported if the Court is satisfied upon a consideration of the express terms of the contract, the surrounding circumstances and the admissible evidence, that an implication

necessarily arises that both parties must have intended the term to form part of their contract.”

[28] This principle remains entrenched in our law. It serves as a caution against judicial overreach and affirms the primacy of party autonomy in contractual dealings. In the present matter, no basis exists on the evidence to support the respondents’ understanding that Kaps was to register the company with shares set aside for the respondents nor is there a basis for inferring that a tacit term, to that effect was created. An alleged contract must be properly pleaded, thereafter be interpreted and enforced according to its express provisions. In my view there was no evidence placed before the Court that the parties had concluded an agreement mandating Kaps to register the company with the allotment of shares to be held over. Nothing prohibited Kaps from allocating the 100% shareholding to himself upon the registration of the company in November 2017.

Misrepresentation of the B-BEE status:

[29] The Broad-Based Black Economic Empowerment Act 53 of 2003, as amended, defines fronting as any practice that undermines the Act’s objectives, including claiming BEE credentials based on black representation in roles lacking genuine participation or economic interest. BEE fronting undermines the authority and legitimacy of BEE criteria, and the constitutional objectives aimed at in terms of the B-BBEE Act. Fronting is a deliberate circumvention or attempted circumvention of the B-BBEE Act and the Codes.

[30] Section 130 of the Act creates a criminal offence for knowingly engaging in fronting practices, and section 13J empowers the B-BBEE Commission to investigate such conduct.

[31] The February 2018 representation that the company had achieved Level 2 status—despite there being no black ownership or benefit flowing to black persons—was a material misrepresentation that constitutes fronting.

What is the effect of the misrepresentation on the share allotment?

[32] The Court must distinguish between the act of incorporation and share allotment, and the later unlawful B-BBEE misrepresentation.

- [33] In *Odendaal v Ferraris* 2009 (4) SA 313 (SCA) it was held that fraudulent conduct in one transaction does not retrospectively invalidate a prior lawful act, absent a causal nexus or inducement linked to the fraud.
- [34] In my view there is no evidence that the B-BBEE misrepresentation in 2018 was used to retrospectively justify the share allocation at inception. During the hearing of this matter, it was not disputed that there are not sufficient facts placed before the Court to make out a specific finding as to why and how the company auditor, Mr. Bampa, had issued a B-BBEE level 2 certificate. I can take it no further than to say that on the totality of the facts, the certificate was a misrepresentation. This was in any event not disputed by the appellants. To this extent it warrants referral to the B-BBEE Commission for investigation, however, this Court is not able to make a more specific finding than what it is called upon to do so.
- [35] In my view, the B-BBEE misrepresentation does not invalidate the original allotment of shares to Kaps, nor can it be held to retrospectively, to undo the allocation of the shares at the time of incorporation and registration. These two events: the allocation of shares on the one hand; and the B-BBEE misrepresentation on the other, are separate and distinct.

Conclusion

- [36] The allotment of 100% of the shares issued to the first appellant was valid and not contrary to the Companies Act nor was it a breach of any express or implied term of an agreement, as no agreement was shown to exist that would contain the terms contended for. The misrepresentation of the B-BBEE Level 2 status in February 2018, whilst disconcerting and sanctionable in law, does not affect the validity of the earlier share allocation.
- [37] For these reasons I would uphold the appeal against the portions of the judgment and order by the Court a quo in which the first appellant's shareholding in MFG was declared unlawful and set aside, including the order of costs made against the appellants.
- [38] For the reasons set out above I would uphold the appeal and propose an order by setting aside the order of the Court a quo and substituting it as follows:

Order

- (i) The appeal is upheld with costs.
- (ii) The order of the Court a quo is set aside and substituted as follows:
 - (a) The application under Part B of the Notice of Motion is dismissed.
 - (b) The applicants are ordered to pay the costs in respect of the application under Part B of the Notice of Motion, jointly and severally, the one paying the other to be absolved.

DA SILVA SALIE J

JUDGE OF THE HIGH COURT

WESTERN CAPE DIVISION

I AGREE:

RALARALA J

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED:

ALLIE J

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