

SOUTH AFRICA / JUDGMENT

Meerensee Resort Limited v Meerensee Share Block Limited and Another (8381/06) [2009] ZAWCHC 52 (17 February 2009) [2009] ZAWCHC 52

COURT

Western Cape High Court, Cape Town

BEFORE

Denzil Potgieter

CASE / FILE NUMBER

8381/06

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IN

THE HIGH COURT OF SOUTH AFRICA

(CAPE

OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE

NO.: 8381/06

In

the matter between :

MEERENSEE

RESORT LIMITED Applicant

and

MEERENSEE

SHARE BLOCK LIMITED First

Respondent

THE

LEGAL REPRESENTATIVE OF MEERENSEE Second

Respondent

JUDGMENT

DELIVERED ON 17 FEBRUARY 2008

INTRODUCTION

[1] This is an application for a declaratory order to the effect that Applicant is entitled, against payment of the par value of R3 974,00, to the allotment of 3 974 B-shares numbers B1 to B3 974 in First Respondent. Ancillary to the said relief, Applicant seeks an order that the relevant shares be issued and delivered to itself and that First Respondent, alternatively in the event of Second Respondent opposing the application, Respondents jointly and severally pay the costs of the application. [2] The application is based upon Applicant's contention that it is the beneficial owner of the shares in question which had been authorised but was never allotted or issued. STATUTORY PROVISIONS [3] Applicant relies upon the provisions of sections 97 and 115 respectively of the Companies Act 61 of 1973 ("the Act")

for the averment that the Court enjoys discretionary powers to direct that the shares in question be allotted and issued in its

favour. These provisions are to the following effect (in relevant part): "97. Validation of irregular creation, allotment or issue of shares.-

(1) Where a company has purported to create, allot or issue shares and the creation, allotment or issue of such shares was invalid by virtue of any provision of this Act or any other law or of the memorandum or articles of the company or otherwise, or the terms of the creation, allotment or issue were inconsistent with or not authorised by any such provision, the Court may upon application made by the company or by any interested person and upon being satisfied that in all the circumstances it is just and equitable to do so, make an order validating the creation, allotment or issue of such shares or confirming the terms of the creation, allotment or issue thereof, subject to such conditions as the Court may impose.

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE NO.: 8381/06

In the matter between :

MEERENSEE RESORT LIMITED Applicant

and

MEERENSEE SHARE BLOCK LIMITED First Respondent

THE LEGAL REPRESENTATIVE OF MEERENSEE Second Respondent

JUDGMENT

DELIVERED ON 17 FEBRUARY 2008

INTRODUCTION

- [1] This is an application for a declaratory order to the effect that Applicant is entitled, against payment of the par value of R3 974,00, to the allotment of 3 974 B-shares numbers B1 to B3 974 in First Respondent. Ancillary to the said relief, Applicant seeks an order that the relevant shares be issued and delivered to itself and that First Respondent, alternatively in the event of Second Respondent opposing the application, Respondents jointly and severally pay the costs of the application.
- [2] The application is based upon Applicant's contention that it is the beneficial owner of the shares in question which had been authorised but was never allotted or issued.

STATUTORY PROVISIONS

- [3] Applicant relies upon the provisions of sections 97 and 115 respectively of the Companies Act 61 of 1973 ("the Act")

for the averment that the Court enjoys discretionary powers to direct that the shares in question be allotted and issued in its

favour. These provisions are to the following effect (in relevant part):

"97. Validation of irregular creation, allotment or issue of shares.-

- (1) Where a company has purported to create, allot or issue shares and the creation, allotment or issue of such shares was invalid by virtue of any provision of this Act or any other law or of the memorandum or articles of the company or otherwise, or the terms of the creation, allotment or issue were inconsistent with or not authorised by any such provision, the Court may upon application made by the company or by any interested person and upon being satisfied that in all the circumstances it is just and equitable to do so, make an order validating the creation, allotment or issue of such shares or confirming the terms of the creation, allotment or issue thereof, subject to such conditions as the Court may impose.

- (2) (3)..." 115. Rectification of register of members.- (1) If-

- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

- (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member, the person concerned or the company or any member of the company, may apply to the Court for rectification of the register. (2) ...

(3)..." [4] Applicant, moreover, contends that the provisions of section 221 of the Act do not

constitute a bar to the relief being sought in these proceedings. The said section provides as follows : "221. Restriction of power of directors to issue share capital.- (1) Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power to allot or issue shares of the company without the prior approval of the company in general meeting." THE RELEVANT FACTS [5] The facts which are material to a determination of this matter are not seriously in contention between the parties and are briefly as follows. The matter relates to the former Sonesta holiday resort near Hermanus in the Western Cape which was acquired from the then Cape Provincial Administration by the brothers Theophil and Frank Steinmann at a public auction during 1992. The plan of the new owners was to expand the development and in due course dispose of some of the units in the development. The Applicant was registered during 1992 in order to undertake the proposed development of the property. Members of the Steinmann family have always been and still are the only shareholders of the Applicant. The land on which the resort is situated was acquired in the name of a separate entity, namely Steinmann Holiday Resorts CC which was also registered in 1992. [6] The proposed development entails three phases, the first whereof relates to a portion of the property known as Meerensee where the chalets of the original Sonesta holiday resort are situated. The second phase relates to that portion of the property where the original Sonesta caravan park was situated, also known as Meerembosch. The third phase of the development consists of 40 individually owned erven known as Sanddown Bay situated on that part of the property where the original community centre was situated on the Sonesta holiday resort. [7] Phase 1 of the development (Meerensee) is administered as a share block scheme. Pursuant to the requirements of the Shareblocks

Control Act 59 of 1980, First Respondent was formed during 1992 for the purpose of administering the share block scheme. Later during 1992 the Meerensee portion of the property was transferred into the name of First Respondent. Members of the Steinmann family as well as the Applicant were the subscribers to the memorandum of association of First Respondent. In terms of the articles of association, First Respondent's share capital consists of 9 215 A-shares in respect of the existing improvements on Meerensee together with 3 794 B-shares in respect of 14 further portions of the said property where improvements were to be effected for later occupation. All of the A-shares held in the names of the members of the Steinmann family were transferred to Applicant, while the remaining authorised A-shares were allotted and issued in favour of Applicant. [8] The brothers Theophil and Frank Steinmann, were directors of both Applicant and First Respondent. They controlled the two companies. [9] On the acceptable evidence, it is apparent that the planning of the development entailed from the outset that the 14 units attached to the B-shares would be developed by the Applicant for its own account. The agreement between First Respondent and Applicant was accordingly that Applicant would be entitled to have the B-shares allotted and issued in its favour. It is also apparent that the relevant parties were under the impression that effect had been given to the said agreement and had only found out subsequently that the B-shares had in fact never been allotted and issued in favour of the Applicant. This was obviously an oversight. [10] The fact that Applicant is entitled to the B-shares as indicated, is also corroborated by both Applicant's attorney as well as the auditor who

acted for both First Respondent and Applicant. [11] It is furthermore relevant that on 14 March 1998 First Respondent adopted a special resolution converting the share block scheme in respect of Meerensee into a sectional title scheme in terms of the Sectional Title Act 95 of 1986. After implementation of the conversion, Theophil and Frank Steinmann resigned as directors of First Respondent during 2001. Towards the end of 2005, Applicant intended to commence with the development of the 14 units attached to the B-shares. It was only at this stage that it became apparent that effect was never given to the agreement to allot and issue the B-shares in favour of Applicant. When the auditors were requested to issue the B-shares in favour of Applicant, this was opposed by some of the present directors of First Respondent. This attitude was confirmed at a general meeting of the members of First Respondent. The resultant deadlock led to Applicant launching the present proceedings. APPLICABILITY OF SECTIONS 97(1) & 115 OF THE COMPANIES ACT [12] First Respondent has raised various defences to the relief being sought by Applicant. Insofar as Applicant's reliance upon sections 97 and 115 of the Companies Act is concerned, counsel for Respondents submitted that these sections find no application in the instant case where there had not been an allotment of shares by First Respondent. Insofar as section 97 is concerned, counsel submitted that it is not Applicant's case that First Respondent had purported to allocate and issue shares in favour of Applicant and that such allotment and issue were invalid. Insofar as section 115 was concerned, the contention was that the section presupposes that the party requiring rectification of the member's register had already established its ownership of the relevant shares. Applicant's case, it was contended, was to acquire ownership by means of the allotment of the shares in question. [13] I cannot agree with counsel's said submission concerning the non-applicability of sections 97 and 115. It is apparent from a proper reading of section 97(1) that the Court is given a discretionary power to validate a purported creation, allotment or issue of shares which for some reason is not effectual. It is readily apparent from the acceptable evidence that pursuant to the agreement between Applicant and First Respondent all the relevant parties accepted that the B-shares were vested in Applicant. As indicated, members of the Steinmann family controlled both companies at all material times and had proceeded on the basis that the B-shares in First Respondent had in fact vested in Applicant. The fact that no formalities were complied with to give effect to the agreement between Applicant and First Respondent does not detract from the validity and binding effect of the agreement in question. [14] It is clear that none of the prescribed steps were followed in order to give effect to the purported allotment and issue of the B-shares in favour of Applicant. There is accordingly in my view no reason, either in principle or based upon a proper interpretation of section 97(1), for the provisions of the section not to apply to the present matter. [15] In applying the provisions of section 97(1) to the instant case, I am satisfied for the following reasons that in all the circumstances it is just and equitable that the purported allotment and issue of the B-shares in question should be validated: 15.1 The directors and shareholders of the Applicant, who were formerly also the sole directors and shareholders of First Respondent, were guided by their auditors insofar as administrative matters were concerned and were reasonably under the impression (incorrectly so) that the shares in question had indeed been allotted and issued in favour of Applicant; 15.2 The auditors of First Respondent confirmed that the B-shares in question were due to the Applicant; The attorney, who represented Applicant at all material

times, also confirmed in his supporting affidavit that the relevant B-shares were due to Applicant and that he was under the impression that the said shares had already been issued in favour of Applicant;

Applicant will suffer a loss of approximately R20-million should effect not be given to its rights to the relevant B-shares, in which event First Respondent would unjustifiably receive a windfall in the said amount;

The failure to take the prescribed formal steps to give effect to the agreement concerning the B-shares is acceptable in view of the fact that the administrative aspects of the development were entirely left in the hands of their professional advisors at the time when members of the Steinmann family were the only shareholders and directors of both the Applicant and the First Respondent. [16] I am accordingly satisfied that the requirements of section 97(1) have been complied with and that the Applicant is entitled to appropriate relief. [17] For the same reasons, I am similarly satisfied that the provisions of section 115 apply in the instant case and constitute a further basis for the relief being sought herein. EFFECT OF SECTION 221 OF THE COMPANIES ACT [18] Respondents' counsel furthermore contended that the provisions of section 221 of the Act also preclude the relief being sought by the Applicant. As indicated, a general meeting of First Respondent refused to allot or issue the relevant B-shares in favour of the Applicant. I agree in this regard with the submission of Applicant's counsel that the provisions of section 221 do not constitute a bar to the relief being sought by the Applicant inasmuch as there was an already existing agreement at the time of formation of First Respondent that the B-shares were due to the Applicant who was one of the subscribers to First Respondent's memorandum as indicated. It is accordingly not competent for the present shareholders and directors of First Respondent to frustrate the implementation of the pre-existing agreement between First Respondent and the Applicant. In my view section 221 does not apply to the present circumstances. [19] In any event, a failure to comply with the provisions of section 221 may be validated in terms of the provisions of section 97(1) (cf. Meskin Henochsbera on the Companies Act (5th ed.) p. 425 & sv General Note). Even if section 221 were to apply there is accordingly no justification in the circumstances of the present matter, for the provisions of section 221 to constitute a bar to the relief being sought by the Applicant and not to validate any failure to comply with section 221.

PRESCRIPTION [20] Respondents' counsel also contended that any claim which the Applicant might have enjoyed in respect of the relief being sought in the present proceedings, has become prescribed in that it had arisen more than 3 years prior to the issue and service of the present application. This contention is based on the submission that an obligation to allot and issue shares in terms of an agreement as relied upon by the Applicant constitutes a debt as envisaged in the Prescription Act 68 of 1969. Applicant's claim would (so it was contended) have prescribed within a period of 3 years in accordance with the provisions of section 11

- (d) of the Prescription Act. [21] The expression "debt" in the context of the Prescription Act entails an obligation to do something (whether by way of payment or delivery of goods or

services) or to refrain from doing something. (*Oertel v Directeur van Plaaslike Bestuur* 1983(1) SA 354 (A) at 370 B; *Phasha v Southern Metropolitan Council of Johannesburg* 2000(2) SA 455 (W) at 463 D-E). The Court accepted in *Electricity Supply Commission v Stewarts & Lloyds of South Africa* 1981(3) SA 340 (A) at 344 F that: "...a debt is- 'that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another'. See *Shorter Oxford English Dictionary*; and see also *Leviton & Son v De Klerk's Trustee* 1914 CPD 685 at 691 in fin. "Whatever is due -debitum - from any obligation." [22] I do not agree with the contention that the provisions of either sections 115 or 97(1) of the Act constitute a debt as envisaged by the provisions of the Prescription Act. I agree in this regard with the following views expressed by the learned author of *Henochsberg op. cit.* at

- p. 222 that "...s115 creates a statutory right to apply to the Court for the exercise by it of a statutory discretionary power, such right is not a 'debt' within the meaning of that expression in Chapter III of the Prescription Act 68 of 1969 and there can be no extinction of such right by prescription. Delay on the part of the applicant would only be a factor affecting the exercise of the Court's power (*Pretorius case supra* at 420
- 422; *Verrin case supra* at 10-11)". [23] In my view similar considerations apply in respect of the discretionary power contained in section 97(1). [24] In any event and even if the provisions of the Prescription Act were to have applied to sections 97(1) and 115 of the Act it would in my view be of no assistance to the Respondents. In terms of section 12(3) of the Prescription Act a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, subject to the proviso that the creditor shall be deemed to have such knowledge if it could have been acquired by exercising reasonable care. As pointed out above, Applicant only became aware during 2005 of the failure to take the necessary formal steps to allot and issue the relevant B-shares in its favour. There is no indication that Applicant could have acquired such knowledge at an earlier stage. The present proceedings were launched during 2006 well within 3 years of the date upon which

Applicant became aware of the failure to allot and issue the relevant B-shares. [25] In the circumstances there is no merit in the contention that Applicant's claim had prescribed. ESTOPPEL [26] Respondents' counsel raised a further defence based on the doctrine of estoppel. The submission in this regard succinctly was that Applicant was negligent in not having had the allotment and issue of the B-shares implemented which created the incorrect impression that First Respondent was the owner of such shares. According to the submission, this resulted in third parties who subsequently purchased sectional title units in Meerensee acting to their detriment. [27] There is no merit in this submission in that there is no indication at all that any third party was brought under an incorrect

impression or had acted to their detriment. In any event, there is no basis at all for concluding in the circumstances that

Applicant had acted negligently in any manner with regard to the failure to formally allot and issue the B-shares in question.

Applicant is accordingly, in my view, not precluded by the doctrine of estoppel from obtaining the relief being sought in these

proceedings. NON-JOINDER [28] Respondents' counsel also raised the issue of non-joinder and contended that the present application was defective in that the shareholders of First Respondent and individual owners of sectional title units had not been joined as parties to the proceedings. [29] The test with regard to joinder is trite, namely whether a party has a direct and substantial legal interest in the subject matter of the proceedings, in which event such party must be joined (Harms : Civil Procedure in the Superior Courts A6-1 & B10-2).

[30] In my view there is no merit in this contention in that the parties in question could only conceivably have an indirect financial interest and are accordingly not necessary parties who should have been joined. LOCUS STANDI IN IUDICIO [31] In the heads of argument, Respondents' counsel contested Applicant's locus standi in iudicio to launch the present proceedings. This submission was based on the contention that Applicant has failed to establish the agreement with First Respondent concerning the allotment and issue of the B-shares. As pointed out above, the agreement in question had been overwhelmingly established by the evidence. Applicant's locus standi in iudicio can accordingly not be assailed at all.

CONCLUSION

[32] In all the circumstances I am satisfied that Applicant had made out a case for the relief being sought in these proceedings. [33] I accordingly make the following order: (a) It is declared that Applicant, against payment of the par value of R3 974,00, shall be entitled to the allotment of 3 974 B-shares in First Respondent being numbers B1 to B3 974 as identified in annexure "A" to First Respondent's articles of association; (b) First Respondent is ordered, against payment of the amount of R3 974,00, to allot, issue and deliver to Applicant the B-shares in First Respondent being numbers B1 to B3 974 as identified in annexure "A" to First Respondent's articles of association;

(c) Respondents are ordered to pay Applicant's costs, jointly and severally, the one paying the other to be absolved. DENZIL POTGIETER, A.J.

(2)

(3)..."

115. Rectification of register of members.- (1) If-

(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or

- (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person concerned or the company or any member of the company, may apply to the Court for rectification of the register. (2) ... (3)..."

- [4] Applicant, moreover, contends that the provisions of section 221 of the Act do not constitute a bar to the relief being sought in these proceedings. The said section provides as follows :

"221. Restriction of power of directors to issue share capital.- (1)

Notwithstanding anything contained in its memorandum or articles, the directors of a company shall not have the power to allot or issue shares of the company without the prior approval of the company in general meeting."

THE RELEVANT FACTS

- [5] The facts which are material to a determination of this matter are not seriously in contention between the parties and are briefly as follows. The matter relates to the former Sonesta holiday resort near Hermanus in the Western Cape which was acquired from the then Cape Provincial Administration by the brothers Theophil and Frank Steinmann at a public auction during 1992. The plan of the new owners was to expand the development and in due course dispose of some of the units in the development. The Applicant was registered during 1992 in order to undertake the proposed development of the property. Members of the Steinmann family have always been and still are the only shareholders of the Applicant. The land on which the resort is situated was acquired in the name of a separate entity, namely Steinmann Holiday Resorts CC which was also registered in 1992.
- [6] The proposed development entails three phases, the first whereof relates to a portion of the property known as Meerensee where the chalets of the original Sonesta holiday resort are situated. The second phase relates to that portion of the property where the original Sonesta caravan park was situated, also known as Meerenbosch. The third phase of the development consists of 40 individually owned erven known as Sanddown Bay situated on that part of the property where the original community centre was situated on the Sonesta holiday resort.
- [7] Phase 1 of the development (Meerensee) is administered as a share block scheme. Pursuant to the requirements of the Shareblocks

Control Act 59 of 1980, First Respondent was formed during 1992 for the purpose of administering the share block scheme. Later during 1992 the Meerensee portion of the property was transferred into the name of First Respondent. Members of the Steinmann family as well as the Applicant were the subscribers to the memorandum of association of First Respondent. In terms of the articles of association, First Respondent's share capital consists of 9 215 A-shares in respect of the existing improvements on Meerensee together with 3 794 B-shares in respect of 14 further portions of the said property where improvements were to be effected for later occupation. All of the A-shares held in the names of the members of the Steinmann family were

transferred to Applicant, while the remaining authorised A-shares were allotted and issued in favour of Applicant.

[8] The brothers Theophil and Frank Steinmann, were directors of both Applicant and First Respondent. They controlled the two companies.

[9] On the acceptable evidence, it is apparent that the planning of the development entailed from the outset that the 14 units attached to the B-shares would be developed by the Applicant for its own account. The agreement between First Respondent and Applicant was accordingly that Applicant would be entitled to have the B-shares allotted and issued in its favour. It is also apparent that the relevant parties were under the impression that effect had been given to the said agreement and had only found out subsequently that the B-shares had in fact never been allotted and issued in favour of the Applicant. This was obviously an oversight.

[10] The fact that Applicant is entitled to the B-shares as indicated, is also corroborated by both Applicant's attorney as well as the auditor who acted for both First Respondent and Applicant.

[11] It is furthermore relevant that on 14 March 1998 First Respondent adopted a special resolution converting the share block scheme in respect of Meerensee into a sectional title scheme in terms of the Sectional Title Act 95 of 1986. After implementation of the conversion, Theophil and Frank Steinmann resigned as directors of First Respondent during 2001. Towards the end of 2005, Applicant intended to commence with the development of the 14 units attached to the B-shares. It was only at this stage that it became apparent that effect was never given to the agreement to allot and issue the B-shares in favour of Applicant. When the auditors were requested to issue the B-shares in favour of Applicant, this was opposed by some of the present directors of First Respondent. This attitude was confirmed at a general meeting of the members of First Respondent. The resultant deadlock led to Applicant launching the present proceedings.

APPLICABILITY OF SECTIONS 97(1) & 115 OF THE COMPANIES ACT

[12] First Respondent has raised various defences to the relief being sought by Applicant. Insofar as Applicant's reliance upon sections 97 and 115 of the Companies Act is concerned, counsel for Respondents submitted that these sections find no application in the instant case where there had not been an allotment of shares by First Respondent. Insofar as section 97 is concerned, counsel submitted that it is not Applicant's case that First Respondent had purported to allocate and issue shares in favour of Applicant and that such allotment and issue were invalid. Insofar as section 115 was concerned, the contention was that the section presupposes that the party requiring rectification of the member's register had already established its ownership of the relevant shares. Applicant's case, it was contended, was to acquire ownership by means of the allotment of the shares in question.

[13] I cannot agree with counsel's said submission concerning the non-applicability of sections 97 and 115. It is apparent from a proper reading of section 97(1) that the Court is given a discretionary power to validate a purported creation, allotment or issue of shares which for some reason is not effectual. It is readily apparent from the acceptable evidence that pursuant to the agreement between Applicant and First Respondent all the relevant parties accepted that the B-shares were vested in Applicant. As indicated, members of the Steinmann family controlled both companies at all material times and had proceeded on the basis that the B-shares in First Respondent had in fact vested in Applicant. The fact that no formalities were complied with to give effect to the agreement between Applicant and First Respondent does not detract from the validity and binding effect of the agreement in question.

[14] It is clear that none of the prescribed steps were followed in order to give effect to the purported allotment and issue of the B-shares in favour of Applicant. There is accordingly in my view no reason, either in principle or based upon a proper interpretation of section 97(1), for the provisions of the section not to apply to the present matter.

[15] In applying the provisions of section 97(1) to the instant case, I am satisfied for the following reasons that in all the circumstances it is just and equitable that the purported allotment and issue of the B-shares in question should be validated:

15.1 The directors and shareholders of the Applicant, who were formerly also the sole directors and shareholders of First Respondent, were guided by their auditors insofar as administrative matters were concerned and were reasonably under the impression (incorrectly so) that the shares in question had indeed been allotted and issued in favour of Applicant;

15.2 The auditors of First Respondent confirmed that the B-shares in question were due to the Applicant;

The attorney, who represented Applicant at all material times, also confirmed in his supporting affidavit that the relevant B-shares were due to Applicant and that he was under the impression that the said shares had already been issued in favour of Applicant;

Applicant will suffer a loss of approximately R20-million should effect not be given to its rights to the relevant B-shares, in which event First Respondent would unjustifiably receive a windfall in the said amount;

The failure to take the prescribed formal steps to give effect to the agreement concerning the B-shares is acceptable in view of the fact that the administrative aspects of the development were entirely left in the hands of their professional advisors at the time when members of the Steinmann family were the only shareholders and directors of both the Applicant and the First Respondent.

[16] I am accordingly satisfied that the requirements of section 97(1) have been complied with and that the Applicant is entitled to appropriate relief.

- [17] For the same reasons, I am similarly satisfied that the provisions of section 115 apply in the instant case and constitute a further basis for the relief being sought herein.

EFFECT OF SECTION 221 OF THE COMPANIES ACT

- [18] Respondents' counsel furthermore contended that the provisions of section 221 of the Act also preclude the relief being sought by the Applicant. As indicated, a general meeting of First Respondent refused to allot or issue the relevant B-shares in favour of the Applicant. I agree in this regard with the submission of Applicant's counsel that the provisions of section 221 do not constitute a bar to the relief being sought by the Applicant inasmuch as there was an already existing agreement at the time of formation of First Respondent that the B-shares were due to the Applicant who was one of the subscribers to First Respondent's memorandum as indicated. It is accordingly not competent for the present shareholders and directors of First Respondent to frustrate the implementation of the pre-existing agreement between First Respondent and the Applicant. In my view section 221 does not apply to the present circumstances.
- [19] In any event, a failure to comply with the provisions of section 221 may be validated in terms of the provisions of section 97(1) (cf. *Meskin Henochsbera on the Companies Act* (5th ed.) p. 425 & sv General Note). Even if section 221 were to apply there is accordingly no justification in the circumstances of the present matter, for the provisions of section 221 to constitute a bar to the relief being sought by the Applicant and not to validate any failure to comply with section 221.

PRESCRIPTION

- [20] Respondents' counsel also contended that any claim which the Applicant might have enjoyed in respect of the relief being sought in the present proceedings, has become prescribed in that it had arisen more than 3 years prior to the issue and service of the present application. This contention is based on the submission that an obligation to allot and issue shares in terms of an agreement as relied upon by the Applicant constitutes a debt as envisaged in the Prescription Act 68 of 1969. Applicant's claim would (so it was contended) have prescribed within a period of 3 years in accordance with the provisions of section 11
- (d) of the Prescription Act.

- [21] The expression "debt" in the context of the Prescription Act entails an obligation to do something (whether by way of payment or delivery of goods or

services) or to refrain from doing something. (*Oertel v Directeur van Plaaslike Bestuur* 1983(1) SA 354 (A) at 370 B; *Phasha v Southern Metropolitan Council of Johannesburg* 2000(2) SA 455 (W) at 463 D-E). The Court accepted in *Electricity Supply Commission v Stewarts & Lloyds of South Africa* 1981(3) SA 340 (A) at 344 F that:

"...a debt is-

'that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another'.

See Shorter Oxford English Dictionary; and see also *Leviton & Son v De Klerk's Trustee* 1914 CPD 685 at 691 in fin. "Whatever is due -debitum - from any obligation."

- [22] I do not agree with the contention that the provisions of either sections 115 or 97(1) of the Act constitute a debt as envisaged by the provisions of the Prescription Act. I agree in this regard with the following views expressed by the learned author of *Henochsberg op. cit.* at p. 222 that "...s115 creates a statutory right to apply to the Court for the exercise by it of a statutory discretionary power, such right is not a 'debt' within the meaning of that expression in Chapter III of the Prescription Act 68 of 1969 and there can be no extinction of such right by prescription. Delay on the part of the applicant would only be a factor affecting the exercise of the Court's power (*Pretorius case supra* at 420
- 422; *Verrin case supra* at 10-11)".

[23] In my view similar considerations apply in respect of the discretionary power contained in section 97(1).

[24] In any event and even if the provisions of the Prescription Act were to have applied to sections 97(1) and 115 of the Act it would in my view be of no assistance to the Respondents. In terms of section 12(3) of the Prescription Act a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, subject to the proviso that the creditor shall be deemed to have such knowledge if it could have been acquired by exercising reasonable care. As pointed out above, Applicant only became aware during 2005 of the failure to take the necessary formal steps to allot and issue the relevant B-shares in its favour. There is no indication that Applicant could have acquired such knowledge at an earlier stage. The present proceedings were launched during 2006 well within 3 years of the date upon which

Applicant became aware of the failure to allot and issue the relevant B-shares.

[25] In the circumstances there is no merit in the contention that Applicant's claim had prescribed.

ESTOPPEL

[26] Respondents' counsel raised a further defence based on the doctrine of estoppel. The submission in this regard succinctly was that Applicant was negligent in not having had the allotment and issue of the B-shares implemented which created the incorrect impression that First Respondent was the owner of such shares. According to the submission, this resulted in third parties who subsequently purchased sectional title units in Meerensee acting to their detriment.

[27] There is no merit in this submission in that there is no indication at all that any third party was brought under an incorrect

impression or had acted to their detriment. In any event, there is no basis at all for concluding in the circumstances that

Applicant had acted negligently in any manner with regard to the failure to formally allot and issue the B-shares in question.

Applicant is accordingly, in my view, not precluded by the doctrine of estoppel from obtaining the relief being sought in these

proceedings.

NON-JOINDER

[28] Respondents' counsel also raised the issue of non-joinder and contended that the present application was defective in that the shareholders of First Respondent and individual owners of sectional title units had not been joined as parties to the proceedings.

[29] The test with regard to joinder is trite, namely whether a party has a direct and substantial legal interest in the subject matter of the proceedings, in which event such party must be joined (*Harms : Civil Procedure in the Superior Courts* A6-1 & B10-2).

[30] In my view there is no merit in this contention in that the parties in question could only conceivably have an indirect financial interest and are accordingly not necessary parties who should have been joined.

LOCUS STANDI IN IUDICIO

[31] In the heads of argument, Respondents' counsel contested Applicant's locus standi in iudicio to launch the present proceedings. This submission was based on the contention that Applicant has failed to establish the agreement with First Respondent concerning the allotment and issue of the B-shares. As pointed out above, the agreement in question had been overwhelmingly established by the evidence. Applicant's locus standi in iudicio can accordingly not be assailed at all.

CONCLUSION

[32] In all the circumstances I am satisfied that Applicant had made out a case for the relief being sought in these proceedings.

[33] I accordingly make the following order:

(a) It is declared that Applicant, against payment of the par value of R3 974,00, shall be entitled to the allotment of 3 974 B-shares in First Respondent being numbers B1 to B3 974 as identified in annexure "A" to First Respondent's articles of association;

- (b) First Respondent is ordered, against payment of the amount of R3 974,00, to allot, issue and deliver to Applicant the B-shares in First Respondent being numbers B1 to B3 974 as identified in annexure "A" to First Respondent's articles of association;
- (c) Respondents are ordered to pay Applicant's costs, jointly and severally, the one paying the other to be absolved.

DENZIL POTGIETER, A.J.

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