

SOUTH AFRICA / JUDGMENT

## New Heights Developers (Pty) Ltd v Bogatsu (2013/24397) [2017] ZAGPJHC 353 (23 November 2017) [2017] ZAGPJHC 353

COURT

South Gauteng High Court, Johannesburg

BEFORE

Spilg

CASE / FILE NUMBER

2013/24397

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 2013/24397

Not

reportable

Of

interest to other judges

Revised.

15

September 2017

In

the matter between:

NEW HEIGHTS

DEVELOPERS (PTY)

LTD Applicant

and

BOGATSU, MANANA

SHEREEN Respondent

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**JUDGMENT**

SPILG, J:

**THE APPLICATION**

1. The applicant, New Heights Developers (Pty) Ltd was registered in 2002 with the object of developing property.

It is common cause that at inception New Heights was a 60% shareholder in Pan Africa Developments (Pty) Ltd (“PAD”).

2. PAD was established for the purpose of constructing, developing and managing the Pan Africa taxi rank in the Alexandra area. Aside from New Heights the other shareholders were Grand Palace Trading 186 (Pty) Ltd as to 25% and Summit Ridge Trading 5 (Pty) Ltd as to 15%.
3. The original shareholder of New Heights was Mr Maepa who it is common cause transferred 50% of his shareholding to Mr Mogashoa in September 2003. It is also common cause that when Maepa passed away in May 2005 the present respondent, Ms Bogatsu was appointed executrix of his estate.
4. Although New Heights contends through Mogashoa that it has no assets and does not conduct business, it is evident that the company’s 60% shareholding in PAD had value.
5. It is also evident that the disputes regarding the shareholding in New Heights affects the manner in which New Heights deals with or otherwise claims its rights to an individual majority stake in PAD if it lawfully has such rights.
6. On 14 June 2013 the respondent’s attorneys addressed a letter by registered post to New Heights. The letter was copied to Mogashoa and Mogashoa’s attorneys who represent New Heights in these proceedings.

In the letter the respondent claimed that she is a director of, and holds 50% of the shares in, New Heights. It is apparent that her claim of entitlement to the shares was derived initially from her appointment as executrix in the deceased estate of the late Maepa. The letter mentioned that Mogashoa was the other director of New Heights and that he alleges that the New Heights’ shares in PAD were transferred to him personally.

The letter then proceeds;

*“4. Our client denies that any agreement was reached or any resolution taken to transfer the shares to Mogashoa and in any event the method in which the transfer of shares allegedly took place does not amount to a valid share agreement or cession of shares.*

5. At present Mogashoa is purporting to act on behalf of New Heights and has purportedly appointed Knowles Hussain Attorneys to oppose an application brought by... Motsumi... wherein he seeks an order of court to reflect in the members of Pan Africa Development (Pty) Ltd that New Heights is a member of and holds 45% of the issued share capital in Pan Africa Development (Pty) Ltd and that he also holds certain shares.
6. We have advised our client accordingly that the continued opposition of this application is not in the best interests of New Heights and that New Heights must take the necessary steps to be joined as applicant or to support Motsumi to get the relief he seeks.
7. ...
8. Under the circumstances, our client has instructed us to demand... that you forthwith proceed to withdraw opposition to Mosumi's action and proceed to support her in such action and take such steps as may be necessary to protect the interest of New Heights and to rectify the register of Pan Africa (Pty) Ltd to reflect New Heights as a shareholder in Pan Africa Development (Pty) Ltd.
9. We address this demand to you by virtue of the provisions of s165 of the Companies Act 71 of 2008.
10. Accordingly, if you do not make an application to set aside this demand or this demand is not set aside by a court you must:
  - 10.1 appoint an independent or impartial committee to investigate this demand and report to the board on any facts or circumstances that may give rise to a cause of action in the demand or that may relate to any proceedings contemplated in this demand;
  - 10.2 The probable costs that would be incurred by New Heights to pursue the cause of action and continue the proceedings
  - 10.3 Whether it appears in the best interests of New Heights to continue such proceedings
  - 10.4 Within 60 days of being served with a demand, to initiate or continue proceedings as demanded or advise us that you are not proceeding therewith and set out reasons therefor. “
7. Also on 14 June 2013 the respondent's attorneys addressed a letter to the applicant's attorneys. The letter recorded that Mogashoa was represented by the applicant's attorneys and contended that he had purportedly instructed them to represent New Heights despite no lawful resolution being taken by its directors to appoint it or to oppose the application of Motsumi.
8. The letter then continued to deal with the steps the respondent claimed she had taken in an attempt to protect New Heights' interest in PAD. The letter concluded that the respondent anticipated that her shareholding in New Heights might be disputed and for that reason requested Mogashoa to advise exactly when, where and how the shares in New Heights were transferred and to whom, as she was not aware of any transaction.

9. The letter also contended that the respondent at no stage resolved or agreed to sell the shares which New Heights held in PAD and therefore the attorneys' continued action in opposing Motsumi's application at the time against PAD, New Heights and Mogashoa was contrary to the best interests of New Heights.

As I indicated earlier that action was settled.

10. The application before the court is brought by New Heights to obtain a declaratory order that s165 is limited to only compelling a company "to commence or continue legal proceedings... or to take related steps, to protect the legal interest of the company and not to compel a company to adopt a particular stance in litigation or change from a defendant or respondent to a plaintiff, claimant or applicant in pending litigation."

The second prayer is to set aside the demand made on 18 June 2013, alternatively to declare that the respondent is not a director or shareholder of New Heights, is not entitled to be a shareholder of the applicant and is not entitled to make demand against the applicant under s165.

There is a further alternative prayer to set aside the demand on the basis that it is frivolous vexatious and without merit

THE

## ISSUES

11. New Heights contends that the respondent was neither a director nor shareholder of the applicant (New Heights) and that the purpose of the demand was to establish herself as a director and shareholder of the applicant.
12. The applicant also contends that the demand dealt with matters which were extraneous to the purpose of a s165 demand in that it was an attempt to steer the applicant's position in regard to the Motsumi case.
13. The final issue raised by the applicant was that demand was made with the ulterior motive of aligning herself with Motsumi in that action and that this justified setting the demand aside as vexatious.

## RESPONDENT STATUS TO MAKE DEMAND UNDER S165

14. In terms of s165, which is headed "Derivative Actions" ;

- (1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.
- (2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person-

- (a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
  - (b) is a director or prescribed officer of the company or of a related company;
  - (c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
  - (d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.”
15. It is evident from s165 (2) that not only is the person who may make such a demand circumscribed but also that the purpose of the demand relates to the affected company commencing or continuing legal proceedings, or taking related steps, “to protect the legal interests of the company.”
16. In my view it is evident that until Mogashoa purported to acquire Maepa’s shares, whether by way of agreement or otherwise, the only person who could deal in or protect Maepa’s shares was either the executrix of his estate or his heirs.
17. In para 43 of Mogashoa’s answering affidavit to the Motsumi application he admitted the following statement made in Motsumi’s founding papers at para 22 that:
- “During about May 2005 Maepa passed away. The executrix of his estate is Bogatsu. Bogatsu was registered as a director of the second respondent.”*
18. In paras 33.13 to 33.15 of Mogashoa’s answering affidavit in the Motsumi application he said;
- 33.13. I personally met with Bogatsu to discuss our obligations as the second respondent. I advised her we required funding on a Rand for Rand basis and that I anticipated that we would require bridging finance because Government never paid its accounts on time. She advised that the funds of Mr Maepa were tied up in his deceased estate, she was not in a position to provide funding for the project. Because of this I was required to provide or raise all the necessary funding. I was not prepared to be solely responsible for providing and raising the funds of the shareholders required by the second respondent. The second respondent entitlement to the shares was predicated on the basis that it would be making the funding required for the project.
- 33.14. We accordingly agreed that the second respondent would not participate in the joint venture and would accordingly relinquish its share in the first respondent. At the time we reached this agreement we were both directors of the second respondent (i.e. New Heights). As I was required to provide all the funding would take up the 60% shares in the second respondent.
- 33.15. We both took legal advice on how best to achieve what we had agreed on..... This was to be achieved by a conclusion of a new shareholder’s agreement (substituting Mogashoa for New Heights as a shareholder in PAD).

19. For sake of completeness the shareholder's agreement was attached to the papers and recorded that Mogashoa, as nominee for principals to be nominated, would be a shareholder in PAD together with Grand Palace, Summit Ridge and a Mr Yende. It is evident that the respondent was not a party to this agreement.

Mogashoa's status in this subsequent shareholder's agreement may also be problematic. He was not a shareholder in his own right but as nominee of a principal.

20. It is also evident from the above that while there was a purported change in the shareholding of PAD, there is nothing before me to show that there was a consensual change in the shareholding of New Heights.
21. Accordingly in an affidavit deposed to by Mogashoa in other litigation he clearly made a statement against interest. He sought to explain it on the ground that as a layperson he was confused about the status of an executrix in a deceased estate. Irrespective of whether or not he caused the respondent's name to be removed as a director of New Heights lawfully or otherwise, there is nothing before me to demonstrate how Mogashoa acquired Maepa's shares in New Heights or at what value. She was a director and the dispute of how she came to be removed does not shift the issue to an internal shareholder's dispute without

more. Since this is an application, I am satisfied on the papers before me that the point of the respondent's lack of status to bring a s165 demand must fail and that the basis upon which the respondent made demand falls within the scope of protecting "the legal interests of the company" in relation to legal proceedings as envisaged by the section. .

#### CONTENTS OF THE DEMAND

22. In my view this issue can be dealt with summarily. It appears irrelevant whether or not a demand may cover other matters. In the present case it was necessary to do so having regard to the circumstances that then prevailed. The fact that there was a subsequent settlement which may have affected certain of the actions which New Heights was required to take does not render the other terms of the demand pro non scripto. If it were otherwise then a series of demands which contain generally extraneous matter would taint what would otherwise be the enforceable portion.
23. I believe that the real issue comes down to whether the recipient of the notice would understand it to be one in terms of s165 and that a failure to respond would trigger the provisions of that section.
24. There is clearly a portion of the demand that required execution in unequivocal terms. The response of the applicant's attorneys adequately demonstrates that the applicant knew this.

25. As regards the point raised that the demand must relate to steps that are required to be taken in relation to court proceedings so as to “protect the legal interests of the company”, it is self-evident that the question of whether or not New Heights is a shareholder in PAD or whether Mogashoa replaced it as shareholder concerns the legal interests which New Heights may have as a shareholder investor in what appears to be a company that has significant value, namely PAD.

#### VEXATIOUS DEMAND

26. The applicant contends that the respondent made demand for the ulterior purpose of aligning herself with Motsumi in his action and that the action was vexatious.
27. The first difficulty that I have with this submission is that it relates to the stand that New Heights was to take in that litigation. It is self-evident that once Mogashoa was able to get into the driver’s seat at New Heights, whether by due process or otherwise, any genuine issues regarding New Heights’ shareholding in PAD could, at least potentially, be swept under the carpet.
28. Secondly, the respondent has persisted with the demand after the settlement of the Motsumi matter.
29. The issue of the respondent’s honest belief that New Heights retained a shareholding interest in PAD would in the present case be answered by reference to the circumstances that prevailed at the time and which concerned New Heights own interest as the second defendant in the Motsumi litigation.

At face value these do not appear to coincide with Mogashoa’s interests as the fifth defendant in that case. It may have been that Mogashoa was utilising his ability to take effective control of New Heights due to the passing of Maepa to protect his personal

interests. If that was the case then his personal position as fifth defendant would have conflicted with those of New Heights if New Heights was asserting its dominance in PAD as the single largest shareholder in its own right.

30. However as correctly pointed out by Adv. Bhana an honest belief that a good cause of action exists is not on its own sufficient to enable a s165 demand to pass scrutiny. There is also the interrelated factor that the objective sought to be achieved is for the benefit of the company itself and not, as quoted from *Swanson v Pratt*

[2002] NSWSC 583 “for obtaining some advantage for which the action is not designed or for some collateral advantage beyond what the law offers.”

This case was cited by Ndlovu J in *Mouritzen v Greystone Enterprises (Pty) Ltd* and another 2012

- (5) SA 74 (KZD) at para 58.

31. Having regard to the shareholders agreements that were attached, it appears that at the time of the Motsumi litigation and irrespective of any amount that Mogashoa might have put into PAD, New Heights already had an asset in regard to the rights it was seeking to exploit and that at no stage was any value placed on the New Heights' held in PAD at a time when New Heights was the individual majority shareholder. There was no suggestion of any offer of a pay out whether by Mogashoa to New Heights directly or by

any of the other shareholders of PAD let alone by Mogashoa to the respondent as an executor of her late husband's estate in relation to his shareholding in New Heights.

32. Accordingly the argument that the s 165 demand was made vexatiously as understood by the cases cited cannot be sustained.

#### ORDER

33. It is for these reasons the application was dismissed with costs.

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SPILG J

POSTEA: 22 November 2017

#### APPLICATION FOR LEAVE TO APPEAL

1. The challenge to the respondent's sending a s 165 notice under the Companies Act 71 of 2008 was whether her requiring New Heights to support an application involving its interests ("the company") where Mr Mogashoa, a 50% shareholder in the company, was at the very least potentially conflicted constitutes commencing or continuing legal proceedings "or to take related steps, to protect the legal interests of the company" and which in any event did not compel it to adopt a particular stance in litigation or change from a respondent to an applicant.
2. A further challenge was to the respondent's locus standi to make a s 165 demand.
3. These two grounds feature as the substantial grounds for seeking leave to appeal. In some instances it is appropriate to clarify my findings while in others there are issues that are raised now on a slightly different basis than earlier and which need to be considered in deciding on the application.

#### TRIGGERING s165 (2)

0cm; line-height: 150%">4. The preamble to s 165 (2) reads:

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

5. The applicant has effectively submitted that the meaning to be given to the following words of s 165(2) is limited to initiating legal proceedings or taking over proceedings that a company has initiated but is not pursuing.
6. The applicant also seeks to place other restrictions on the section which are clearly case specific to the litigation to which the letter of demand had also related.
7. In my judgment I regarded the section as not so limiting. In effect the applicant sought to restrict the scope of the section to the commencing or continuation of legal proceedings and that the phrase “or take related steps” within the context of protecting the legal interests of the company. It would render the phrase be superfluous and run counter to a basic presumption in the interpretation of legislation that every word in a statute must be given a meaning and that superfluous words are not intended.[1]
8. I accept that this is a so called presumption. However in the case of s 165, which in terms of sub-section (1) abolishes the entire common law on the subject of derivative actions, the presumption must gain weight; particularly having regard to the processes the legislation went through before it was finally enacted.
9. Moreover unless the preamble to s 165(2) is considered in this manner it would amount to giving form over substance. Again it is a trite principle that one has regard to the substance, both in the sense of discerning the purpose of the legislation and as a general precept of legal analysis.
10. It is evident therefore that the phrase “or take related steps” is to be interpreted at least *eiusdem generis* the words that precede it and within the context of protecting the legal interests of a company. This would go to the purpose of the legislation which in turn has regard to the substance of the step which the author of the demand requires the company to take and not its form.

The section is concerned with both initiating or supporting an application as a co-applicant, or if already sued as a party (even if only as an interested party against whom no relief is directly sought) in joining in the relief sought against the other respondents

if the opposition by the other respondents would infringe the companies legal interests of the company.

Since there is no lis between co-respondents the company as one of a number of respondents must then place itself in a position to seek substantial relief

against the other respondents in order to protect its interests as it cannot depend on the applicant pursuing the relief it seeks to finalisation of litigation. The means by which a shareholder or director may seek to enable the company as a cited respondent to establish a lis between the company and the respondents still comes down to seeking relief in its own right and therefore exercising the rights of an applicant (whether in convention or in reconvention) against the other respondents.[2] This remains well within the intention of the legislature. And however

inelegantly framed the demand might be that is clearly what the respondent sought to do.

The issue is therefore not a unique one, but concerns the application of two well established principles of the interpretation of statutes.

#### LOCUS STANDI

11. The applicant took the point that the respondent is not a registered shareholder and therefore could not make a competent demand under s
165. As I understand the law of administration of estates an executor or executrix exercises custody and control over assets of the deceased until there is a distribution to the beneficiaries[3]. If there is more than one beneficiary this may take the form of a distribution of money only after realising the assets in the estate.
12. The applicant contends that registration by an executor nomine officio as a shareholder is essential for the purposes of s 165(2) (a). The subsection only requires an entitlement to be registered as a shareholder which would cover the position of an executrix. If I am wrong then it is unnecessary to consider whether s165 should be given an extended meaning or whether there is a lacuna bearing in mind that a process of requiring the company to register a shareholder may be obstructed or even frustrated by a co-shareholder

with consequential delays through court battles.

13. However an appeal court need not be concerned with that because it is common cause that the respondent was appointed as a director at some stage. It is her removal that is in issue. She contends that any attempts to have removed her would have been wrongful as she never relinquished her rights as director and Mogashoa, as only a 50% shareholder did not purport to convene a proper meeting to remove her when on his own admission he recognised that she at the time had the rights to protect the interest of the other 50% shareholder.
14. On the basic principle of Plascon-Evans[4] the applicant must fail in respect of the factual enquiry as to whether the respondent had been removed as director and whether on the facts it was lawful. Again, if I am wrong then at the very least the applicant was aware that there would be disputes of fact and it did not seek leave to introduce oral evidence.
15. The proceedings were subsequently settled and the applicant contends that its application was intended to be broader than an attack on the specific notice under s165 that had been sent on 14 June by the respondent to the company.
16. I certainly did not understand the case to be argued on this basis when it came before me. While the relief may be broadly framed the grounds were limited to an attack on the letter itself and the respondent's locus at the time to have made that demand. I have indicated that at the very least from the applicant's perspective the respondent's

status was in dispute and it did not seek a referral to oral evidence.

There therefore could have been no final determination in the applicant's favour on a broader relief that precluded the respondent from making any other demand at any stage under s165 in respect of attempting to protect the company's legal interests. The company's legal interest as indicated in the judgment was its shareholding in PAD. PAD held certain rights and even if it could not exploit those rights those rights had an economic value. The applicant's papers neither indicated that value was given or that there was even a discussion between the shareholders regarding whether there was any value that ought to be paid for the right held by PAD irrespective of whether finance was required to enable the rights PAD held to be fully exploited.

#### SUPPLEMENTARY AFFIDAVIT

17. The applicant contends that the respondent was not entitled to file a supplementary affidavit. The respondent asserts that it related to new matter which renders the appeal academic. In view of the outcome of this application I direct that each party bears its own costs.
18. In my view and having regard to the additional submissions made the appeal would not have a reasonable prospect of success nor is there some other compelling reason why the appeal should be heard as contemplated in terms of s 17(1) of the Superior Courts Act 10 of 2013.
19. The application for leave to appeal is dismissed with costs save that each party will bear its own costs in respect of the supplementary affidavit and response thereto.

Date of Judgment (Main application): 15 September 2016

Date of Judgment (Leave to appeal): 23 November 2017

-For the applicant: Adv. AR Bhana SC

Adv. Meiring (main application)

Adv. RM Moultrie (Leave to appeal)

Knowles Husain Lindsay Inc.

For the respondent : Adv. JG Dobie

Leonard Singer Attorneys.

[1] Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd [1993] ZASCA 89; 1993

(4) SA 110 (A) at 116F "If the implication is that the word 'actually' is mere surplusage and can be ignored, that would be contrary to the firmly established rule of statutory construction that a meaning must be given to every word." See National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC) at para 99

[1] Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd [1993] ZASCA 89; 1993

(4) SA 110 (A) at 116F

*“If the implication is that the word 'actually' is mere surplusage and can be ignored, that would be contrary to the firmly established rule of statutory construction that a meaning must be given to every word.”*

See National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC) at para 99

[2] Albeit that if it cannot join as a co-applicant then it would presumably bring a third party notice against the other

respondents; but that goes to the form of the procedure not to the substance of the right sought to be pursued under s165

[3] See s 26(1) of the Administration of Estates Act. Under common law the totality of rights, obligations and power to deal with the assets in a deceased estate vest in the executor or executrix and only that person may deal with them. See Meyerowitz on Administration Estates and their Taxation 2010 edition at paras 12.2 and 12.20

[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984

(3) SA 623 (A) at 634H – I

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