IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 55346 /18

1. Reportable: ~~Yes / No~~
2. Of interest to other Judges: Yes / No
3. Date delivered: 06 August 2019
4. Signature:

JOHANNES FREDERICK GOUWS N.O	First Applicant
WILLEM JACQUES GOUWS N.O	Second Applicant
LYNETTE GOUWS N.O	Third Applicant
ABRAHAM AARON ROUP N.O	Fourth Applicant
(In their capacity as duly authorised trustees of the WM GOUWS Familie Trust)	
JOHANNES PETRUS ERASMUS SWARTS N.O	Fifth Applicant
JOHANNES PETRUS ERASMUS SWARTS N.O	Sixth Applicant
ANETTE VAN ZYL N.O	Seventh Applicant
(In their capacity as duly authorised trustees of the Johan Swarts Familie Trust)	
BORN FREE INVESTMENTS 161 (PTY) LTD (Registration Number: 2004/017211/07)	Eighth Applicant

and

CHAPMAN FUND MANAGERS (PTY) LTD	First Respondent

(Registration Number: 1955/001152/07)

DOUW GERBRANDT KRUGER N.O	Second Respondent
JOHANNES NICOLAAS BELL N.O	Third Respondent
ERIKA KRUGER N.O	Fourth Respondent
ANNETTE VAN ZYL N.O	Fifth Respondent

(In their capacities as duly authorised trustees of the Olympus Trust –IT: 4790/1995)

PATRICK MPHEPHU N.O	Sixth Respondent
ABIGAIL MPHEPHU N.O	Seventh Respondent

(In their capacities as trustees of the Abipa Family Trust –IT: 9498/2004)

PACIFIC COAST INVESTMENTS 121 (PTY) LTD	Eight Respondent
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Ninth Respondent

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JUDGMENT

MAKHUBELE J

Introduction and summary

[1] The relief sought in this application is phrased in the following terms;

> *"1. Setting aside the CM26 Form Lodged on behalf of the 1st respondent with the 9th respondent on 12 January 2011;*
>
> *2. Setting aside the Class B shares in the 1st respondent, and ordering the 6th to 8th respondents to return their share certificates (insofar as it pertains to the Class B shares) to the 1st respondent for cancellation, and expunging the recordal of the Class B shares from the 1st respondent's share register.*
>
> *3. Ordering the 9th respondent to record the setting aside of the Class B shares in the 1st respondent.*

4. *That the applicants pay the costs of this application, unless this application is opposed, in which event the respondents so opposing the application is ordered the costs of this application;*

5. *Further and/or alternative relief"*

[2] The applicants and second to eighth respondents are shareholders in the first respondent. The main, if not sole business of the first respondent emanates from government tenders with the Department of Public Works. At some point the initial shareholders were second respondent, Gouws and Swart (first and fifth applicant in their personal capacities) as well as one Smith. They were required to bring in Black Economic Empowerment partners (BEE Partners) as a condition for extension of their contract which was due to expire in 2010 with a further ten years or more. The sixth, seventh and eighth respondents are some of the BEE partners that were brought in at one point or another.

[3] During 2010, the shareholders agreed to create B Class shares without voting rights. The intention was to give the BEE partners more dividends, but with no control or management of the company. A meeting was called where a special resolution in this regard as well as other issues was passed. The second respondent who is indicated as both Director and Officer in the Company Report was mandated to lodge the CM26 Form for registration with the CIPC.

[4] The record before me is silent about what happened since the passing of this resolution until 2017 when the dispute first brew out. The first thing to note from the relief sought in this matter is the date of the special resolution in the CM26 Form that is alleged to have been unlawfully lodged and or registered. The gist of the dispute centers on the question as to whether the second respondent was authorised by the shareholders to unilaterally amend the CM26 Form and register the B class shares with voting rights.

[5] What is clear though is that the dispute with regard to issue of the registration of the Class B shares with voting rights first arose when the applicants called a shareholders meeting in 2017 and filed a proposal to remove the second respondent as Director in the first respondent. He then responded by producing the voting allocation of all the shareholders. To the applicants' disbelief and dismay, they then realized that they no longer had the majority voting shares to can carry out the removal of the second respondent. On investigation, the issues pertaining to the chain of events were reconstructed, with the information from the CIPC, the discussions amongst themselves, until the launching of this application, as they could not agree on the way forward. They lodged a complaint with the CIPC, but it refused to investigate on the basis that the complaint was *"frivolous, vexations or does not allege facts which, if proven, would constitute grounds for a remedy under the Companies Act 2008"*. The applicants were advised to approach the High Court for appropriate relief.

[6] The second to fifth respondents contend that the applicants have been aware since 2011 that the original special resolution (Form C26) could not be registered because one of the resolutions that created a Class B shares without voting rights was, according to the ninth respondent, not in accordance with the provisions of the Companies Act, at the time the Companies Act, Act 61 of 1973 as amended.

[7] Whilst the applicants admit that indeed there was a legal hurdle with one of the special resolutions, they contend that the second respondent did not inform them, but went ahead and unilaterally amended the special resolution, without the mandate of the shareholders. They maintain that there never was an intention to grant the BEE partners voting rights and they would have never consented to that.

[8] The defences raised by the second to fifth respondents, represented by the second respondent are firstly, that he acted in good faith, on the advice of the auditors and that in any event, he had an express or implied mandate to do whatever was necessary to implement the resolution and this include

complying with legal prescripts. Other defences raised include, prescription of the debt and estoppel. They rely on the conduct of the applicants in terms of which they accepted the facts, and also that they failed to review the decision of the CIPC which they were aware of since 2011.

[9] The sixth and seventh respondents initially filed a notice to oppose, but it was later withdrawn.

[10] The eighth respondent contends that the relief sought is not legally sustainable because the applicants are aggrieved by the actions of the CIPC of stamping and registering the special resolution that until it is so stamped or registered has no legal force or effect. They argue that the available remedy for the applicants is a judicial review of the decision of the ninth respondent. Other defences raised are that the reversal of the voting rights will prejudice the BEE partners.

Summary of findings

[11] The Special resolution in question was passed in terms of section 75(1)(i) of the Companies Act, Act 61 of 1973. The question is whether it was competent for CFM to pass a resolution for creation of shares without voting rights. There is not sufficient evidence that this was permissible in terms of the Articles of association.

[12] Even if Kruger had consulted his co-shareholders and directors by telephone or personal meetings as he alleged, this is not sufficient because one of the requirements for validity of a special resolution is that it should be passed at a meeting of shareholders, for which the prescribed notice would have been given. The CIPC is also enjoined to have regard to the documents emanating from this meeting when considering registration of a special resolution.

[13] If this matter were to be decided on the issue of Kruger's authority, the alleged dispute of facts regarding his authorization to amend the special

resolution are academic in view of the legislated requirements for validity of special resolutions.

[14] The decision of the Registrar to register special resolutions entails having regard to all relevant documents and exercising a discretion, which, on the language of the Act is subject to a court challenge, either to force registration or to investigate a dispute. Therefore, it is the decision or actions of the ninth respondent that caused the applicants to suffer harm.

Articles of association and common cause issues relating to shareholding in the first respondent

[15] It is common cause that the first respondent, who I shall henceforth refer to as "CFM" was previously registered as *'Reislin Investments (pty) ltd* ', and that the second respondent, who I shall henceforth refer to as "Kruger", acquired shareholding and directorship in that company during 1998.

[16] The name change to CFM occurred by special resolution that was registered with the Registrar of Companies on 24 February 1998. The special resolution also made provision for amendment of article 5 of the Articles of Association to provide for a minimum of one and a maximum of ten directors. It also made provision for increment of the company's authorised share capital 'of 100 (one hundred) ordinary par value shares of two rand (one pound) each to 4 000 (four thousand) ordinary shares of two rand each.

[17] The original Articles of Association was registered on 25 April 1955. The only provision that was referred to in the papers before me is Article 3. The heading is titled "*SHARES AND CERTIFICATES OF SHARES*"

As written, it reads as follows:

> *'3. Subject to the provisions, if any, in that behalf of the memorandum of association of the company, and without prejudice to any special rights previously conferred on the holders of existing shares in the company, any share may be issued with such preferred, deferred, or other special rights, or such restrictions, whether in regard to dividend, voting, return of capital or otherwise, as the company may from time to time by special resolution determine, and any preference share may,*

with the sanction of a special resolution, be issued on the terms that it is, or at the option of the company, is liable to be redeemed"

[18] Kruger acquired sole ownership of CFM during 2000.

[19] It is also common cause that other than Kruger, the current shareholders (and others before them) came into the picture during and after it was awarded a tender by the Department of Public Works ('DPW') in 2003.

[20] When the tender was awarded, the shareholders were Kruger, Mr. George Smith, Mr. Gouws and Mr. Swarts. Messrs.' Gouws and Swarts in their representative capacities, are the first and fifth applicants. Their initial shareholding in their personal capacities in CFM was in recognition of their efforts in securing this DPW tender.

[21] Mr. George Smith is the person that alerted Kruger to the tender. His shareholding was 50%. Mr. Gouws was asked to come in as an electrical engineer because that was one of the specifications for this tender. His shareholding was 25%. He diluted his shareholding by giving half of his shares to Mr. Swarts, his co-employee at the City of Tshwane Municipality.

[22] The shareholding of convenience did not end there. They needed BEE (Black Economic Empowerment) partners. Kruger invited Mr. Mabotja's company, the eighth respondent, as his 'BEE' partner in CFM.

[23] The initial contract with DPW was for seven (7) years, meaning that it would have expired in 2010 or thereabout.

[24] Although it is a contended issue, it is however clear from reading the portions of the Shareholders Agreement that I will refer to hereunder that BEE was a consideration that influenced the extension of the contract between CFM and DPW for a further period of ten (10) years.

[25] According to Kruger DPW introduced a certain Mr Phala of Tidal Sea Trading 59 (Pty) Ltd who subsequently obtained shares in CFM. New shares

totaling 2500 were issued. The shareholders also concluded a Shareholders Agreement dated 08 April 2008.

Shareholders Agreement

[26] Save for Mr. Smith, the other parties to the Shareholders Agreement are trusts and companies in which the founding members and others are trustees and / or owners respectively.

[27] The parties to the Shareholders Agreement, dated 08 April 2008 are;

[27.1] Mr. Smith.

[27.2] WM Gouws Familie Trust.

The Trustees are the first to fourth applicants.

[27.3] Johan Swarts Familie Trust.

The Trustees are the fifth to seventh applicants.

[27.4] Born Free investment 121 (Proprietary) Limited.

This is the eight applicant

[27.5] Chapman Fund Managers (Proprietary) Limited

[27.6] Pacific Coast Investments 121 (Proprietary) Limited. This is the eighth respondent, represented by Mr. Mabotja.

[27.7] Tidal Sea Trading 59 (Proprietary) Limited.

[28] Paragraph 2 of the Shareholder's Agreement reads as follows;

"RECORDAL

2.1 The company, was awarded a tender no. PT03/006 to manage the energy consumption of the Department of Public Works during May 2003. This contract ends on 31 May 2010 but can be extended for a further period.

2.2 The company was approached by a Black Empowerment company, Tidal Sea who offered their support to negotiate an extension of the existing contract with the Department of Public Works. As consideration for their support and efforts they were awarded with a ten percent shareholding in the Company by the existing shareholders.

2.3 The Company hereby undertakes, from the effective date, to transfer, to CUMS, all the leased buildings energy management business of the Department of Public Works' currently not part of the Company's contract plus liabilities, and all and any low voltage energy management business emanating from tender number PT03/006 and/or extension thereof, which low voltage energy management services would have, but for this provision 2.3, been provided by the Company to the Department of Public Works-Gauteng North (Pretoria) Regional Office. For this purpose the Company hereby agrees that the CUMS shall directly invoice and collect from the Department of Public Works-Gauteng North (Pretoria) Regional Office any and al fees and revenue emanating from the provision 2.3 to he Department –Gauteng North (Pretoria) Regional Office.

Paragraph 4.3 reads amongst others as follows:

"... The shares will be issued once the Department of Public Works has confirmed in writing that the contract period has been extended. In the event that the contract has been extended by a period of ;- (a) 10 years or less, then Tidal Sea shall start benefitting from such extension of the contract from June 2010; or (b) greater than 10 years, then Tidal Sea shall start benefitting immediately. After the share issue the shares will beneficially belong to and be registered in the names of the following parties:

[29] The shareholding was indicated as follows:

Mr. Smith:	20% (500 shares)
Born Free:	20% (500 shares)
Olympus Trust:	20% (500 shares)
Gouws Trust:	10% (251 shares)
Pacific Coast:	10% (250 shares)
Tidal Sea:	10% (250 shares)

Exit of Smith and Tidal Sea and entrance of Abipa Trust represented by the sixth and seventh respondents

[30] During or about 2010, the shares allocated to Smith and Tidal Sea became available because the former was bought out after a fallout with other shareholders and the latter's were declared null and void.

[31] Abipa Trust, represented by the sixth and seventh respondents came into the picture around this time and purchased some of the 250 of Mr. Smith's shares, acquiring 10% shareholding in CFM. The remaining 500 shares were shared amongst the other shareholders.

[32] The shareholding at the relevant time to which this application pertains (end of 2010) was as follows;

Born Free:	22, 22% (500 shares)
Olympus Trust:	25, 87% (582 shares)
Gouws Trust:	14, 84% (334 shares)
Pacific Coast:	11, 11% (250 shares)
Swarts Trust:	14, 84% (334 shares)
Abipa Trust:	11, 11% (250 shares)

The directors

[33] Save for the amendments indicated above regarding the change of name of the company, number of directors and an increased share capital, the articles of association do not appear to have been amended any further until the purported amendment that forms the subject matter of this application. The powers and duties of the Directors are indicated in Articles 65 to 73. The relevant provision for present purposes appears to be Article 71 that reads as follows;

> *"The business of the company shall be managed by the directors..., and* ***may exercise all such powers of the company as are not by the Companies Act , 1926, or any amendment thereof, or by these regulations required to be exercised by the company in general meeting, subject nevertheless to any of these regulations, to the provisions of the said Act or modification thereof,*** *and to such*

regulations not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting, but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made' (highlighted for emphasis)

[34] In terms of Article 74 (c), the directors are required to ***'cause minutes to be made in books provided for the purpose of all resolutions and proceedings at all meetings of the company,*** *and of the directors and of committees of directors'*.(highlighted for emphasis)

[35] The directors at the relevant time were;

[35.1] Gouws;

[35.2] Swarts;

[35.3] Kruger;

[35.4] Davey Solomon Mabotja;

[35.5] Duduzile Cynthia Myeni; and

[35.6] Ronald George Phala.

[36] It is common cause that the shareholders have a representation in the Board of Directors. It was however not canvassed whether all shareholders are represented. It does not seem to be an issue. The only contention by the applicants was that there is a difference or separation between shareholders and directors' meeting. This was in response to a point made by Kruger that he discussed the rejection of the initial resolution by CPIC with the shareholders' representatives and that they all agreed to the amendment.

The creation of B-Class shares without voting rights and the passing of the special resolution

[37] There is no record of the deliberations that took place on the day of the meeting that was held on 01 December 2010.

[38] The applicants are adamant that the issue of giving voting rights was not an option. They never discussed it and they would not have agreed to it.

[39] The second to fifth respondents' recollection of what transpired in the meeting when the decision was taken is rather vague. Kruger alleges that the parties discussed some form of prohibition on the alienation of the shares and everyone made suggestions. He however does not have any written correspondence and cannot recall who suggested what. The auditor made a presentation to the shareholders and prepared the CM26 Form, which was to be passed in terms of section 75(1) (i) of the 1973 Companies Act.

[40] The eighth respondent, supports the factual contentions of Kruger, but he also gets himself in an untenable position because where it matters most, he alleges that he cannot recall things that happened eight years ago because he thought everything had been resolved. He then pulls the prejudice card when confronted with a possibility of a reversal of the voting rights.

[41] What is common cause though is that the following special resolutions were passed on 01 December 2010 and recorded in the CM26 Form, which was signed by Kruger. It is not clear in which capacity he signed the form because there are three options, namely 'Director/Secretary/Manager' and there is no certainty as to which one was chosen.

The Resolution reads as follows:

> *"1. To convert the company's existing authorised share capital of 4000 (four thousand) ordinary shares of R2-00 (Two Rand) each into 3 600 (three thousand six hundred) ordinary shares of R2-00 (Two Rand) each and 400 (four hundred) ordinary B shares of R2-00 (Two Rand) each.*
>
> *2. To amend the company's Memorandum of Association by deleting the contents of paragraph 4 and to amend it to read:*
>
> *" The capital of the company is R8 000-00 divided into three thousand six hundred ordinary shares of Two Rand each and four hundred ordinary B shares of Two Rand each"*

3. *To amend the company's Articles of Association by the addition[1] of the following article 4.1*

(a) "The company's ordinary B shares are under the control of the board of directors who may in their sole discretion allot such ordinary B shares to any person or cancel such allotments previously made.

(b) The holder of ordinary B shares is not entitled to dispose of such shares to any third party.

(c) The company is entitled to repurchase ordinary B shares at any time and in the sole discretion of the board of directors at the nominal value of such shares and the holder of such shares is obliged to sell such shares to the company upon receipt of written notification from the company, alternatively the company may cancel such allotment previously made.

(d) The holder of ordinary B shares shall enjoy no voting or any other rights normally attached to ordinary shares.

(e) The holder of the ordinary B shares shall have no rights to dividends other than to dividends determined and approved by the Board of Directors in their sole discretion.

(f) Ordinary shareholders of the company will have no right to dividends declared and paid to the holders of ordinary B shares and will have no claim against the company or board of directors in respect of dividends paid to ordinary B shareholders'.

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[1] Article 4 reads as follows:

"If at any time the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of shares of that class) may be varied with the consent in writing of the holders of three-fourths of the issued shares of that class, or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of that class. To every such separate general meeting the provisions of these regulations relating to general meetings shall mutatis mutandis apply but so that the necessary quorum shall be two persons holding or representing by proxy at least one-third of the issues shares of that class"

[42] The notice for the meeting was given on 01 December 2010 and the special resolution was passed on the same day. It appears from a reading of the document that there was consent to waive the prescribed notice period.

[43] It was further recorded that the *"Special resolution passed in terms of section 75 (1) (i) of the Act / Paragraph 'article 3 of the articles'*. There is an option to delete whichever is not applicable, but nothing was deleted.

Events subsequent to passing of the Special Resolution: The dispute

[44] The dispute centers on the new article *4.1(d)* as envisaged in paragraph 3 of the Special Resolution that according to the applicants was unlawfully amended. In its original form it reads as follows:

> *"(d) The holder of ordinary B shares shall enjoy no voting or any other rights normally attached to ordinary shares"*

[45] The circumstances under which the alterations or amendment were made form the gist of the dispute. The words 'no" and 'or' were deleted. 'Or' was replaced by "AND". A handwritten insertion after 'shares' was made. In its amended form, the new article 4.1 (d) reads as follows:

> *"The holder of ordinary B shares shall enjoy voting AND any other rights normally attached to ordinary shares, SUBJECT TO THE REMAINING CLAUSES OF THIS RESOLUTION".*

<u>The applicants' contentions</u>

[46] The applicants contend that the last thing they know about the Special Resolution is that Kruger was mandated to lodge it with the CIPC and that as far as they are concerned, there was no further meeting to authorize the amendment. This is evidenced by the fact that even in its amended version, the CM26 Form still refer to the meeting of 01 December 2010.

[47] They only became aware that there were alterations or amendments during 2018 when they called a general shareholders meeting with a view to

propose that Kruger be removed as a Director in terms of section 71(1) of the Companies Act, Act 71 of 2008. Thereafter, the following events unfolded;

[47.1] In response to a proposed resolution to remove him as a Director, Kruger produced the amended resolution from which they realized, for the first time that they no longer held the majority shares (52%) because the class B shares held by the partners, to their disbelief and shock, now carried voting rights.

[47.2] The applicants made enquiries with CFM's auditors and Kruger regarding the amendment of the special resolution. They were advised that the CIPC had rejected the original CM26 Form because it was in conflict with Section 193(1) of the Companies Act that provides that every member of a company having a share capital shall have a right to vote.

[47.3] The applicants filed a complaint with the CIPC on 12 July 2018 and alleged that *'Class B shares were issued with voting rights on Mr. Douw Gerbrandt Kruger's request without the necessary authority in terms of inter alia sections 36,38 and 16 of the Companies Act, Act 71 of 2008"*.

[47.4] The CIPC issued a *'Notice of Non-investigation of complaint'* on 12 July 2018' and advised, amongst other things that it would not investigate the complaint because *"it believes the complaint to be frivolous, vexatious, or does not allege any facts which, if proven, would constitute grounds for a remedy under the Companies Act, 2008"*.

It also attached a report, Annexure A to elaborate further on the decision not to investigate. Paragraphs 3 and 4 read as follows;

> " 3. *Note that issuing of shares, share transfer, allocation of shares and/or share agreements disputes do not fall within CIPC's mandate.*

4. *The CIPC advises that you apply to the High Court for an appropriate relief in this matter*'.

[47.5] Shareholding of shareholders:

	Pre-Registration		Post-Registration	
Names	**Shares**	**Percentage**	**Shares**	**Percentage**
Abipa	250	11	484	19
PCI	250	11	366	14
Olympus Trust	582	26	582	22
JS Trust	334	15	334	13
WMG Trust	334	15	334	13
BFI	500	22	500	19

[47.6] The applicants also received a copy of communication between the auditors and CIPC dated 24 April 2018, which is an enquiry and confirmation from the latter to the effect that the original CM26 Form could not be processed and was rejected with the notice that reads as follows " *The ordinary "B" shares must have voting rights*".

[48] The intention of creating the ordinary B class shares was to give the BEE partners more dividends, but with no voting rights. They rely on the provisions of article 3 of the Articles of Association, which they contend, that allow for issuing of shares with special rights or restrictions in regard to voting and return of capital dividends.

[49] They contend further that they would not have agreed to issue of the B class shares with voting rights because this is not in line with the purpose for creating the shares. They do not have a problem with the BEE partners having more shares / dividends, but they want a correction or reclassification to be made with regard to their voting rights because they never intended or anticipated a situation where they (BEE partners) would have control or management of the company without any consideration. They are emphatic that Kruger did not consult them or their representatives in the Board before

amending the new article 4.1(d) in the Special Resolution and that if he did, they would not have given the consent.

Second, Third, Fourth and Fifth Respondents' contentions

[50] As indicated, these respondents are trustees of the Olympus Trust. Kruger articulated their version in the answering affidavit.

[51] Save for denying that the B class shares were created in terms of Article 3 of the Articles of Association and that they are a new or different class of shares, Kruger confirmed all other material facts relating to the basis for passing the special resolution and that he was mandated to give effect thereto by lodging and registering it with the CIPC.

[51.1] Kruger contends that there is only one type of shares in CFM.

[52] Kruger contends that he signed the CM26 Form because he was mandated to do so. The Company Auditor lodged the special resolution with the CIPC on 6 December 2010. The CIPC refused to register the Class B shares as non-voting shares. The CM26 Form was resubmitted on 8 January 2011, after amendment as advised by the Auditor, and it was accepted and registered by the CIPC.

[53] He also contends that other than the express mandate, he had a tacit, alternatively implied mandate that he would do all things necessary in order to comply with the legal prescripts to give effect to the special resolution in as far as it concerned the issuing of shares to their BEE partners. At the time when he signed the CM26 form, the B class shares had not yet been registered or issued, as such it is not correct that there was a need for a special resolution to be passed to reclassify the B class shares with voting rights.

[54] The CIPC refused to register the original CM26 Form special resolution and advised that the B- class shares must have voting rights. This is in terms of Section 193 (1) of the Companies Act. The CIPC is empowered to reject the CM26 Form if it does not comply with legislative prescripts.

[55] Kruger maintains that the applicants knew at all times that the resolution was lodged and registered with amendments because he took it up with his co-shareholders and directors, during personal meetings or telephone conversations after the auditors advised him they should change the wording of Resolution 3(d) to make it clear that the holders of ordinary B shares would indeed enjoy voting rights.

[56] The amendment was effected by the Auditor, and he also signed the form. It was lodged by the auditors on 12 January 2011 and was approved by the CIPC on 18 January 2011.

[57] Kruger contends that he acted *bona fide* as advised by the Auditor.

[58] He cannot find records of formal meetings, but this is not unusual because they did not always keep minutes as they trusted one another and issues were often resolved informally. This was the case until at the end of 2017 when personal differences developed between him on the one hand and Gouws and Swart on the other hand. The latter sought to remove him as director in various companies where they were serving together, including CFM.

[59] Kruger also relies on the conduct of the shareholders after the registration of the B class shares to demonstrate the fact that they were always aware that the registration was effected with voting rights.

[60] The BEE partners have received increased dividends since 2011, and they will be severely prejudiced if the resolution is cancelled after this lengthy delay. He contends that the relief sought constitutes a 'debt' for purposes of the Prescription Act 68 of 1969. In this regard, the claim has prescribed.

[61] Kruger also relies on the defence of estoppel. The argument here is that the BEE partners have been led to believe that their B class shares with voting rights are valid and in force. DPW was also led to believe that CFM has

the requisite BEE status, and on this basis the contractual position of CFM was strengthened.

[62] To illustrate the conduct of the shareholders that he alleges caused the BEE partners to act to their detriment and the DPW to increase CFM's BEE credentials, Kruger highlighted the following instances/incidents:

[62.1] He attached an email that he wrote on 15 February 2011 addressed to the Directors / Shareholders. In this email, Kruger referred to the resolution of 01 December 2010 which had been approved by 'CIPRO'. He also reminded them about the reasons for the special resolution and also proposed a way forward to give effect to it. In this regard, he wrote that:

"The reason behind the special resolution was to issue B shares to our BEE partners who will qualify only for dividend income from these shares. We have a limited number of shares available to issue because we converted some of our authorised ordinary shares to create these shares. I took into consideration that to make it simple to declare future dividends from these shares we will approve a dividend per share that will be equal for all shares, i.e. ordinary shares and B shares. In doing so it is impossible get the percentages spot on but I kept in mind the proposed share percentages for our BEE partners and the above reasoning to simplify the calculation and dividend declarations. Hence I want to propose that the new B class shares be issued as follows:

234 B class shares to Abipa Family Trust and;

116 B class shares to Pacific Coast Investments.

The effect of this would be that the current ordinary shareholders of the company are:

Olympus Trust	*583*	*25,911%*
Born Free Investments	*500*	*22,222%*
Johan Swarts Family Trust	*333*	*14, 8%*
WM Gouws Family Trust	*334*	*14, 8%*
Abipa Family Trust	*250*	*11,111%*

Pacific Coast Investments	*250*	*11,111%*
TOTAL ISSUED ORDINARY SHARES	***2250***	***100%***

The B class shareholders are:		
Abipa Family Trust	*234*	*66, 85%*
Pacific Coast Investments	*116*	*33,143%*
TOTAL ISSUED B CLASS SHARES	***350***	
100%		

I WOULD APPRECIATE YOUR URGENT FEEDBACK FOR APPROVAL PURPOSES TO ENABLE ME TO INSTRUCT THE AUDITORS TO CONTINUE WITH THE ISSUE OF THE NEW B CLASS SHARES TO GIVE EFFECT TO THE ABOVE.

Kind Regards
Douw

[62.2] Kruger further alleges that he reported the changes at CFM Board meeting of 2 March 2011. The minutes attached indicate that the meeting was attended by DG Kruger, PJE Swarts, JF Gouws, P Mphephu and D Mabotja. An apology from D Myeni was recorded.
Under item 2, the Board approved the minutes of a meeting that was held on 02 December 2010. No specific issues were noted as arising from those minutes, which do not form part of the record before me.
Under item 5 (New Items), amongst others, the following was recorded; *"Share issues-CIPRO accepted the proposed share issue format and it is now implemented as approved by the Board. The remaining shares will be issued during March 2011".*

[62.3] The ordinary B class shares were issued to the BEE partners with no voting restrictions.

[62.4.] CFM was subjected to regular BEE audit and verification and has successfully tendered for work at DPW which has its own policies

in terms of the Broad-Based Economic Empowerment Act 53 of 2003 and the Regulations and Codes under this Act.

[62.5] The issue of B shares with voting rights was never an issue since 2011 until 2017 when the applicants realized that they did not have sufficient majority to remove him as a director.

[62.6] In 2018 when this issue arose he disclosed all relevant facts to his co-shareholders/directors by email dated 28 April 2018. The email contents are similar to the version he has put up above. The only other relevant point raised was that what transpired when the shares were issued can be confirmed in the *'documents, resolutions and minutes'* which are *'company documents which should be contained in our company share registers and minute books'*.

[63] Registration of B Class shares with voting rights constitutes administrative action by CIPC.

[64] Applicant seeks rectification of voting shares to non-voting shares, and supportive of allocation and relies on Section 37 of Companies Act 2008. This reliance is misplaced, as this section does not support the Applicants.

[65] The practice in CFM has been not to cast votes, but to reach decisions on consensus. This is the reason why there has never been an issue about the voting rights because there was never a need to cast a vote.

[66] Applicants introduced allegations of fraud against him in the replying affidavit, whilst admitting in the founding affidavit that Kruger was authorised to implement the special resolution.

[67] The applicants should have brought judicial review application against the CIPC.

[68] The second to fifth respondents attached a confirmatory affidavit of a Mr. Pieter Hendrik Smit, who described himself as an auditor of C & S Audits Inc. He confirmed the facts deposed by Kruger which he indicated are of his *'own knowledge and from books, records, and documents of the Applicants, which I either have, access to, or have in my possession or under my control, and are to the best of my belief both true and correct*".
He also confirmed the replying affidavit. It is worth noting that C & S is according to the documents CFM's auditors. It is however not clear whether this Smit is the same auditor who advised Kruger to amend the CM26 Form to indicate that the B class shares have voting rights.

Eighth respondent's (Pacific Trust) contentions

[69] Mabotja corroborates Kruger's version that applicants were aware that the CIPC has registered the B class shares resolution with voting rights. According to Mabotja, Kruger made contact with him, but he cannot recall whether it was by telephone or personal meeting to advise him about the amendment that was sought by the CIPC. He was under the impression that Kruger had the requisite implied authority to effect the changes, but he nevertheless gave him the necessary consent.

[70] Other than corroborating Kruger's version, Mabotja contends that the relief sought in prayer 1, that of setting aside the CM26 Form is not legally sustainable because that form only has legal force and effect and is only valid after it has been stamped and registered by the CIPC. As a result, the applicants' remedy would be to review the actions of the CIPC, if they are of the view that they are unlawful.

[71] The other defences is that the relief sought in prayers 2 and 3 , that of setting aside the company's class B shares and return of the share certificates as well as recordal of the setting aside are not legally sustainable. The reasoning is that the shares came into existence by registration of CM26 Form and remains valid until the registration is reviewed and set aside. The share certificates can only be returned and the setting aside recorded only

when the decision of the CIPC to register the CM26 Form has been reviewed and set aside.

[72] The other submissions under the heading 'Correct approach' are actually a lesson on the process of registration of special resolutions, the shortcomings and the gaps in the registration. He referred to sections 200,202 and 203 of the Companies Act, 1973.
I will address these provisions separately.

Mabotja contends that the applicants' complaints should be directed at the ninth respondent (the CIPC and that the Promotion of Administrative Justice Act (PAJA) is applicable. He further contends that the relief sought by the applicants is ill-conceived because it seeks to circumvent the requirements to bring review proceedings without reasonable delay. The applicants will have to explain the delay in bringing review proceedings in 2018 when registration occurred in 2011.

[73] The point made is that on the evidence submitted by the applicants, it would appear like the amended resolution should not have been registered because of some shortcomings on the CIPC's requirements, and in that event, the applicants' remedy is to review the actions of the CIPC.

[74] Mabotja also made a point that the creation of B Class shares was to improve the BEE credentials of CFM for its contract to be extended by DPW during 2010. The essence of shares issued is that they give voting rights/ownership and control of the company.

Legal framework

[75] It appears from the face of the CM26 Form that the special resolution was passed in terms of Section 75(1) (i) of the 1973 Companies Act and CFM's Article 3.
The relevant provision of section 75(1) (i) authorizes a company with a share capital, subject to sections 56 and 102, and if authorized by its articles, to convert any of its shares, whether issued or not, into shares of another class.

Therefore, the second to fifth respondents' contentions that the creation of the Class B shares was not done in terms of the Articles of Association has no merit. If the relief sought were against the decision of the Registrar (CIPC), the parties would have to motivate their decision to create shares without voting rights. The applicants would have to deal with the provisions of Article 3 read with other relevant sections of the Act, particularly on the requirements for voting rights. For present purposes, it is sufficient to note that the Special resolution was passed in terms of the Articles of Association. Whether or not this was competent is not an issue before me.

[76] Section 193, '*Voting rights of shareholders* 'reads as follows:

> *(1) Subject to the provisions of sections 194 and 195 and to the exceptions stated in section 196, every member of a company having a share capital shall have a right to vote at meetings of that company in respect of each share held by him.*
>
> *(2) Every member of a company limited by guarantee shall, unless the articles otherwise provide, have the right to vote at meetings of that company and shall have one vote.*

[77] Section 194, '*Voting rights of preference shareholders*' reads as follows:

> *(1) Notwithstanding the provisions of section 193 (1), the articles of a company may provide that preference shares shall not confer the right to vote at meetings of the company except-*
>
> *(a) during any period determined as provided in subsection (2) during which any dividend or any part of any dividend on such shares or any redemption payment thereon remains in arrear and unpaid; or*
>
> *(b) in regard to any resolution proposed which directly affects any of the rights attached to such shares or the interests of the holders thereof, including a resolution for the winding-up of the company or for the reduction of its capital.*
>
> *(2) The period referred to in subsection (1) (a) shall be a period commencing on a day specified in the articles of the company concerned, not being more than six months after the due date of the dividend or redemption payment in question, or,*

where no due date is specified, after the end of the financial year of the company in respect of which such dividend accrued or such redemption payment became due.

[78] Section 195, 'Determination *of voting rights* 'reads as follows:

(1) A member of a public company having a share capital shall-

(a) if the share capital is divided into shares of par value, be entitled to that proportion of the total votes in the company which the aggregate amount of the nominal value of the shares held by him bears to the aggregate amount of the nominal value of all the shares issued by the company;

(b) if the share capital is divided into shares of no par value, be entitled to one vote in respect of each share he holds.

(2) The voting rights of a member of a private company shall, subject to the provisions of section 193 (1), be determined by the articles of the company.

(3) When any shares of a company are converted into stock, or have been so converted after the first day of January, 1953, all the provisions of this section shall apply mutatis mutandis as if such stock consisted-

(a) in the case of shares of par value, of as many units of equivalent number and value as the number and nominal value of the shares so converted; or

(b) in the case of shares of no par value, of as many units as the number of shares so converted.

(4) Notwithstanding the provisions of this section, the articles of a company may provide-

(a) for the chairman of any meeting to have a casting vote; and

(b) for the votes to which any member is entitled above a stated number to increase, not in direct proportion to the number of shares held, but in some lower proportion specified in such articles and may in such event further provide that no member shall be entitled to a number of votes exceeding the number so specified or that the number of votes to which any member is entitled be limited to a specified number.

[79] Section 196, *'Exceptions as regards voting rights in existing companies'* reads as follows:

(1) The provisions of section 193 (1) shall not apply in respect of shares of a company which at the date of the commencement of this Act had already been

issued without voting rights, or in respect of issued shares (other than preference shares) in respect of which at that date there existed different voting rights or in respect of shares subsequently issued in respect of which there existed at that date a contractual right or obligation to issue any such shares.

(2) If any such company issues new shares, all the provisions of this Act as to voting rights shall, save as provided in subsection (1), apply in respect of such new shares, and, for the purpose of determining the voting rights attached to such new shares as provided in section 195 all its shares shall be deemed to have been issued with voting rights in accordance with the provisions of this Act.

[80] Section 197, 'Exercise *of voting rights*' reads as follows:

(1) Any person present and entitled to vote, on a show of hands, as a member or as a proxy or as a representative of a body corporate at any meeting of the company shall on a show of hands have only one vote, irrespective of the number of shares he holds or represents.

(2) On a poll at any meeting of a company, any member (including a body corporate) or his proxy shall be entitled to exercise all his voting rights as determined in accordance with the provisions of this Act, but shall not be obliged to use all his votes or cast all the votes he uses in the same way.

[81] Section199, 'Requirements *for special resolutions* 'reads as follows:

(1) A resolution by a company shall be a special resolution if at a general meeting of which not less than twenty-one clear days' notice has been given specifying the intention to propose the resolution as a special resolution, the terms and effect of the resolution and the reasons for it and at which-

(a) members holding in the aggregate not less than one-fourth of the total votes of all the members entitled to vote thereat, are present in person or by proxy, or

(b) in the case of a company limited by guarantee, not less than one-fourth of the members entitled to vote thereat are present in person or by proxy, the resolution has been passed, on a show of hands, by not less than three-fourths of the number of members of the company entitled to vote on a show of hands at the meeting who are present in person or by proxy or, where a poll has been demanded, by not less than three- fourths of the total votes to which the members present in person or by proxy are entitled.

(2) (a) If less than one-fourth of the total votes of all the members entitled to attend the meeting and to vote thereat or, in the case of a company limited by guarantee, less than one- fourth of the members of such company, are present or represented at a meeting called for the purpose of passing a special resolution, the meeting shall stand adjourned to a day not earlier than seven days and not later than twenty-one days after the date of the meeting and the provisions of section 192 (2) shall apply in respect of such adjournment.

(b) At the adjourned meeting the members who are present in person or by proxy and are entitled to vote may deal with the business for which the original meeting was convened and a resolution passed by not less than three-fourths of such members shall be deemed to be a special resolution even if less than one-fourth of the total votes are represented at such adjourned meeting.

(3) With the consent of a majority in number of the members of a company having the right to attend and vote at such meeting and holding in the aggregate not less than ninety-five per cent of the total votes of all such members, a resolution may be proposed and passed as a special resolution at a meeting of which less than twenty-one clear days' notice has been given. A copy of such consent, on the prescribed form, shall be lodged with the Registrar together with the copy of the special resolution.

(3A) Notwithstanding the provisions of subsection (1), a resolution may, with the written consent, on the prescribed form, of all the members of the company, be proposed and passed as a special resolution at a meeting of which notice as contemplated in subsection (1) has not been given. A copy of such consent, on the prescribed form, shall be lodged with the Registrar together with a copy of the special resolution.

(4) At any meeting at which a special resolution is submitted to be passed, a declaration by the chairman that the resolution is carried shall, unless a poll is demanded, be conclusive evidence of that fact without proof of the number or proportion of the votes recorded in favour of or against the resolution.

(5) When a poll is demanded regard shall be had, in computing the majority on the poll, to the number of votes cast for and against the resolution.

(6) For the purposes of this section notice of a meeting shall, subject to the provisions of this Act, be deemed to have been duly given and the meeting shall be deemed to be duly held when the notice is given and the meeting is held in the manner provided by the articles of the company concerned.

[82] Section 200 'Registration *of special resolutions* 'reads as follows:

(1) Within one month from the passing of a special resolution a copy of such resolution together with either a copy of the notice convening the meeting concerned or a copy of the consent contemplated in section 199 (3A), as the case may be, shall be lodged with the Registrar, who shall, subject to the provisions of subsection (2), and upon payment of the prescribed fee, register such resolution.

(2) The Registrar may refuse to register any special resolution so lodged with him, except upon an order of the Court, if such resolution appears to him to be contrary to the provisions of this Act or of the memorandum or articles of the company concerned.

(3) A copy of every special resolution for the time being in force shall be embodied in or annexed to every copy of the articles issued after the registration of the resolution.

(4) A copy of every special resolution shall be transmitted by the company concerned to any member thereof at his request, and on payment of an amount of twenty-five cents or such lesser amount as the company may determine.

(5) Any company which fails to comply with any requirement of subsection (3) or (4) and every director or officer thereof who knowingly permits or is a party to the failure, shall be guilty of an offence.

(6) If a company makes default in lodging with the Registrar a copy of any special resolution, and the notice or the consent, as required by subsection (1), the company, and every director or officer who knowingly permits or is a party to the default, shall be guilty of an offence.

[83] Section 201, 'Special *resolutions for altering memorandum or articles and matters in pursuance thereof may be passed at same meeting* 'reads as follows

"Where this Act permits any company to do anything by special resolution subject to the condition that its memorandum or articles authorizes it and its memorandum or articles do not provide for such authority, but do not prohibit it, the company concerned may convene a single meeting for the purpose of-

(a) passing a special resolution for the creation of the said authority in the memorandum or articles; and

(b) passing the intended special resolution".

[84] Section 202, 'Special *resolution to lapse unless registered'* reads as follows

'Any special resolution of which a copy is not lodged with the Registrar and registered by him within six months from the date of the passing of that resolution shall, unless the Court otherwise directs, lapse and be void'.

[85] Section 203, '*Dates on which resolutions take effect* 'reads as follows:

" (1) A special resolution shall not take effect until it has been registered by the Registrar under section 200.

(2) Any other resolution passed by a meeting of a company or of the holders of any class of shares of a company shall have effect as from the date on which it is passed"

[86] Section 204 *'Keeping of minutes of meetings of companies'* reads as follows:

"(1) (a) Every company shall cause minutes of the proceedings at any meeting of the company to be entered, in one of the official languages of the Republic, in one or more minute books kept for the purpose, within one month after the date on which the meeting was held.

(b) Any such minute book shall be kept at the registered office of the company or at the office where such minute book is made up.

(2) For the purpose of this section loose leaves of paper shall not be deemed to constitute a minute book unless they are bound together permanently, without means provided for the withdrawal or insertion of leaves and the pages are consecutively numbered.

(3) The minutes of any meeting purporting to be signed by the chairman of that meeting or by the chairman of the next succeeding meeting shall be evidence of the proceedings.

(4) Any company which fails to comply with any requirement of subsection (1) or (2), and every director or officer thereof who knowingly permits or is a party to the failure, shall be guilty of an offence"

Observations

[87] The applicants did not cite the Auditor, upon whose advice Kruger acted. The advise of the Auditor is material in the creation of the B Class shares and amendment of the Special resolution. Furthermore, it is clear from a reading of the quoted provisions in the 1973 Companies Act that a special resolution is lodged with minutes of a meeting. Whether this happened or not is within the knowledge of Kruger and the auditor.

[88] The applicants downplay the importance of the DPW contract and the importance of the BEE partners whose presence earned the company the extension of the contract. The principle of reciprocity: the applicants wanted government tender as result of BEE status, but did not want to surrender some control to BEE partners (wants to eat cake and still have it). The introduction of BEE where direct empowerment is the focus, in a *"going concern"* naturally leads to dilution of ownership/control, but compensated for by awarding of higher points on scorecard (tender for the benefit of the company).

[89] The applicants failed to ensure compliance with the internal processes as regards the meetings to be held by shareholders, in a going concern entity.

[89.1] They are also silent on the application of the provisions of the Companies Act that I have deliberately reproduced above.

[90] The applicants are silent on the roles of Chairperson and Secretary of the company in a company that is a going concern. The Board failed in its entirety to execute the resolution in a prescribed manner. The role of Board and shareholders in respect of ensuring compliance with both internal

processes and the Companies Act to issue Kruger with a signed resolution by all is a collective responsibility and not an individual responsibility.

Discussion

[91] Whether Kruger was authorised to proceed with registration of the special resolution after the Registrar refused to register non-voting rights shares? Are there genuine factual disputes?

[92] Counsel for the applicants, Mr. Labuschagne SC contends that it was necessary for the shareholders to issue a further special resolution after the original one was rejected by the Registrar and its absence shows that Kruger was never authorised to effect an amendment as he did.

[92.1] This contention in my view is correct and is in line with the provisions of Section 199 of the Companies Act. The requirement for a special resolution to be passed at a meeting of shareholders has been specifically legislated.

[92.2] Even if one were to accept that Kruger did consult with the shareholders and or directors on an informal basis as he alleges, this is not sufficient. Unanimous assent is not sufficient where legislation requires a special resolution **(Quadrangle investments (Pty) Ltd v Witind Holdings Ltd 1975 (1) SA 572 (A)**.

[92.3] Even if this matter were to be decided on the issue of disputes of authority, it is clear that there is no genuine dispute of facts because Kruger appears to have been responsible for the day to day running of the company. It is also apparent from a reading of the newly created article 4.1 that the administration of the new class shares was left to the discretion of the Board of Directors. In the matter of **Moraitis Investments (Pty) Ltd v Montic Dairy (Pty) Ltd**[2], the Supreme Court of Appeal considered whether there was a genuine dispute of lack of authority, and if so, whether it could be resolved on the papers or by a

[2] (799/2016) [2017] ZASCA 54 (18 May 2017)

referral to oral evidence. The onus to prove lack of authority is on the party who alleges so. The court took into account the business association between the parties, the affidavits filed in other matters and basically background facts relating to prior dealings between the trust and the business associates (the respondents) to come to the conclusion that there was no genuine dispute of lack of authority. The defence of lack of authority was dismissed.

[93] Counsel for the second to fifth respondents, Mr. Heystek, submitted that there is a real factual dispute and the matter should be referred to oral evidence to establish whether Kruger had a mandate to effect the changes or not.

[94] Mr. Labuschagne SC did not agree with this submission that there is a real factual dispute. He argued that the defences raised by Kruger do not create a bona fide dispute of fact because if indeed he consulted with the shareholders, he would not be relying on an implied mandate or tacit mandate. Furthermore, he cannot find any record of any meeting where the rejection of the original resolution was discussed. The minutes of the meeting of directors dated 02 March 2011 that he has attached in his affidavit do not say anything about an amended resolution. Instead they confirm the original resolution. If the shareholders knew about the amendment, it would not have been necessary for him to remind them in the email of 28 April 2018. He submitted further that the applicants' version that there was no resolution, formal or informal to amend the initial resolution should be accepted and that Mr. Kruger's denial does not create a bona fide dispute. In this regard, I was urged to keep in mind that as the applicant is seeking final relief in motion proceedings, such relief may be granted only if those facts averred in the applicant's affidavit which have been admitted by the respondents, together with the facts alleged by the Respondent, justify such final relief (***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 632 H - I.***)

In the alternative, it was argued on behalf of the applicants that Kruger's version is inherently incorrect as he sits on many chairs, which do not support his version. The further alternative is that his version should be subjected to cross-examination.
The issue of dispute of authority or authorization is academic in view of what I have already stated above.

[95] On whether the relief of correction or reclassification of shares is competent or not, counsel for the applicant submitted that the provisions of Section 37 (2) of the 2008 Companies Act will be applicable.

The section reads as follows:

> *"(2) Each issued share of a company, regardless of its class, has associated with it one general voting right, except to the extent provided otherwise by*
>
> *(a) this Act; or*
> *(b) the preferences, rights, limitations and other terms determined by or in terms of the company's Memorandum of Incorporation in accordance with section "*

[96] The second to fifth respondents contend that this section would not be applicable because CFM has only one class of shares.

[97] The CIPC has already refused to investigate the complaint and in my view, issues pertaining to the nature of shares that should have lawfully been registered are not relevant, unless the proceedings are directed at the CIPC to compel it to do one or other thing.

Judicial review: whether CIPC decision to register B Class shares with voting rights is a clerical or administrative action.

[98] I agree with the submissions of the respondents' counsel that the functions of the Registrar are not merely clerical but that it exercises a discretion, which of course would be subject to scrutiny by the courts.

This is evident from the language in the various provisions of the 1973 Companies Act that I have quoted in the preceding paragraphs. The Act itself recognizes the rights of companies to approach the courts where the Registrar refuses to act in a particular manner.

[99] In the matter before me, there are at least three decisions that the ninth respondent has taken.

[99.1] The refusal to register the original CM26 Form,

[99.2] The registration of the amended CM26 Form,

[99.3] The decision to refuse to investigate the complaint.

[100] On the question of delay and competency of the CIPC to investigate complaints not lodged in time, the Supreme Court of Appeal in the matter of **Singh & Others v The Companies and Intellectual Property Commission & Others**[3] held that there was no time bar to investigate complaints because the CIPC had an obligation to maintain an accurate register of companies.

> *"[16] Counsel for the appellants focused his submission on the finding of the court a quo, based as it was on s 219(1) (b) of the Act, that the records of the company continued to reflect that Smith was not a director, was an omission which constituted a continuous practice. He submitted that an incorrect insertion into a record of a company is a single act. In the view of counsel for the appellants, the words 'continuing practice' were therefore inapplicable in this case.*
>
> *[17] In my view, it is possible to find an answer to this submission in the dictum of Wallis AJ, in Makate v Vodacom Ltd [2016] ZACC13; 2016 (4) SA 121 (CC) para 192, wherein he states:*
>
> *'In the case of a continuing wrong there can be no question of prescription, even though the wrong arises from a single act long in the past. The reason, which may appear somewhat artificial, but which is well established, is said to be that while the original wrongful act may have occurred in a time past the wrong itself continues for so long as it is not abated.' (Emphasis added). See also Barnett & others v Minister of Land Affairs & others [2007] ZASCA 95; 2007 (6) SA 313 (SCA) para 20-21 and Slomowitz v Vereeniging Town Council 1966 (3) SA 317 (A) at 330H-331G which judgments accept the description of a continuing wrong as one which still is in the course of being committed and is not to be located wholly in a single past action.*

[3] (822/2018) [2019] ZASCA 69 (30 May 2019)

[18] In the present case, however it appears to me to be unnecessary to decide this issue on the basis of a 'continuing practice' in that s 219(1)(a) of the Act is applicable rather than s 219 (1)(b) in which the phrase 'course of conduct or continuing practice is employed. Section 219(1)(a) refers to 'an act for an omission' either of which is applicable in this case. The Commission has an obligation to maintain an accurate register of companies. This obligation is not frozen in time. If it were it would compel the Commission to work knowingly with inaccurate information, even in a case where the record was tainted by fraudulent activity. If, as must be the case, the Commission is enjoined to maintain accurate records and thus effect necessary corrections to ensure accuracy, the failure by a company to ensure that inaccuracies are corrected amounts either to a misrepresentation of the correct position or an omission to correct the incorrect entry. In summary, when s 219(1)(a) of the Act employs the words 'the act or omission' the purpose thereof is to impose an obligation not to misrepresent the accuracy of the records or to omit to ensure that they are corrected. Thus, if the records of the company reflect incorrect information, there is an obligation on officers of the company to ensure that the inaccuracy is cured. Thus the failure to ensure that the record is maintained accurately constitutes either an act or an omission which falls within the scope of 219(1)(a). Thus, if there is a complaint that the records of the company are inaccurate, that constitutes a complaint that there has been an act or an omission which in terms of s 219(1)(a) constitutes the cause of the complaint. The failure to cure the inaccuracy or to draw it to the attention of the Commission constitutes a discrete act which is not frozen in time, which was the appellants' argument in respect of prescription. "

Conclusion and order

[101] The facts of the matter before me clearly demonstrate that it is the decision of the ninth respondent that has caused the applicants the harm that they have alleged in their papers. The legal prescripts are very clear; even if the actions of the second respondents were reprehensible, the real question is whether the ninth respondent has followed the prescribed requirements when registering the amended CM26 Form. This question can best be answered, in the first place by Kruger and the auditors, who are obliged to keep records of the company's resolutions, minutes and other documents. If they have not performed their duties diligently, the applicants' remedies lie in the internal processes, which may include criminal charges if they persist with their allegations of fraud, or even a civil suit of damages. Whatever documents the second respondent and the auditor have submitted to the ninth

respondent will enable the applicants to consider their available remedies and options properly, which include challenging the registration of what they allege to be a defective special resolution.

[102] The relief sought in the notice of motion is simply not sustainable in the absence of a challenge against the ninth respondent and or the second respondent and or the auditor to reveal the nature of documents that served before the former when the amended special resolution was registered. It is not for me to prescribe the nature of the court proceedings or remedies that the applicant should invoke. Such would constitute an academic exercise because of all the gaps in the documentation and sequence of events that I have highlighted in this judgment.

[103] Consequently, I make the following order;

[103.1] The application is dismissed with costs.

TAN MAKHUBELE J
Judge of the High Court

APPEARANCES

Applicant:	**Advocate EC Labuschagne SC**
Instructed by:	Savage,Jooste & Adams Inc
	Nieuw Muckleneuk
	PRETORIA

Second to Fifth respondents:	**Advocate AM Heystek**
Instructed by:	Stefan Swart Attorneys
	Brooklyn
	PRETORIA

Eighth Respondent:	**Advocate Kennedy Tsatsawane SC**
Instructed by:	Gildenhuys Malatji Inc
	Groenkloof
	PRETORIA

Heard on: 12 March 2019