IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2020/12082

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

DATE
SIGNATURE

In the matter between:

MISIBITHI INVESTMENTS (PTY) LTD	1st Applicant
TSIRA CONSOLIDATED INVESTMENTS (PTY) LTD	2nd Applicant
WOMEN IN CAPITAL GROWTH (PTY) LTD	3rd Applicant
PHAMBILI INVESTMENT CORPORATION (PTY) LTD	4th Applicant
THE TRUSTEES FOR THE TIME BEING OF THE MBAZENI TRUST	5th Applicant
TSIVHASE, MASHUDU ELPHAS	6th Applicant
WECBEC LTD	7th Applicant
RAMANO, MASHUDU ELIAS	8th Applicant
AKHONA TRADE AND INVESTMENT (PTY) LTD	9th Applicant
and	
AFRICAN LEGEND INVESTMENT[S] (PTY) LTD	1st Respondent
OFF THE SHELF INVESTMENTS FIFTY SIX (RF) (PTY) LTD	2nd Respondent
THE DIRECTORS OF AFRICAN LEGEND INVESTMENTS (PTY) LTD listed in Schedule 1	3rd to 8th Respondents
THE DIRECTORS OF OFF THE SHELF INVESTMENTS FIFTY SIX (RF) (PTY) LTD listed in Schedule 2	9th to 10th Respondents
THE TRUSTEES FOR THE TIME BEING OF THE ASTRON ENERGY EMPLOYEE PARTICIPATION PLAN TRUST	11th Respondent

(IT3223/2002)	
GLENCORE SOUTH AFRICA OIL INVESTMENTS (PTY) LTD	12th Respondent
ASTRON ENERGY (PTY) LTD	13th Respondent
SHAREHOLDERS OF THE FIRST RESPONDENT (OTHER THAN THE APPLICANTS) listed in Schedule 3	14th to 38th Respondents
BDT CHARTERED ACCOUNTANTS INC	39th Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application to set aside a resolution taken in terms of section 74 of the Companies Act, 71 of 2008 dismissed

Application to have director declared delinquent dismissed

Application granted to validate share issue of the year 2000 – Section 97 of the Companies Act, 61 of 1973

Order

[1] In this matter I make the following order:

1. *The 1st to 10th Respondents' application for the joinder of 14th to 17th, and the 19th to 38th Respondents as co-respondents in the counter application is granted;*
2. *The 1st and the 3rd to 8th Respondents' application to amend the relief sought in the counter application to include that relating to the directors' share issue referred to below, is granted;*

3. *The 1st and 3rd to eighth Respondents' application to raise new matter in their replying affidavit, and to deliver a further replying affidavit, in the counter-application, is granted;*

4. *The 1st and 3rd to 8th Respondents' application to file a supplementary answering affidavit, in response to the 1st to 8th Applicants' application in terms of section 97 of the Companies Act, 61 of 1973 ("the old Companies Act"), is granted;*

5. *The 1st Respondent's application for leave and authority to counter-apply for the relief relating to the directors' share issue is granted;*

6. *The main application by the Applicants:*

   6.1. *The application is dismissed;*

   6.2. *The Applicants are ordered to pay the costs of the application, including the costs of two counsel where so employed, jointly and severally the one paying the other to be absolved;*

7. *The main counter-application by the 1st to 10th Respondents for orders in terms of section 162 and 163 of the Companies Act:*

   7.1. *The application is dismissed;*

   7.2. *The 1st to 10th Respondents are ordered to pay the costs of the application, including the costs of two counsel where so employed, jointly and severally the one paying the other to be absolved.*

8. *The expanded counter-application by the 1st to 10th Respondents for an order that the First Respondent's share issue of 1998-2000 be set aside: An Order is issued in terms of Section 97 of the Companies Act, 61 of 1973:*

   8.1. *Validating and confirming the creation, allotment and issue of the shares issued to the directors of the First Respondent, African Legend Investments (Ply) Ltd ("ALI"), pursuant to the Special Resolution of the Shareholders of ALI adopted on 30 October 1998, read with the Special Resolution of the Shareholders of ALI adopted on 29 September 2000, duly registered, and the Ordinary Resolutions of the Shareholders of ALI of the same dates, and as evidenced by the Share Certificates issued by ALI numbers 328, 338, 333, 343, 336, 346, 331, 341, 332, 342, 334, 344, 330, 340, 329, and 339;*

   8.2. *Directing that a copy of the Order be lodged with the Companies and Intellectual Property Commission ("CIPC");*

   8.3. *Directing that ALI take all required steps and do all things necessary to procure the registration of the Order with the CIPC including the payment of all prescribed fees (if any) so that the shares shall be deemed to have been validly created, allotted or issued upon the terms of the creation, allotment or issue thereof;*

   8.4. *The 1st to 10th Respondents are ordered to pay the costs of the application, including the costs of two counsel where so employed, jointly and severally the one paying the other to be absolved;*

[2] The reasons for the order follow below.

Introduction

[3] The litigation arises out of a power struggle for control of the 1st respondent ("ALI"),[1] in broad terms between the majority of the board members on the one hand and the persons who controlled the majority of the shareholder voting rights on the other. The 'board faction' is led by the 3rd respondent ("Ahmed") and the 'shareholder faction' by the 8th applicant ("Ramano").

[4] I set out the facts very selectively in this judgment. The papers are voluminous and to set out all the averments by all parties would run to hundreds of pages. All the evidence contained in the numerous affidavits have been read and considered.

[5] The applicants are shareholders of ALI. The remaining shareholders are cited as the 14th to 38th respondents.

[6] The application is opposed by the 1st to 10th respondents. When I refer to the respondents in this judgment I am referring to the 1st to 10th respondents unless the context indicates otherwise.

[7] African Legend Energy Holdings is a wholly owned subsidiary of ALI and is turn is a majority shareholder[2] in Off the Shelf 68 (RF) (Pty) Ltd, the majority shareholder[3] in the 2nd respondent ("OTS56"). The latter company owns 23% of the shares in the 13th respondent ("Astron Energy") while the 11th respondent holds 2%.[4] ALI is able to indirectly control the exercise of voting rights of OTS56 and the latter is a related

1 ALI was formerly known as the National Empowerment Corporation (Pty) Ltd or NECorp.
2 It holds more than 83% of the issued shares.
3 It holds more than 70% of the issued shares.
4 Founding affidavit par. 17 (Caselines B21) and "FA1" to founding affidavit (CaseLines B107).

person.[5]

[8] The 3rd to 10th respondents ("the respondent directors") are directors of ALI and OTS56.

8.1 The 3rd to 8th respondents are directors of ALI (the "ALI directors");

8.2 The 5th, 6th, and 8th to 10th respondents are directors of OTS56 (the "OTS56 directors);

8.3 The 5th, 6th, and 8th respondents are therefore directors of both companies;

8.4 Ramano was a director of ALI until he was removed at the annual general meeting on 27 February 2020.

[9] There are a number of applications before the Court and I intend to deal with them independently even though the facts are interconnected.

9.1 In the main application the applicants seek orders[6] that a resolution taken by the board of ALI on 27 February be declared invalid, that a subscription agreement entered into between ALI and the 11th respondent (the "Astron Trust") be set aside, and relief flowing from these orders.

9.2 In the main counter-application[7] the 1st to 10th respondents seek an order

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5 S 2 of the Companies Act, 71 of 2008.
6 Notice of motion (CaseLines B1).
7 Notice of counter – application (CaseLines E1416)

that Ramano[8] be declared a delinquent director or alternatively placed under probation for a period, as well as an order to regulate the affairs of the 1st respondent by directing it to amend its Memorandum of Incorporation to ensure parity of voting rights, and alternative relief requiring the creation of a unanimous shareholders' agreement or the compulsory sale of his shares by Ramano, or further alternative relief.

9.3 The relief sought in the counter – application was subsequently expanded [9] to seek a declaration that a share issue originating in 1998 that was part of a restructuring of the company was in contravention of section 221 and 222 of the repealed Companies Act, 61 of 1973 and unlawful and void, alternatively voidable.

9.4 The applicants brought a conditional counter-application[10] to the expanded relief and sought an order in terms of section 97 of the Companies Act of 1973 that to the extent necessary, the share issue be validated.

[10] It was agreed prior to argument that all the affidavits are properly before Court and a striking out application brough by the opposing respondents was not proceeded with. This sensible agreement between the parties disposed of questions and criticisms relating to new matter in reply.

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8 The notice of counter – application actually refers to the 8th respondent.
9 Amended notice of counter – application (CaseLines F1-191).
10 Supplementary notice of motion (CaseLines G1).

A brief history[11]

[11] In 1998 and after investigations and consultations ALI, a pioneer Black Economic Empowerment company that arose after Democratisation in 1994, was restructured. Ramano took centre stage and enjoyed voting rights disproportionate to and far in excess of his shareholding. This was in accordance with an intended purpose of the restructuring namely to establish a dominant shareholder incentivised to build the company and take it into the future.

[12] The 4th to 8th respondents were directors of ALI at the time and participated in the restructuring. The proposals were implemented unanimously. As will be shown below, Ahmed who had joined the board a few years later together with the other ALI directors now seek to undo the restructuring in a counter application.

[13] Disputes arose within the company. Early in 2019 Ramano was removed as the executive chairperson of the board of ALI and OTS56 by the directors of the two companies.[12] In the same time period Ahmed and the 6th respondent ("Scott") obtained irrevocable undertakings[13] from shareholders of ALI,[14] to vote in favour of, inter alia, the removal of Ramano as a director and chairperson of ALI.

[14] On 4 April 2019 there served resolutions before a general meeting of ALI calling for the removal of Ramano as director, the removal of the ALI directors, and the appointment of new directors. These resolutions were not voted on; instead a Shareholders Committee (commonly referred to as the SOC or Shareholders Oversight Committee) was appointed to investigate the impasse on the board and other issues.

[11] The facts are fully dealt with in comprehensive affidavits and in very helpful heads of argument filed on behalf of the applicants and the 1st to 10th respondents who participated in the litigation.

[12] Founding affidavit par. 109 (CaseLines B52).

[13] Valid for a period of 18 months.

[14] CaseLines B287 *et seq*. These undertakings were the subject of a judgment in this Court under case number 2019/11178 on 3 April 2019 (CaseLInes E946).

The SOC was appointed unanimously.[15]

[15] The SOC furnished an interim report to shareholders in August 2019[16] and an update followed in December of that year. The SOC sought to discuss their findings at a shareholders general meeting.

The applicants' main application

[16] Early in 2020 there was a dispute about the need or otherwise to have a general meeting. Litigation followed but the ALI directors committed to the date of 27 February 2020 for the annual general meeting.

[17] The members of the board were at loggerheads and this is evidenced for instance by a letter[17] by the chairperson of the board, the 4th respondent ("Oliphant") to shareholders on 27 January 2020 on behalf of all board members except Ramano, and setting out the majority's views of the dispute between Ramano and the other board members. The letter was written in response to correspondence circulated by Ramano and the letter also confirmed that the annual general meeting would take place on 27 February 2020.

[18] The meeting scheduled for 27 February 2020 was convened on 12 February 2020 with a record date of 26 February 2020. At the meeting the shareholders were to vote on a number of resolutions,[18] including one to remove Ramano as director and six others to remove the ALI directors. The notice also provided for the appointment of four

15 Founding affidavit annexure "FA15" – the Minutes of the meeting (CaseLInes B297 to 301).
16 CaseLines B311.
17 Annexure "FA25" to founding affidavit (Caselines B459).
18 Annexure "FA4" to founding affidavit (CaseLines B138).

new directors.

[19] It was apparent that the balance of power at the shareholders' meeting was with the Ramano faction and that, barring something unexpected happening, the Ramano faction would have their way and the other directors, including Ahmed would be removed by the shareholders in general meeting.

[20] Something did happen and the applicants say it was unexpected. On 25 February 2020 a number of events took place in quick succession:

20.1 Ahmed as the company secretary circulated[19] proposed resolutions in accordance with section 74 of the Companies Act and clause 31.4.1 of the Memorandum of Incorporation ("MOI"),[20] to the effect that ALI issue authorised but unissued shares to the Astron Trust, represented by its trustees for the time being, Lusanda Ngxonone and Jill Koopman, for R24 million, of which R23 million would be used to fund the acquisition of shares in the 13th respondent ("Astron Energy") and/or in Astron Energy (Botswana) (Pty) Ltd as contemplated in the Pre-Emption Framework Agreement in place between the 12th respondent ("Glencore SA"), OTS56, and Glencore Energy UK Ltd. These were sent at 11h12.

20.1.1 A copy of the intended subscription agreement between the Astron Trust and ALI was attached to the proposed resolution.

20.1.2 It was common cause during argument that the purchase of the shares by the Astron Trust was financed by Glencore.

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19 Annexure "FA26" to founding affidavit (CaseLines B475)
20 Annexure "FA24" to founding affidavit (CaseLines B407).

20.2 The notice accompanying the proposed resolutions requested board members to indicate their response and return the signed resolution to Ahmed.

20.3 No time limit was imposed. Ramano responded by enquiring as to when there had been a discussion among board members regarding the proposals.

20.4 A little over an hour later, Ahmed notified the board that the resolutions had been adopted by a majority of directors. Five of the six directors had supported and signed the resolution.[21] The next day, the 26th, the chairperson informed shareholders that the shares had been issued to the Astron Trust for the purposes of addressing the *"urgent need of funding required for assisting in the acquisition of further interests in"* Astron Energy and meeting the funding needs of the company.[22]

20.5 The resolution was implemented immediately and the necessary entries made in the share register.

[21] The adoption and full implementation of the resolution changed the balance of power and meant that it was Ramano and not the ALI directors who was removed at the annual general meeting on the 27th. The resolutions proposing the appointment of new directors were also rejected.[23]

[22] The notice period for meetings of the board is seven days unless directed otherwise by the chairperson when the board is dealing with urgent matters.[24] The

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21 Annexure "FA27" to founding affidavit (CaseLInes B503).
22 Annexure "FA18" to founding affidavit (CaseLines B511).
23 Annexure "FA29" to founding affidavit (CaseLines B513)
24 Clause 31.4.3.1 of the MOI (CaseLines B446).

applicants argue that the seven day notice period applies also when the directors act otherwise than at a meeting. They rely on *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others.*[25] In this judgment, Carelse AJA said:

> *"[21] The proviso to s 74 requiring notice is to ensure that directors know what is being decided. Our courts have emphasised the importance of giving notice to directors of a meeting so that the participants are aware not only of the existence of a meeting but of the nature of the business. The purpose of the notice is not only to inform directors of the date of the meeting but the reason therefor. There can surely be no difference between the importance of a notice where a board meeting is called in terms of s 73 of the Act and a notice when the provisions of s 74 of the Act are invoked."*

[23] To my mind, the quoted *dictum* underlines the importance of stating the *reasons* for a proposed resolution in the notice referred to in section 74. The notice proposing the resolutions must therefore contain the same information in respect of proposed resolutions as would be required of a notice of a meeting in terms of section 73. When the directors act other than at a meeting, there is obviously no meeting and no meeting date – the proposed resolutions and the reasons therefor must be sent to all the directors. Directors are nevertheless required to take an informed decision and reasons for the proposed resolutions are necessary.

[24] There is nothing in the Companies Act or the MOI that make the seven-day notice period applicable to section 74 of the Companies Act. However, taking decisions in great haste might possibly be indicative of oppressive or unfairly prejudicial conduct within the meaning of these terms in section 163[26] of the Companies Act.

[25] The powers[27] exercised by the board were far-reaching powers, and it should be

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[25] *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* 2019 (4) SA 436 (SCA) paras 18 to 22. See also the judgment in the court a quo reported at 2019 (4) SA 218 (GLD).

[26] See Delport & others *Henochsberg on the Companies Act 71 of 2008* (2011) 298(8) 574(1).

remembered that with great power such as the power to issue shares[28] comes great responsibility. I was referred to authority in England and Australia that make the self-evident point that the exercise of directors' powers to change the balance of power within a company might (depending as always on the facts) be improper.

[26] In *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another*[29] van der Linde J referred to Commonwealth authorities and then concluded that a director's belief that the power was exercised in good faith is still subject to the control of the Court where there is no rational basis for the belief.

[27] Before I deal with the actual or primary purpose of the resolutions and section 163 of the Act, I point out that the ALI respondents' evidence was that the share issue was in fact discussed at board meetings even though the proposed resolutions relating to the share issue were not tabled for decision at those meetings.

[28] The applicants rely on section 163 (1) (b) and (c) of the Companies Act.[30] These two paragraphs provide that -

> *"A shareholder or a director of a company may apply to a court for relief if-*
>
> *(a) …;*

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27 See s 76 of the Companies Act in respect of the standards to be applied to the conduct of directors. See Delport & others *Henochsberg on the Companies Act 71 of 2008* (2011) 298(8).

28 The power to issue shares means that the board has the power to dilute the shareholding of existing shareholders. This is not necessarily objectionable though.

29 *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* 2018 (3) SA 157 (GJ) par. 74 (confirmed on appeal but on a different basis).

30 The equivalent section in the previous Companies Act, 61 of 1973, was s 252 and the authorities that deal with s 252 and with s 11 bis of the Companies Act, 46 of 1926 are still relevant and useful.

> *(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or*
>
> *(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant."*

[29] The respondents argue that the actual purpose of the resolution was not to change the balance of power on the ALI board but to obtain funding for ALI to fund the acquisition of the shares referred to and to carry on business. They argue that obtaining funding is and was the primary purpose pursued by the board.

[30] Oppressive conduct *"involves at least an element of lack of probity or fair dealing"* or a *"visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."*[31] The Court deciding the question is enjoined to look at *"the business realities of a situation"* and to not confine itself to a *"narrow legalistic view."*[32]

[31] Cillié J said in *Livanos v Swartzberg and Others*[33] 1962 (4) SA 395 (W) that *"it is not the motive for the conduct that the Court must look at but the conduct itself and the effect which it has on other members of the company."* This *dictum* was referred to with approval in the Supreme Court of Appeal by Petse JA in *Grancy Property Ltd v Manala and Others.*[34] The *effect* of course was additional and much needed funding. Obtaining the funding was a proper purpose.

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31 *Elder v Elder & Watson Ltd* 1952 SC 49 p 60 & p 55, referred to in *Aspek Pipe Co (Pty) Ltd and Another v Mauerberger and Others* 1968 (1) SA 517 (C) 526H *et seq* with reference to s 11 bis of the Companies Act, 46 of 1926. See also *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) 397E *et seq, Bader and Another v Weston and Another* 1967 (1) SA 134 (C), *Garden Province Investment and Others v Aleph (Pty) Ltd and Others* 1979 (2) SA 525 (D) 531, *Louw and Others v Nel* 2011 (2) SA 172 (SCA) par. 23.

32 *Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66 (HL) 71.

33 *Livanos v Swartzberg and Others* 1962 (4) SA 395 (W) 399.

34 *Grancy Property Ltd v Manala and Others* 2015 (3) SA 313 (SCA) par. 27.

[32] The test is objective.[35] In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*[36] Rogers J said:

> *"[80] As to proper purpose (s 76(3)(a)), the test is objective, in the sense that, once one has ascertained the actual purpose for which the power was exercised, one must determine whether the actual purpose falls within the purpose for which the power was conferred, the latter being a matter of interpretation of the empowering provision in the context of the instrument as a whole. In the context of decisions by directors, there will often be, in my view, a close relationship between the requirement that the power should be exercised for a proper purpose and the requirement that the directors should act in what they consider to be the best interests of the company. Put differently, the overarching purpose for which directors must exercise their powers is the purpose of promoting the best interests of the company."*

[33] The resolution in terms of section 74 of the Companies Act was adopted for a proper purpose. I conclude that the main application ought to be dismissed with costs as set out in the order.

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35 See also *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Another* 2018 (3) SA 157 (GJ) par. 74.1 (confirmed on appeal but on a different basis).

36 *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) par. 80.

The main counter-application: Delinquency

[34] Certain of the present applicants have instituted an action against certain of the respondents in which they seek a declaration of delinquency. Pleadings have closed.[37] The plaintiffs in the action are the 1st to 8th applicants in this application and the defendants are the 3rd to 10th respondents in this application.

[35] In this part of the counter – application the main relief sought by the 1st to 10th respondents is that Ramano be declared a delinquent director for a period of seven years or such other period as the Court may determine, alternatively to be under probation for a period of five years or such other period as the Court may determine, and ancillary relief.

[36] As will be shown below, there are disputes of fact that make it undesirable to decide the question of delinquency on affidavit. A counter-claim in the pending action would perhaps have been more appropriate.

[37] In 2016 Chevron Energy announced an intention to dispose of its interest in Astron Energy. OTS56 secured a commitment to provide financial and technical assistance from Glencore UK In 2017, and then accepted an offer from Chevron Energy for 75% of the issued share capital of Astron Energy and 100% of the issued share capital of Astron Botswana.

[38] OTS56, Glencore UK, and Glencore SA entered into a Pre-Emption Framework Agreement ("the Agreement"). It provided for two transactions.

38.1 In terms of Transaction 1 OTS56 acquired 75% of the share capital of

[37] The summons is Annexure "AA2" to the answering affidavit (CaseLines E383).

Astron Energy and 100% of the shares of Astron Botswana. Funding was provided by Glencore SA in terms of an Exchangeable Loan Agreement.

38.2 In terms of Transaction 2, OTS56 would sell the shares and related interests to Glencore SA with the price to be set-off against the exchangeable loan. Transaction 2 was subject to a number of conditions which included approval by the Competition Commission of and the shareholders of ALI[38] by way of a special resolution.

[39] The Competition Tribunal approved Transaction 1 which became unconditional and effective, and closed on 27 September 2018. On the same day,

39.1 OTS56 and Glencore SA entered into an amendment agreement that provided that if Transaction 2 did not close, OTS56 would be obliged to repay the exchangeable loan within two days, and

39.2 Glencore SA gave a Written Undertaking[39] to procure payment of a distribution by Chevron SA equal to the amount of accrued interest on the preference shares held by OTS69 in OTS56 from 31 March 2018 within ten days of the closing of Transaction 2, or otherwise procure an offsetting mechanism equal to this amount. The Written Undertaking then continued: *"We also agree that at any time between the date of this letter and T2 you may make to us for our consideration in good faith a commercially attractive offer of an acquisition by you of the Shares."* The Written Undertaking concludes with the words *"This letter is legally enforceable."*

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38 S 115 of the Companies Act.

39 Annexure "FA9" to founding affidavit (CaseLInes B273).

[40] It is the case for the applicants that OTS56 acquired an enforceable right to obtain the shares, but that Glencore SA repudiated the Written Undertaking. However, the undertaking to consider an offer is[40] nothing more than an unenforceable *pactum de contrahendo.* All it says is that Glencore SA would consider an offer. It is not bound to accept the offer. This of course does not answer the question why Glencore SA gave such an undertaking and what it meant with the words *"This letter is legally enforceable."*

[41] Ramano however advised the board of OTS56 on 12 October 2018 that Glencore SA had provided a letter which allowed OTS56 to buy Glencore SA out before the closure of Transaction 2. He had received legal advice to the effect that the Written Undertaking was legally binding and constituted an enforceable option.

[42] On 27 November 2018 the ALI shareholders were advised in an attorneys' letter that shareholders who acted contrary to the undertakings might incur liability.

[43] The applicants accused Glencore SA of negotiating in bad faith and at the annual general meeting of ALI on 30 November 2018 the company's shareholders unanimously passed a resolution to the effect that the special resolution referred to above and that was required for the implementation of Transaction 2 be deferred to the end of March 2019. In doing so, the ALI board delayed Transaction 2. To my mind, the fact that the resolution was adopted unanimously implies that Ramano was not acting on his own but with the co-operation of all shareholders.

[44] Further correspondence followed. The solicitors acting for Glencore UK accused OTS56 of being in ongoing breach of its obligations[41] and a week later, on 22 January

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40 Ramano had legal advice to the contrary.
41 Annexure "FA10" to founding affidavit (CaseLines B274).

2019 Glencore SA's attorneys approached[42] the Competition Commission to say that no offer had been made in terms of the Written Undertaking and that it merely provided that Glencore SA would consider an offer. It was alleged that the only remaining transaction for an investigation as a large merger before the Competition Commission was Transaction 2.

[45] Ramano and his co-directors were now on a collision course and Ramano still believed that the Written Undertaking created legally binding rights and duties. Ramano made a presentation to the Competition Commission on 24 January 2019 where he essentially spoke against the approval of Transaction 2 as a large merger. He was critical of the transactions and of OTS56.

[46] The respondent directors had a different view than that of Ramano. Their view was that OTS56 was indeed in breach and they removed Ramano as executive chairperson of the boards of ALI and OTS56 during February 2019. In that month they took legal advice and then confirmed OTS56's unequivocal support for the Glencore SA transactions to the Competition Commission. Romano was removed as director on 27 February 2019 (a matter dealt with above). On the same day he wrote to the Competition Commission to insist that there were unresolved contractual matters with Glencore SA and that he was unable to participate further in the proceedings pending resolution of the disputes.

[47] On 2 April 2019 Glencore SA sought and obtained an urgent interdict compelling ALI to hold a shareholders meeting on 4 April 2019, and to compel certain of the respondents there cited to attend and vote in accordance with the irrevocable undertakings already referred to.

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[42] Annexure "FA11" to founding affidavit (CaseLines B275).

[48] The steps taken eventually led to the successful closing of Transaction 2 and payment of the outstanding balance of the success fee of $15 million.

[49] This part of the counter – application falls to be dismissed on the basis that there were foreseeable disputes of fact as to whether Ramano was delinquent or merely misinformed or acting on incorrect advice, and to whether he acted on his own or with the full support of all shareholders.

The expanded counter-application: the restructuring of 1998-2000

[50] In 1998 ALI had 34 shareholders none of whom held more than 3.5% of the vote and ordinary resolutions required the support of 15 or more shareholders. The company was unwieldy and unable to react quickly in a competitive business environment. These shortcomings were identified in a report[43] commissioned by the chief executive officer at the time, and it was proposed that a dominant shareholder with substantial voting rights and meaningful (but not dominant) economic benefit be created, and further that control of the company be placed in the hands of the board through an allotment of shares.[44]

[43] The NECorp Restructuring document (CaseLines F413).
[44] CaseLines E22.

[51] These proposals were then adopted through resolutions adopted by ALI.[45] Ramano and the ALI directors with the exception of Ahmed served on the board at the time, and Ramano was the dominant shareholder envisaged in the proposals. He enjoyed a disproportionate share of the voting rights[46] and was appointed chairperson of the board.

[52] It is common cause[47] that ALI adopted resolutions authorising the issue of the "A" ordinary and "N" ordinary shares to the directors at the time[48] and that the shares be issued to the directors *"at a subscription price equal to the full diluted[49] net asset value per ordinary and "N" ordinary shares (after the allotment and issue of all of the ordinary and "N" ordinary shares contemplated by this specific authority) as determined by the auditors of the company as at the latest practical date prior to the allotment and issue of all of the ordinary and "N" ordinary shares contemplated by this specific authority."*

[53] It is also common cause that the directors paid for their shares. This did not happen in 1998 as originally alleged by Ramano[50] but in 2000. This *status quo* was accepted by all parties until 2019 when Scott queried the disproportionality of voting power. In response to these enquiries Ahmed carried out investigations and produced a report in December 2019 stating that an analysis of the 1998 to 2000 financial statements indicated that the shares were given to the directors at almost 96% below their net asset value. He later adjusted this figure to between 97% and 99%.

[54] He could not find the minutes of the meetings where these issues were

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45 See s 221(1) of the Companies Act, 1973. Shares could only be allotted or issued with the prior approval of the company in general meeting. Any particular allotment or issue is subject to prior approval by the company in general meeting: S 222 (1). A criminal sanction is provided for in s 222 (2) and s 44 of the 1973 Act.

46 He held 40% of the voting control in general meetings and 8.6% of the equity. The remaining directors held 20% of voting rights in aggregate.

47 The notice of the 1998 annual general meeting is Annexure "AA218" to the replying affidavit (CaseLines F1-202)

48 Ramano, Makoena, Dondolo, Scott, Peer, Tuntubele, Robertson, C Nkosi, and U Skosana

49 Taking into account the shares to be issued in determining the asset value.

50 Replying affidavit par. 43.14 (CaseLines F141).

discussed but stated in his report annexed to the answering affidavit (but not circulated to the board during Ramano's tenure as director) that certain directors had recently raised the issue as to why the shares were issued to directors. This is surprising as shares were issued also to these directors some or all of whom now claimed not to know why they received and paid for the shares two decades earlier, but on the other hand, human memory is fallible and short.

[55] The respondents argue that the transaction is void, alternatively voidable, at the instance of ALI on the basis that –

55.1 Shareholder approval was based on a material misrepresentation;

55.2 An agent is not authorised to act contrary to the principal's interest;

55.3 The grant of authority would have been impliedly conditional upon the authority being exercised honestly;

55.4 Ramano issued the shares contrary to the interests of ALI.

[56] It was also argued that the requisite resolutions are not to hand.

[57] There is a paucity of evidence.

57.1 Ramano admits that his recollection of the events of two decades ago is hazy (and claims that this was why he changed his evidence on affidavit);

57.2 Ahmed was not involved at the time;

57.3 He was making further enquiries from the Companies And Intellectual Property Commission (CIPC) at the time when the affidavits were being prepared but the outcome of the investigation is not known;

57.4 The ALI directors who were involved and knew everything that Ramano knew make no contribution to the affidavits;

57.5 ALI's records are incomplete and at least one minute book is missing.

[58] The company adopted resolutions[51] at the 2000 annual general meeting that referred to and amended the 1998 resolutions that had not been implemented, allegedly due to various clerical and administrative errors, but the 1998 resolutions could not be located. Ahmed undertook to make further enquiries at the CIPC offices.

[59] An analysis of ALI's annual financial statements dated 30 September 2000 shows that the directors paid R52 856 for shares, and Ramano specifically paid R34 735.62 and obtained voting rights of 40%.

[60] In his replying affidavit in the main application Ramano said that the resolutions were implemented in 1998. This was not true and in a further affidavit he says that the shares were issued two years later at par value as the shares had a negative net asset value in 1998 and for some time thereafter. He argued that par value represented the lowest price payable. Issuing shares at below par would result in shares being issued at a discount, which would fall foul of section 81 of the Companies Act, 61 of 1973.

[61] He adds that any non-compliance with the Companies Act of 1973 was inadvertent and had nothing to do with the board at the time. The shares were issued at

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51 CaseLines F1-244.

par level to give effect to the true intention of the parties. He also expressed the view in his last affidavit that the directors were entitled to delay the share issue to best suit themselves. Ramano's evidence in this regard is not satisfactory, but cannot summarily rejected and his explanation that two decades had passed since these events is plausible.

[62] This evidence is disputed by Ahmed who did his own calculations to substantiate his view that the shares were given to the directors at the time at a discount. He calculates that issuing shares to the directors at the time implied a discount of more than 98%. He points out that if, as Ramano alleges, the intention was always to issue the shares at par then the resolutions could have that said so. Ahmed concludes with reference to a report[52] by an accountant and advice from attorneys at the time that the whole board knew that the shares should not be issued at par value in 2000.

[63] The shareholders nevertheless were asked and passed the resolutions of 2000 referred to above. The respondents make the inference that the accountant's report was given to shareholders and on this basis they must also have known that the shares should not be issued at par value. There is no evidence to the effect that they were acting in bad faith in doing so or that they were being misled by the board.

[64] Ramano is critical of Ahmed's calculations and claims that they were done with the benefit of hindsight, and that corrections now done *"cannot …. have an effect on retrospective transactions."*

[65] ALI had a substantial investment in a successful company at the time that increased its share value, and this was known to the shareholders and the board. All parties were aware of the possibility of a fluctuating share price including a meteoric

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[52] Annexure "MR1" to Ramano's further affidavit (CaseLines G86).

rise or fall.[53]

[66] Ramano obtained a report[54] dated 19 June 2000 from an accountant that was intended to answer questions by shareholders about share value. It was received a few days before advice on the share issue was received from the attorneys briefed on behalf of ALI at the time. The report was not intended as a valuation for the purposes of purchase and sale but was obtained to provide shareholders with an indicative value of the shares at the time. His analysis of the accountant's report is nevertheless that par value was the correct price for the shares.

[67] The accountant however determined a net asset value of -R12.79 in September 1999, R39.42 in March 2000 and R28.56 in June 2000.

[68] There are a number of disputes of fact exacerbated by the non - availability of essential documents and unreliable memory on the part of Ramano and probably also the ALI directors. I point to a few.

68.1 ALI was subject to various funding agreements at the time. The agreements would have an impact on share value but the respondents have no knowledge of their whereabouts.

68.2 There are also disputes between Ahmed and Ramano on how the liability of Special Purpose Vehicles has to be dealt with when analysing the financial information.

68.3 Ahmed and Ramano differ fundamentally about the interpretation of

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[53] Reference was made to information obtained from a Senior Client Services Consultant in the office of the Chief Operating Officer of the Johannesburg Stock Exchange.

[54] Annexure "MR1" to Ramano's further affidavit (CaseLines G86).

> financial statements and the valuation of the shares. Ramano alleges that the shares were allocated at par value because the net asset value was below par and Ahmed contends that the shares were allocated at a discount. The calculations done and the interpretation of the available information are disputed.

[69] There is however no evidence of any determination by the auditors of the company of the "*full diluted net asset value per ordinary and "N" ordinary shares (after the allotment and issue of all of the ordinary and "N" ordinary shares contemplated by this specific authority) …. as at the latest practical date"* whenever that date is.

[70] It is also not known whether such information served before the directors or the shareholders in general meeting at any relevant time. Ramano has no recollection of such a valuation but maintains that the shares were issued in terms of such a valuation. It appears from the minutes of a board meeting held on 7 December 2000 that a report of some kind did exist[55] in 2000 but it is not now available to the parties and its contents are not common cause. The dispute surrounding the determination by the auditors is three-fold – whether it existed at all and if it did, what it said and when the auditors' determination was done.

[71] Ramano concedes that there might have been non-compliance with the legislation at the time but states that it was inadvertent.

[72] These factual disputes go to the root of the counter – application, namely the value of the shares during the period 1998 to 2000 and whether the value was determined by "*auditors of the company as at the latest practical date prior to the allotment and issue"* of the shares. Ahmed is an accountant and both Ahmed and

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[55] Annexure "AA292" to the respondent's supplementary replying affidavit (CaseLines H208).

Ramano are by all accounts competent and experienced businesspeople, but no independent expert evidence was presented by any party relating to interpretation and evaluation of the financial statements that are available, and determinations by auditors pursuant to resolutions either do not exist or are no longer to hand.

[73] If the directors believed that they were entitled to delay the share issue without a further valuation post-1998 and thereby to obtain shares at the lowest possible price due to the fluctuations, the question of the value of the shares as determined at the relevant time and reported on by auditors still remains unanswered.

[74] I find it impossible to draw the conclusion on the papers that the whole board of ALI (as then constituted) acted dishonestly and in concert to mislead the shareholders, and that they managed to have resolutions passed at the annual general meetings in 1998 and 2000 by making misrepresentations to the shareholders and then allocating shares to themselves without complying with the requirements imposed by the relevant resolutions.

[75] It is not the case for the ALI directors who were shareholders and directors during the restructuring and who are among the ‘counter – applicants’ that they were acting in bad faith with the intention of causing harm to ALI during 1998 to 2000 when the events that gave rise to the counter – application took place. The case for the ALI directors is that they were quite unaware of anything untoward until they read the report compiled by Ahmed. It is also not their case that they were at all relevant times duped by Ramano or unaware of the true facts when they attended board meetings and annual general meetings. There are simply no *‘mea culpa’* averments in the affidavits by the ALI directors.

[76] The reasonable inference is that when the directors acquired their shares in 2000,

the shares had to their knowledge been valued by auditors at the latest practical date as required and that they were acquiring their shares at the price determined by the annual general meeting. If they were wrong in so thinking they made a mistake but one cannot impute fraud, recklessness or negligence to all the directors who were allocated shares. Such a conclusion is not justified by the evidence.

[77] The respondents likewise do not dispute the averments made by Ramano of clerical and administrative errors at the time.

[78] What is clear however is that there is no evidence of the determination of the full diluted net asset value as determined by auditors at any time and I conclude that the share issue was invalid. The applicants disputed the relief sought by the respondents and also brought a conditional counter – application to the counter – application in terms of section 97 of the Companies Act of 1973. For the reasons set out below I am of the view, on the basis that the share allocation to the directors was invalid because there was no determination by the auditors of the diluted net asset value and that the net asset value was indeed higher than par, that it would be just and equitable to grant an order in terms of section 97.

[79] Section 97 provides as follows:

> *"**97. Validation of irregular creation, allotment or issue of shares.**— (1) Where a company has purported to create, allot or issue shares and the creation, allotment or issue of such shares was invalid by virtue of any provision of this Act or any other law or of the memorandum or articles of the company or otherwise, or the terms of the creation, allotment or issue were inconsistent with or not authorized by any such provision, the Court may upon application made by the company or by any interested person and upon being satisfied that in all the circumstances it is just and equitable to do so, make an order validating the creation, allotment or issue of such shares or confirming the terms of the creation, allotment or issue thereof, subject to such conditions as the Court may impose.*
>
> *(2) The Court shall, when making an order under subsection (1), direct that a copy thereof be lodged with the Registrar.*

(3) Upon the registration of the copy of the said order by the Registrar and after the payment of all prescribed fees, the said shares shall be deemed to have been validly created, allotted or issued upon the terms of the creation, allotment or issue thereof and subject to the conditions imposed by the Court."

[80] Section 97 applies to invalidity howsoever arising and the Court enjoys a wide discretion to be exercised in favour of validation when it is just and equitable to do so.[56] I refer to the following reasons for saying so.

80.1 The share issue and allotment now under attack took place two decades ago.

80.2 All the directors at the time had knowledge of the same facts and supported the resolutions and the implementation of those resolutions at the time.

80.3 There is no indication that any information was withheld from those shareholders who were not directors.

80.4 The 14th to 38th respondents did not join in the counter – application as co-applicants.

80.5 There is no indication that the board as then constituted was acting dishonestly or in bad faith.[57] Such an allegation would have required some of the counter – applicants to allege mischief on their own part, and they did not do so.

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[56] See Meskin & others *Henochsberg on the Companies Act* (2011) 196. The reference is to the digital version made available by LexisNexis as an appendix to Delport & others *Henochsberg on the Companies Act 71 of 2008* (2011).

[57] The Court will be loath to endorse a deliberate attempt at circumventing the law. See *Bauermeister v C C Bauermeister (Pty) Ltd and Another* 1981 (1) SA 274 (W).

80.6 Third parties were not prejudiced.[58]

80.7 The company functioned under the regime now sought to be undone, for two decades and on all accounts did so successfully until disputes arose in about 2018 as set out elsewhere in this judgment.

80.8 The directors who benefitted from the share issue contributed to the well-being of the company for the two decades on the *bona fide* understanding that their shareholding and allocation of votes was legitimate.

80.9 In the two decades, decisions were taken and implemented, The company entered into agreements and did business represented by its board as constituted from 1998 onwards, and shareholders took resolutions on the basis that the voting structure was legitimate.

80.10 To undo the current structure and reverting to 1998 when the company had 34 shareholders none of whom held more than 3.5% of the vote and passing an ordinary resolution required the support of 15 or more shareholders, would be unworkable.

80.11 Erasing the past might have unintended consequences that are not only not foreseen, but are unforeseeable.

[81] I conclude that this is an appropriate case for an order in terms of section 97 of the Companies Act of 1973.

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[58] This was considered an important factor in *Ex parte Durban Deep Roodepoort Ltd* 2002 (6) SA 537 (W).

[82] I therefore make the order as set out above.

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J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **28 FEBRUARY 2023**.

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INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR INC
DATE OF HEARING:	13, 14, & 15 FEBRUARY 2023
DATE OF ORDER AND JUDGMENT:	28 FEBRUARY 2023

SCHEDULE 1

ABDOOLRAWOOF AHMED	Third Respondent
TOMMY RICHARD OLIPHANT	Fourth Respondent
TAOLE RESETSELEMANG MOKOENA	Fifth Respondent
MPHO INNOCENT SCOTT	Sixth Respondent
ANTHONY CHARLES RUITERS	Seventh Respondent
MZUKISI STEPHEN DONDOLO	Eighth Respondent

SCHEDULE 2

TAOLE RESETSELEMANG MOKOENA	Fifth Respondent
MPHO INNOCENT SCOTT	Sixth Respondent
MZUKISI STEPHEN DONDOLO	Eighth Respondent
KEELY CANCA	Ninth Respondent
WELCOME THEMBINKOSI MAZIBUKO	Tenth Respondent

SCHEDULE 3

	SHAREHOLDER		E mail Address
1.	African Pioneer Group (Pty) Ltd	**14th Respondent**	sdondolo@africanpioneer.co.za
2.	Al - Akwan Investment Corporation Limited	**15th Respondent**	mbrey@brimstone.co.za
3.	Almatom Investments Consultants Limited	**16th Respondent**	tommy@krier.co.za
4.	Brimstone Investment Corporation Limited	**17th Respondent**	modea@brimstone.co.za
5.	Commlife Holdings (Pty) Ltd	**18th Respondent**	Faizel.cariem@commlife.co.za
6.	Continental Africa Investment Holdings (Pty) Ltd	**19th Respondent**	taole.mokoena@gmail.com
7.	Cross Country Trading (2) (Pty) Ltd	**20th Respondent**	aaco@wirelessza.co.za
8.	Eastern Cape Black Empowerment Consortium Limited	**21st Respondent**	noncebawotshela@yahoo.com
9.	Firstrand Bank Limited	**22nd Respondent**	Marcello.cecchin@rmb.co.za Shane.thompson@rmb.co.za
10.	Frontline Africa Investment (Pty) Ltd	**23rd Respondent**	arnold@morondova.com
11.	Indweyesakape (Pty) Ltd	**24th Respondent**	akpeer@lagroup.co.za hsattar@lagroup.com
12.	Lerumo Investment Scheme (Pty) Ltd	**25th Respondent**	ramasia@mweb.co.za

13.	Masibambane Consultants (Pty) Ltd	**26th Respondent**	tony@adinah.com
14.	Abdul Kader Peer	**27th Respondent**	akpeer@lagroup.co.za
15.	Sadtu Investment Holdings (Pty) Ltd	**28th Respondent**	nondwe@sihold.co.za mashilo@mmcon.co.za
16.	SMD Family Trust	**29th Respondent**	sdondolo@africanpioneer.co.za
17.	D S Tuntubela	**30th Respondent**	sam@ypi.co.za
18.	Unity Management (Pty) Ltd	**31st Respondent**	mpho@curadox.co.za
19.	Vunani Limited	**32nd Respondent**	pqwaze@vunanicapital.co.za
20.	Wabad Investments (Pty) Ltd	**33rd Respondent**	aaco@wirelessza.co.za
21.	Woman Investment Network (Pty) Ltd	**34th Respondent**	Taole.mokoena@gmail.com
22.	Galikwa (Ptv) Ltd	**35th Respondent**	yusuf.m@telkomsa.net
23.	Lion of Africa Life Assurance Company Ltd	**36th Respondent**	frobertson@brimstone.co.za
24.	African Equity Empowerment Investments Limited	**37th Respondent**	mandla@sekunjalo.com
25.	Frederick John Robertson	**38th Respondent**	frobertson@brimstone.co.za