THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 675/2012
Not Reportable

In the matter between:

GEORGE TALBOT SPENCER	First Appellant
DAVID THURSTON OWEN KOLLER	Second Appellant
ROBERT HUGH FRYER	Third Appellant
PAUL STAVELEY HOWARD	Fourth Appellant
TIMOTHY JOHN ANTHONY SCOTT	Fifth Appellant
DEON ROESTORFF	Sixth Appellant
GERBER GOLDSCHMIDT GROUP SA (PTY) LTD	Seventh Appellant
EMCON AFRICA (PTY) LTD	Eighth Appellant
and	
XOLISA KENNEDY MEMANI	First Respondent
THE TRUSTEES FOR THE TIME BEING OF THE THE MASAKHANE TRUST, IT NO. 6410/100	Second Respondent

Neutral citation:	*Spencer v Memani* (675/12) [2013] ZASCA146 (1 October 2013)
Coram:	Lewis, Ponnan, Pillay and Willis JJA and Meyer AJA
Heard:	**27 August 2013**
Delivered:	**1 October 2013**

Summary: Defence of *lis alibi pendens* – declaration about the same dispute sought in earlier action proceedings and in later motion proceedings – defenceavailable where the same *lis*is pending in two cases in the same court –can be raised before *litiscontestatio*– and immaterial that party raisingthe defence is the plaintiff in the other proceedings.

ORDER

On appeal from: KwaZulu-Natal High Court, Durban (Madondo J, sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court a quo is set aside and there is substituted an order which reads:

'(a) The proceedings are stayed pending the determination of case number 13132/2010 in the KwaZulu-Natal High Court, Durban.

(b) The applicants are ordered jointly and severally the one paying the other to be absolved to pay the respondents' costs of the application.'

JUDGMENT

MEYER AJA (LEWIS, PONNAN et PILLAY JJA concurring):

[1] This is an appeal with leave of the court a quo, against the judgment and order of Madondo J, sitting in the KwaZulu-Natal High Court, Durban. The court a quo rejected the appellants' objection of *lis alibi pendens*(amongst others)and declared that the first respondent, Mr Xolisa Kennedy Memani (Memani), was a director of the eighth respondent, Emcom Africa (Pty) Ltd (Emcom), and entitled to certain information.[1]

[2] The appellants, as respondents in the application that led to this appeal, relied on an agreement of sale which was concluded during 2006 between the first to seventh appellants, who at the time were the shareholders of Emcom, Memani, who is a beneficiary and trustee of the second respondent, the Masakhane Trust (the trust) and the trust (the sale agreement). In terms of the sale agreement, the first to

[1] A number of other defences were raised. It is not necessary to deal with them.

seventh respondents (collectively referred to as the shareholders) sold 25 percent of their shareholding in Emcom to the trust.

[3] The sole purpose of getting the trust on board as a shareholder was to enable Emcom to trade with the benefit of what was referred to as BEE status. The trust warranted that it would achieve such status for Emcom and that the company would be accepted as a 'Black and/or Black-owned Empowered Economic Entity'.

[4] According to the shareholders the sale agreement also included the following term:

'Notwithstanding the transfer of the Shares into the names of the Purchasers, the Purchasers undertake, immediately upon receipt of the said Shares to sign blank endorsed transfer forms and lodge same together with the Shares with the Sellers' nominees & furthermore the Purchasers hereby cede and assign the said Shares back to Sellers as security for the due fulfillment of their obligations hereunder and authorise the Sellers to take transfer of the said Shares in the event of the cancellation and/or the Purchaser's breach of this Agreement.'

[5] It is common cause that a shareholders' agreement was concluded on 16 June 2006 (the shareholders' agreement). The relevant provisions of the shareholders' agreement are clauses 3.1, 3.2, 3.5 and 18 which read as follows:

'3. APPOINTMENT OF DIRECTORS

3.1 Each shareholder holding 15% (Fifteen Percent) or more of the issued shares of the Company shall be entitled to appoint one director of the Company for each 15% (Fifteen Percent) so held.

3.2 Until the shareholders decide otherwise in writing there shall be a maximum of 6 (Six) directors of the Company, 3 (Three) being appointed collectively by TMTrust [the trust] and Spencer [first appellant], and 3 (Three) by the other shareholders represented by GGG [seventh appellant] and Koller [second appellant].

. . .

3.5 Each shareholder entitled to appoint one or more directors shall be entitled, howsoever arising, to remove any of its such appointees [sic] and subject to the written consent of the other shareholder(s), which consent shall not unreasonably be withheld, to replace such appointee.

. . .

18. PROVISIONS AFFECTING THE MASAKHANE TRUST

18.1 TMTrust warrants that it qualifies as 100% (One Hundred percent) "black" for purposes of Broad Based Economic Empowerment Code of Practice;

18.2 Notwithstanding that the TMTrust shall from time to time hold shares in the Company, the parties record that it does so solely as a result of the active involvement of Xolisa Kennedy Memani . . . ("Memani") as director of the business;

18.3 Should TMTrust breach its warranty per clause 18.1, and not rectify or be capable of rectifying said breach having received reasonable notice to do so, or should Memani die, TMTrust hereby irrevocably consents to the other Shareholders, in their collective discretion, repurchasing the TMTrust's shares (or any part thereof) in the business, and, in the case of a breach of clause 18.1, restoring the status quo ante, and should Memani die applying the terms of clause 17 above.'

[6] Several disputes arose during the years that followed the conclusion of the sale and shareholders' agreements. The appellants maintained that the trust had breached the warranty relating to the trust's BEE status and that Memani and the trust had failed to remedy that breach. They accordingly cancelled or considered the sale agreement 'to be of no force and effect', the trust not being entitled to appoint a director to the board of directors of Emcom and Memani not eligibile or entitled to be a director of Emcom. It is stated in the answering affidavit that the appellants

'... as they were entitled to, restored the status quo ante and re-transferred the shares that were allotted to Second Applicant [the trust] and First Applicant [Memani] lost his entitlement to be a director.'

It is the alleged breach of the warranty and restoration of the *status quo ante* that is the foundation of the litigation between the parties.

[7] During October 2010 the first, second, third and seventh appellants and Emcom (plaintiffs) instituted action against inter aliosMemani and the trust in the Kwazulu-Natal High Court, Durban in which they sought declaratory orders that the sale agreement between them and Memani and the trust had been validly cancelled or that it was unenforceable; that Memani and the trust were not members of Emcom and that their removal from the register of members was valid; and that Memani was not a director of Emcom and that his removal from the register of directors was valid. The repayment of certain dividends that were allegedly paid by Emcom inter alia to the trust and to Memani, plus interest, was also claimed. The plaintiffs pleaded the sale agreement; its breach by the trust in not qualifying for BEE rating purposes and in failing to fulfill the condition of the sale by not achieving BEE status for Emcom; and its cancellation by the plaintiffs. They pleaded that

Memani and the trust were consequently not entitled to be shareholders and that Memani was not entitled to be a director of Emcom. The concluding paragraph of the particulars of claim reads:

'Second and Third Defendants [Memani and the trust] dispute the aforementioned contentions of Plaintiffs and contend that they are shareholders of Fifth Plaintiff [Emcom], that Second Defendant is entitled to be a director of Fifth Plaintiff and that Plaintiffs are not entitled to a refund of the sum of R389 512-69 or any portion thereof.

[8] Memani and the trust defended the action and it is still pending. The application that led to this appeal was subsequently brought against the shareholders and Emcom during June 2011, also in the Kwazulu-Natal High Court, Durban. In the application Memani and the trust sought a declarator that Memani was a director of Emcom and for the setting aside of his 'purported removal' as director. The appellants raised the objection of *lis alibi pendens*to the application that an action had already been instituted in the same court.

[9] In *Nestlé (South Africa) (Pty) Ltd v Mars Inc* 2001 (4) SA 542 (SCA), Nugent AJA said the following:[2]

'The defence of *lis alibi pendens*shares features in common with the defence of *res judicata* because they have a common underlying principle, which is that there should be finality in litigation. Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*). By the same token the suit will not be permitted to revive once it has been brought to its proper conclusion (*res judicata*). The same suit between the same parties, should be brought once and finally.'

[10] In *Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA), this court reaffirmed the principles referred to in the above passage and went on to refer with approval to the following passage by *Voet*44.2.7 (Gane's translation) vol 6 at 560*:*[3]

'*Exception of* lispendens *also requires same persons, thing and cause.* - The exception that a suit is already pending is quite akin to the exception of *res judicata*, inasmuch as, when a suit is pending before another judge, this exception is granted just so often as, and in all those cases in which, after a suit has been ended there is room for the exception *res judicata*, in terms of what has already been said. Thus the suit must already have started to be mooted before another judge between the same

[2]Para 16.
[3] Para 13 fn 1.

persons, about the same matter and on the same cause, since the place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending.'

[11] Voet states further:

'Pending suit defined. Moreover a suit is deemed to have been begun and thus to be pending elsewhere not only if joinder of issue has already taken place, but also if there has been merely a citation or summoning to law, since such a thing brings on anticipation. This is so provided that the statement of claim or at least the cause for claiming has at the same time been notified to the defendant, so that it can be known whether the suit is being again set in motion elsewhere on the same cause and about the same matter, or on the other hand the cause or matter is different.'

[12] Our courts have adopted Voet's view that the defence of *lispendens* can be raised before *litiscontestatio* (close of pleadings) although many writers on the Roman-Dutch practice held the contrary view that there is no *lispendens*before *litiscontestatio*.[4] The defence is also available where the same *lis* is pending in two cases in the same court.[5] A defendant can raise the defence even though it is the plaintiff in the other proceedings.[6] The

'… requirement of the same cause of action is satisfied if the other proceedings involve the determination of a question that is necessary for the determination of the case in which the plea is raised and substantially determinative of the outcome of that latter case.'[7]

[13] I disagree therefore with the principal submission made by counsel on behalf of Memani and the trust that the defence of *lis alibi pendens*was not available to the appellants by reason of the fact that the origin of Memani and the trust's entitlement to relief in the application was the shareholders' agreement which did not feature in the trial action. A declaration about the same dispute – whether Memani is a director of Emcom - was sought in both the earlier action and later application. The concluding paragraph of the particulars of claim refers to the contentions of Memani and the trust that they were shareholders of Emcom and that Memani was entitled to be a director of the company. Although their plea had not been delivered by the time the application was brought, Memani and the trust in their founding affidavit

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[4] See: *Michaelson v Lowenstein* 1905 TS 324 at 328; *Van As v Appollus&Andere* 1993 (1) 606 (C) at 609G-610B.
[5] *Marks &Kentor v Van Diggelen*1935 TPD 29 at 37.
[6] *CaesarstoneSdot-Yam Ltd v The World of Marble and Granite CC* (741/12)[2013] ZASCA 129 (26 September 2013) para 23; *Cook v Muller* 1973 (2) SA 240 (N) at 246B-D.
[7] Per Wallis JA in*Caesarstone*(supra) para 21.

disclosed the grounds upon which they relied in support of their contention that Memani was a director of Emcom and that his removal from the register of directors was invalid. They relied on clause 3.1 of the shareholders' agreement, which entitles the trust to appoint one director to Emcom's board of directors. Memani, it is alleged, was the trust's appointed director and his removal as a director, if it happened, would not have been in compliance with the procedural requirements prescribed by s 220 of the Companies Act 61 of 1973 relating to the removal of a director, and is therefore null and void.

[14] There is no need to consider the merits of the contention. It is a matter for the trial court to determine. To refuse to allow the objection of *lis alibi pendens* simply because the plaintiffs in the action did not spell out the grounds upon which Memani and the trust rely in the dispute about which a declaration is sought would amount to an elevation of form over substance. The trial court will have to decide upon the very matters which the court a quo was asked to decide upon as far as the directorship of Memani is concerned. The pending earlier action and the later application involve the same parties (the relevant shareholders,[8]Emcom, Memani and the trust) and are based on the same cause of action and in respect of the same subject-matter as far as the dispute relating to Memani's directorship is concerned. Had the relevant appellants obtained judgment in their favour in the earlier action on the question of Memani's directorship, the respondents would have been met by a plea of *res judicata* had they thereafter instituted the application that led to this appeal.

[15] There are compelling reasons why the *lis*which was first commenced should be the one to proceed. A decision of the application will not bring finality in the litigation between the parties but merely result in a piecemeal adjudication of the issues in dispute between them. For purposes of this matter, the appellants' version must be accepted that Memani '…performed no functions as a director …' and '… showed no interest in doing so …' during the period between June 2006 (when the shareholders' agreement was concluded) and February 2010 (when the sale of shares was allegedly cancelled).[9] There is consequently no reason why the

[8] It is common cause that the shareholders and directors of Emcom have changed from time to time. The second, fourth, and seventh respondents are no longer shareholders of Emcom and a certain Ms Vermeulen has in the meantime become one. It is stated in the appellants' answering affidavit that'[a]ll interested parties who have not been cited in the action due to the changes in directorship and shareholding will be joined in the action in due course.'

[9]See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

decision, to be taken in due course by the trial court on whether Memani should be declared to be a director of Emcom, should be pre-empted and decided separately in the application proceedings. Furthermore, a weighty consideration is the one mentioned by Navsa JA in *Socratous*.[10] This consideration is summarised as follows in the headnote of that judgment:

'South African courts are under severe pressure due to congested court rolls, and the defence of *lis alibi pendens*must be allowed to operate in order to stem unwarranted proliferation of litigation involving the same parties based on the same cause of action and related to the same subject-matter.'

[16] The judgment of the court a quo on the question of *lis alibi pendens*is brief and not reasoned. Madondo J held as follows:

'In the premises I find that his [Memani's] removal was unlawful. That the respondents [the present appellants] have become wise after the event. In fact they tried to lock the stable door after the horse has bolted by trying to obtain an order confirming what they have done. So such proceeding in my view could not constitute an impediment to the granting of this application.'

[17] The court a quo erred in not finding that the requisites of a plea of *lis alibi pendens*have been established. It also did not duly and properly exercise its discretion in allowing the application to proceed given the facts and considerations that I have mentioned.

[18] In the result the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2The order of the court a quo is set aside and there is substituted an order which reads:

'(a) The proceedings are stayed pending the determination of case number 13132/2010 in the KwaZulu-Natal High Court, Durban.

[10]Para 10 (supra).

(b) The applicants are ordered jointly and severally the one paying the other to be absolved to pay the respondents' costs of the application.'

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P A MEYER
ACTING JUDGE OF APPEAL

WILLIS JA (dissenting):

Introduction

[19] I have read the judgment of Meyer AJA. I do not agree with his conclusions that the high court did not properly exercise its discretion in the face of a plea of *lis alibi pendens* and that there was, therefore, no need to consider the merits of the contentions relating to Memani's alleged directorship of Emcom Africa (Pty) Ltd, the eighth appellant. Accordingly, it is necessary for me traverse the issues more fully ─ precisely because I think that the high court had issues before it which it could, should and indeed did adjudicate whereas Meyer AJA does not think so.

[20] The relief which the respondents in this court had successfully sought in the high court was predicated upon a written agreement which had been entered into between the parties in 2006.

[21] Not only were the eight appellants in this appeal the respondents in the high court but the appellants were also the plaintiffs in a related trial action in which the respondents in this appeal were defendants. Against this background, I shall refer to the parties as follows: Mr George Talbot Spencer, the first appellant, as 'Spencer'; Spencer and any of the second to eighth appellants collectively as 'Spencer and his associates'; Emcom Africa (Pty) Limited, the eighth appellant, as 'Emcom'; MrXolisa Kennedy Memani, the first respondent in this appeal, as 'Memani'; the Trustees for the time being of the Masakhane Trust, the second respondent in this appeal, as 'the Trust'; and Mpisi Trading 48 (Pty) Ltd as 'Mpisi'.

[22] Memani and the Trust sought an order in the high court by way of application in motion proceedings that the purported removal by Spencer and his associates of Memani as a director of Emcom be set aside, that the high court issue a declaratory order that Memani was indeed a director of Emcom, that Spencer and his associates were to supply Memani and the Trust with certain information, including documentation and that Spencer and his associates were to be ordered to pay the costs of Memani and the Trust in the application. The time period that was applicable to the documentation to be provided was from February 2007 to the date of the court's order. This documentation included minutes of meetings of the board of directors of Emcom, lists of its customers since February 2007, as well as its potential customers in terms of tenders actually made, management accounts, annual financial statements, sales records, sales receipts, bank statements and certain information, including documentation, relating to Emcom's standing in terms of broad-based black economic empowerment ('BEE') as well as the representations which Emcom had made, generally to the public, in respect thereof. The high court granted Memani and the Trust the relief which they had sought.

The Relevant Facts

[23] On 9 June 2006 Spencer and the second, third, fifth, sixthand seventh appellants, together with the Trust (all of whom were shareholders of Emcom) entered into an agreement with Emcom. For convenience this agreement is referred to as the 'shareholders' agreement'. In terms of the shareholders' agreement, each shareholder owning 15 per cent or more of the issued shares in Emcom is entitled to appoint a director of Emcom. The Trust, at the time of entering into the shareholders' agreement, owned more than 15 per cent of the shares in Emcom. Memani and the Trust claim that, by reason of the provisions of the shareholders' agreement, Memani had been appointed as a director of Emcom. Spencer, as well as the second, third, fifth and sixth appellants were, at all material times, directors of Emcom. The seventh appellant, which also owned more than 15 per cent of the shares in Emcom, appointed the fourth appellant as a director of Emcom.

[24] On 5 November 2010 Spencer and his associates instituted an action in the KwaZulu-Natal High Court, Durban in which they sought an order that Mpisi, Memani and the Trust 'are not members of' Emcom and that 'their removal from the register

of members by the Fourth Defendant' (the Registrar of Companies) was 'valid'. Spencer and his associates also sought an order declaring that 'the transaction for the sale of shares' by Spencer and his associates to Mpisi, Memani and the Trust had been 'validly cancelled, alternatively is unenforceable'. Spencer and his associates sought a further declaratory order that Memani was not a director of Emcom and that his 'removal from the register of directors' by the Registrar of Companies was 'valid'. Moreover, Spencer and his associates sought an order that Memani and the Trust pay the sum of R389 512.68 to Emcom, together with interest and costs.

[25] Spencer and his associates did not make reference to the shareholders' agreement in their particulars of claim. They did, however, resist Memani and the Trust's application on the basis that the shareholders' agreement contained a warranty that the Trust would provide Emcom with BEE certification. They claim that the agreement provided that, in the event that there was a breach of this warranty, the status quo ante would be restored. As Spencer and his associates contend that the Trust was in breach of this warranty, they go on to assert that the status quo ante had been restored and, accordingly, that Memani had, ipso facto, not only lost his entitlement to be but had also ceased to be a director of Emcom. The parties agreed that the relevant clause relating to the warranty and the restoration of the status quo ante, is clause 18 of the shareholders' agreement. By reason of clause 18's importance it is quoted below in extenso:

'18. **PROVISIONS AFFECTING THE MASAKHANE TRUST**

18.1 TMTrust [defined in the agreement as The Trust] warrants that it qualifies as 100% (One Hundred percent) "black" for purposes of Broad Based Economic Empowerment Code of Practice;

18.2 Notwithstanding that the TMTrust shall from time to time hold shares in the Company, the parties record that it does so solely as a result of the active involvement of Xolisa Kennedy Memani ("Memani") as a Director in the business;

18.3 Should TMTrust breach its warranty per clause 18.1, and not rectify or be capable of rectifying said breach having received reasonable notice to do so, or should Memani die, TMTrust hereby irrevocably consents to the other Shareholders, in their collective discretion, repurchasing the TMTrust's shares (or any part thereof) in the business, and, in the case of a breach of clause 18.1, restoring the status quo ante, and should Memani die applying the terms of clause 17 above.'

The parties place differing interpretations on clause 18.3. The case turns, ultimately, on what one makes of clause 18.3, read together with clause 18.1. It is, however, undisputed that Memani and the Trust were not called upon to rectify the alleged breach and that the shares were not repurchased as provided for in clause 18.3.

[26] On 25 March 2011 Memani and the Trust took exception to the particulars of claim in the trial action. The exception was opposed. The exception was set down by the excipients for hearing on 21 April 2011. On 16 May 2011 Spencer and his associates served a notice on their opponents indicating an intention to amend their particulars of claim.

[27] In the meanwhile, in the weeks and months preceding the bringing of the application by Memani and the Trust in June 2011, in an exchange of correspondence between the attorneys acting for the contending sides, Spencer and his associates asserted that Memani was ‘no longer a director’ and that he had been removed by a resolution of Emcom taken on 24 March 2010.

[28] In the answering affidavit Spencer protests that Memani did not allege when, in what manner and how he had become a director. Spencer did not, however, dispute that Memani had, in fact, been a director.

[29] Spencer did not allege in the answering affidavit that Memani had been removed as a director of Emcom in terms of the provisions of s 220 of the then applicable Companies Act 61 of 1973, as amended (‘the old Companies Act’). Spencer contends in the answering affidavit that whether or not there had been compliance with s 220 of the old Companies Act was irrelevant to the issue of whether Memani had an entitlement to be a director of Emcom.

[30] It is common cause that Memani has not received the information which has been sought in the prayers of the notice of motion.

[31] On 23 August 2011, Memani’s attorneys wrote to Spencer’s attorneys contending that they had ‘no desire to omit interested parties’ and enquired as to the whereabouts of a certain MsVermeulen who ‘may have an interest in the matter’. Spencer’s attorneys replied that MsVermeulen was, as at August 2011, a shareholder of Emcom but that MrsVermeulen had not been a shareholder at the

time of the ‘Mpisi transaction’ or at any other relevant time. The ‘Mpisi transaction’ refers to the sale, with effect from 1 June 2003, by Spencer and the second appellant of a shade less than 50 per cent of the shares in Emcom to Mpisi. MsVermeulen has brought no application to be joined in these proceedings.

The Decision of the High Court

[32] The high court found that, on Spencer’s own version of events, the only reasonable inference that could be drawn was that Memani had indeed been a director of Emcom. Upon this foundation the high court concluded that the removal of Memani as a director had been unlawful; that Spencer and his associates had instituted an action to confirm what they had done was no impediment to Memani and the Trust obtaining the relief which they had sought; that Memani, as a director of Emcom, was entitled to the information which he and the Trust had sought; and that, in the light of the history of the matter, there was no merit in the complaint by Spencer and his associates concerning the issue of non-joinder. The high court decided that the application should succeed and granted an order accordingly.

The Contentions of the Parties

[33] Counsel for Spencer and his associates submitted that, as Memani and the Trust had failed to establish that Memani had indeed been appointed as a director of Emcom and, as their whole case had been predicated upon his having been a director, Memani and the Trust’s forensic horse had not even entered into the starting blocks: Memani and the Trust were out of the case before it could even be argued.

[34] Perhaps more critically for the resolution of this case, Spencer and his associates relied on the alleged breach of the Trust’s warranty to obtain BEE certification to justify a restoration of the status quo ante which, in their submission, necessarily resulted in the reversal of the Trust’s shareholding and, correspondingly, Memani’s entitlement to be a director and to derive any rights therefrom.

[35] Spencer and his associates furthermore contended that the application by Memani and the Trust had been fatally defective in that MsVermeulen had not been joined in the proceedings. Spencer and his associates also submitted that the high

court had failed to apply its mind at all to the question of the discretion which it had to exercise in terms of s 19(1)*(a)*(iii) of the Supreme Court Act 59 of 1959, as amended ('the Supreme Court Act'); that the high court had been wrong in not having accepted the protest by Spencer and his associates that their previously instituted action against Memani and the Trust had given them a valid defence of *lis alibi pendens*; and that the high court had failed to take into account, as it is required to do, that the order would not finally resolve the dispute between the parties.

[36] Memani and the Trust submitted that, as a matter of law, the shareholders' agreement gave rise to Memani's appointment as a director, without the need for any further ado. They relied on *Gohlke and Schneider & another v WestiesMinerale (Edms.) Bpk and another.*[11] Mr Olsen, who together with MrBoulle, appeared for Memani and the Trust, supported the reasoning of the high court and went on to submit that, in any event, the past correspondence between the respective attorneys and the particulars of claim in the trial action together with Spencer and his associates' responses in their answering affidavit, justified the conclusion that Memani had indeed been a director of Emcom. Similar submissions were made in regard to the 'non-joinder point' taken by Spencer and his associates.

[37] Mr Olsen submitted that, at common law, a person was entitled to a declaration of rights if his rights had been infringed. Mr Olsen developed this submission further by contending that the issue of the exercise of a discretion by the judge hearing the application in the high court did not arise where rights had, in fact, been infringed. Mr Olsen submitted that the terms of s 19(1)*(a)*(iii) of the Supreme Court Act did not detract from this common law right. In this regard he relied on *Geldenhuys and Neethling v Beuthin.*[12]

[38] Mr Olsen contended that the defence of *lis alibi pendens* was not available to Spencer and his associates by reason, inter alia, of the fact that the *fons et origo* of Memani and the Trust's entitlement to relief was the shareholders' agreement which did not feature in Spencer and his associates' particulars of claim in the trial action. Mr Olsen submitted that the appellants could have applied for a consolidation in terms of rule 11 of the Uniform Rules of Court.

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[11] *Gohlke and Schneider & another v WestiesMinerale (Edms.)Bpk& another* 1970 (2) SA 685 (A).
[12] *Geldenhuysand Neethling v Beuthin* 1918 AD 426.

[39] Memani and the Trust claimed that the purported removal of Memani as a director of Emcom was unlawful inasmuch as (i) there had been non-compliance with the procedures for which provision had been made for the removal of directors in terms of s 220 of the old Companies Act; and (ii) if Spencer and his associates wished to restore the status quo by reason of the Trust's breach of the BEE warranty, there would, in terms of clause 18.3 of the shareholders' agreement, have to have been a repurchasing of the Trust's shares which, it is common cause, had not occurred.

[40] Memani and the Trust reasoned that, as Memani had not properly been removed as a director of Emcom, the Trust was entitled to receive such information, inter alia, pursuant to s 284 of the old Companies Act and, by reason of the fact that Memani represented and was duly appointed by the Trust, he would be entitled to receive that information on behalf of the Trust.

Conclusions

Lis alibi pendens

[41] As Nugent AJA said in *Nestlé (South Africa) (Pty) Ltd v Mars Inc*:[13]

'Once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated (*lis alibi pendens*).'

This dictum has been reaffirmed by this court in *Socratous v Grindstone Investments*[14]as have the more general principles, set out by Johannes Voet in his *Commentarius Ad Pandectas*.[15] These general principles are that a defence of *lis alibi pendens* requires that the suit must already have commenced before another judge between the same parties, for the same cause and in respect of the same subject-matter. The place where a judicial proceeding has once been taken up is also the place where it ought to be given its ending. In the present case the matter has not commenced before another judge. The same case had not been instituted in different fora. The *causae* relied upon by the parties were different, even though the relief claimed was, in certain respects, the mirror image of the others'. In the trial

[13]*Nestlé (South Africa) (Pty) Ltd v Mars Inc*2001 (4) SA 542 (SCA) para 16
[14]*Socratous v Grindstone Investments* 2011 (6) SA 325 (SCA para 13.
[15]45.5.27.

action, Spencer and his associates relied upon the agreement for the sale of shares in Mpisi. In the application before the high court in respect of which this appeal is heard, Memani and the Trust had relied upon the shareholders' agreement.

[42] For a defence of *lis alibi pendens* to succeed, more is required than a mere overlapping of some of the issues in two or more cases. It would appear from the judgment of Greenberg J in *Marks and Kantor v Van Diggelen*[16] that the rule concerning the defence of *lis alibi pendens*in our adjectival law arose in order to prevent a plaintiff from harassing a defendant. Memani and the Trust have acted in a manner that far from harasses the appellants. They have sought relief, by way of motion proceedings, in a cheap and expeditious manner, on one of the issues that Spencer and his associates themselves wished to have resolved by way of a longer and more expensive trial action. This step taken by Memani and the Trust left open the other issues, such as the sale of shares in the Mpisi transaction and the payment of money by the present respondents to Emcom, for determination in the trial action.

[43] A cry of '*lis alibi pendens*' is not an abracadabra that, whenever there are correlative issues in different processes of court, will invariably, be able to summon judicial immobility. As Mr Olsen submitted, it was open for Spencer and his associates to have applied in terms of Rule 11 of the Uniform Rules of Court for a consolidation of the two matters.

[44] As was said by Corbett AJ in *New Zealand Insurance Co Ltd v Stone & others*,[17] Rule 11 confers a wide discretion upon a court to consolidate actions, where substantially the same questions of law or fact are involved, taking into account, as the paramount consideration, the convenience of the parties and the court. Also relevant is the prejudice to the respective parties.[18] See also *Nel v Silicon Smelters (Edms) Bpk& 'n ander*.[19] It is apparent from *International Tobacco Company of South Africa Ltd v United Tobacco Companies (South) Ltd*,[20] that judicial imagination has been given wide scope when it comes to taking appropriate

[16]*Marks and Kantor v Van Diggelen* 1935 TPD 29 at 38.
[17]*New Zealand Insurance Co Ltd v Stone& others* 1963 (3) SA 63 (C).
[18]Ibid.
[19]*Nel v Silicon Smelters (Edms) Bpk& 'n ander*1981 (4) SA 792 (A) at 800F-801C.
[20]*International Tobacco Company of South Africa Limited v United Tobacco Companies (South) Limited* 1953 (1) SA 241 (W).

procedural steps in the interests of saving time and limiting the escalation of costs among litigants.

[45] In *Solar Basic Industries Inc v Advance Transformer Company of South Africa (Proprietary) Ltd and Fluorescent Corporation SA Ballast Manufacturers (Proprietary) Ltd*[21]it was held that an application and an action cannot be consolidated in terms of rule 11. It would, however, be open for a court to refer an application to trial in terms of Rule 6(5)(*g*) and, having done so, to then consolidate the respective actions under rule 11. The high court pertinently found that the bringing of a trial action by Spencer and his associates to determine the issue of the directorship of Memani 'could not constitute an impediment to the granting' of the application in question.

[46] It is instructive to read *Michaelson v Lowenstein*[22] in which Smith J gave a comprehensive analysis of the Roman-Dutch authorities on the question of *lispendens*, including the question of whether or not there could be such a defence before *litiscontestatio* (the actual leading of evidence in a case). The court concluded that:

'…[I]t is a matter within the discretion of the Court to decide whether an action brought before it should be stayed pending the decision of another previously brought between the same parties, for the same cause and in respect of the same subject-matter, or whether it is more just and equitable or convenient that it should be allowed to proceed'. (My emphasis)

[47] That the court has a discretion in deciding whether or not to stay proceedings in the face of a plea of*lis alibi pendens* has been reaffirmed in the recent judgment of this court:*CaesarstoneSdot-Yam Ltd v The World of Marble and Granite CC*.[23] In *Caesarstone*[24] this court endorsed the position taken by Milne J in *Cook & others v Muller*[25] that ultimately, when considering a plea of*lisalibi pendens*, a court must exercise a judicial discretion in controlling the proceedings before it.

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[21]*Solar Basic Industries Inc v Advance Transformer Company of South Africa (Proprietary) Ltd and Fluorescent Corporation SA Ballast Manufacturers (Proprietary) Ltd* 1970 BP 448.
[22]*Michaelson v Lowenstein* 1905 TS 324.
[23]*CaesarstoneSdot-Yam Ltd v The World of Marble and Granite CC* (741/12) [2013] ZASCA 129 (26September 2013) para 23.
[24]Supra para 45.
[25]1973 (2) SA 240 at 244H-246B.

[48] I have taken note of the fact that it decided that a defendant may raise a plea of*lis alibi pendens*even though it is the plaintiff in another matter. I also take note of the fact that in *Caesarstone*[26] the court affirmed that which Coetzee DJP had said in *Kerbel v Kerbel*:[27]

'It is definitely undesirable that the same issue should be the subject of litigation in two different courts even if both have jurisdiction to deal with the matter, unless good reason is shown that the court where the action first commenced should not be allowed to carry on with the proceedings.' (My emphasis)

[49] Salient to the issues in the case before us is the observation by Wallis JA in *Caesarstone*[28] that:

'Subject to the person concerned having had a fair opportunity to participate in the initial litigation, where the relevant issue was litigated and decided, there seems to me to be something odd in permitting that person to demand that the same issue be litigated all over again with the sane witnesses and the same evidence in the hope of a different outcome.'

[50] One must be careful not to conflate the maxim *qui prior est tempore potiorest jure* ('the person who is earlier in time is stronger in law)' with a plea of *lis alibi pendens*. That would open the road to abuse: a litigant could institute action precisely in order, for example, to enable it to profit from the tardiness of the process or practices that may prevail in another forum or, to use another example, to rely on the expense and time delays that would result from adopting a trial action rather than the cheaper or more expeditious instrument of motion proceedings.

[51] On the papers before it, the court could determine the issues before it by way of motion proceedings. To the extent that it had been necessary to do so, the high court exercised its discretion in favour of proceeding with the application in question.*National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs& others*[29] has made it plain that an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles

[26]Supra para 36.
[27]1987 (1) SA 562 (W) at 567G.
[28]Supra para 43.
[29]*National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs& others* 2000 (2) SA 1 (CC) para 11.

or a misdirection of the facts or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles. In *Ex parte Neethling& others*[30] the test was set by this court as being whether the court below had 'exercised its discretion capriciously or upon a wrong principle' or that it had 'not brought its unbiassed judgment to bear on the question' or had 'not acted for substantial reasons'.

[52] The fact that the high court did not pertinently allude to its discretion does not mean that it did not apply its mind thereto. The structure of the high court's judgment, which was delivered ex tempore, indicates that the judge carefully applied his mind to all the issues argued before him.

[53] If one bears in mind the principles in *National Coalition for Gay and Lesbian Equality*,[31] it cannot be concluded that the high court was influenced by wrong principles or a misdirection on the facts or that the court reached a decision which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles. There is no basis upon which this court can, in the present case, interfere with the discretion exercised by the high court judge.

[54] As there were a number of other issues that were argued fully, consideration will now be given to them.

Clause 18 of the shareholders' agreement

[55] It falls short of the standard required by our courts for a litigant to set out conclusions whether of fact or law, without first predicating them upon a firm, foundational record of actual facts. Those material facts upon which a party relies must be set out with clarity, precision and particularity. In *Radebe& others v Eastern Development Board*[32] this court, having referred to *Willcox& others v Commissioner for Inland Revenue*,[33] concluded that, in motion proceedings, it is fatal for a respondent to rely on secondary facts when the primary facts have been omitted.[34] In this case the restoration of the status quo ante is a secondary fact. The primary facts

[30] *Ex parte Neethling& others* 1951 (4) SA 331 (A) at 335B-E.
[31] Supra para 11.
[32] *Radebe& others v Eastern Development Board* 1988 (2) SA 785 (A) at 793C-H.
[33] *Willcox& others v Commissioner for Inland Revenue 1*960 (4) SA 599 (A) at 602.
[34] At 793C-E.

upon which a restoration of the status quo ante depend would have been the calling upon the Trust to remedy the breach and then, in the event of a failure by the Trust to do so, repurchasing the Trust's shares, as provided for in clause 18.3 of the shareholders' agreement.

[56] In*Radebe* the court referred with approval to the following which appeared in Odger's*Principles of Pleading and Practice in Civil Actions in the High Courts of Justice* 22ed at 97:

'Whenever the same legal result can be attained in several different ways it is not sufficient to aver merely that the result has been arrived at, but the facts must be stated showing how and by what means it was attained.'[35]

The position in *Radebe* has been reaffirmed by this court in *Trope & others v South African Reserve Bank*.[36]

[57] The apparent failure by Spencer and his associates to have called upon Memani and the Trust to remedy the Trust's alleged breach of clause 18.1 of the shareholders' agreement and, related thereto, the failure by Spencer and his associates to have acted in terms of clause 18.3 of the shareholders' agreement and repurchased the shares that gave rise to Memani's directorship has, in the application under consideration, been fatal to Spencer and his associates.

The factual question of the directorship of Memani

[58] The failure of Spencer and his associates to dispute that Memani had been a director of Emcom has significant consequences. As was said by Miller JA in *McWilliams v First Consolidated Holdings (Pty) Ltd*,[37] in the absence of a cogent explanation, an adverse inference is likely to be drawn against a person who, in a commercial situation in which there has been a preceding exchange of correspondence and negotiations, fails to contest an assertion of fact by the other side.

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[35]*Radebe*supra at 793F-G.
[36]*Trope & others v South African Reserve Bank* 1993 (3) SA 264 (A) at 273A-B.
[37]*McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E-H.

[59] *Gohlke*,[38] *Alpha Bank Limited & others v the Registrar of Banks & others*[39] and *Randcoal Services Ltd & others v Randgold and Exploration Company Ltd*[40] make it clear that, where a unanimous written agreement by the shareholders of a company provides for the appointment of directors, no further formalities, in terms of resolutions passed pursuant to the provisions of the old Companies Act, are required. As Gauntlett AJ said in *Delfante& another v Delta Electrical Industries Ltd*,[41] after referring to *Burroughs Machines Limited v Chenille Corporation of South Africa (Pty) Ltd*[42] and *Barlows Manufacturing Co Ltd & others v R N Barrie (Pty) Ltd & others*,[43] provisions in shareholders' agreements for the appointment of directors should not be rendered nugatory and must be construed with an eye to commercial realities.[44]

[60] In *Desai & others v Greyridge Investments (Pty) Ltd*,[45] the court of appeal unanimously concurred with Trollip JA when he assumed that *Stewart v Schwab & others*[46] had correctly been decided when it determined that a shareholders' agreement is 'enforceable by one party by interdict to prevent the others from voting as shareholders for his removal as a director'.[47] See, also, the observations of Cohen AJ in *Amoils v Fuel Transport (Pty) Ltd & others*.[48] The contention by Memani and the Trust that he became a director of Emcom by reason of the provisions of clause 3.1 of the shareholders' agreement cannot therefore be gainsaid.

[61] Consequences attach to the contention by Spencer's attorneys that Memani had been 'removed' as a director. Similar considerations apply to the claim in the trial action for the confirmation of Memani's removal as a director of Emcom. Against this background Memani and the Trust cannot be criticized, when preparing their founding papers, for having believed that it had been a common cause fact that Memani had indeed been a director before his so-called 'removal' as one. As a

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[38] Supra at 693E-694F.
[39] *Alpha Bank Bpk&anderev Registrateur van Banke&andere* 1996 (1) SA 330 (A) at 348G-H.
[40] *Randcoal Services Ltd & others v Randgold and Exploration Company Ltd* 1998 (4) SA 825 (A) at 840G-H.
[41] *Delfante& another v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C).
[42] *Burroughs Machines Ltd v Chenille Corporation of South Africa (Pty) Ltd* 1964 (1) SA 669 (W) at 670F-671C.
[43] *Barlows Manufacturing Co Ltd & others v R N Barrie (Pty) Ltd & others* 1990 (4) SA 608 (C).
[44] At 230C-D.
[45] *Desai & others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A).
[46] *Stewart v Schwab & others* 1956 (4) SA 791 (T) at 793H.
[47] Desai at 518H-519A.
[48] *Amoils v Fuel Transport (Pty) Ltd & others* 1978 (4) SA 343 (W) at 347C-G.

matter of logic, one cannot be removed from an office – as Spencer contends that Memani was – unless one held it prior to one's removal.

[62] As Van Zyl J said in *Moleah v University of Transkei & others*,[49] the court ultimately has to determine whether an applicant has set out with sufficient clarity the grounds upon which he relies for the relief claimed. A relevant issue is always whether the respondents in motion proceedings have been adequately apprised of the case which they have to meet. The reason for this is that, in order for a court to be able to make a well-informed decision, it needs to have all the relevant facts placed before it. Memani and the Trust left their opponents with no room for doubt as to the peg upon which they had hung their case: it was Memani's directorship of Emcom. Spencer and his associates knew very well that it was the case of Memani and the Trust that Memani had been appointed as a director of Emcom.

[63] Spencer and his associates had at their disposal ready access to Emcom's records. If they wished to place in issue the fact that Memani had been appointed as a director, they could easily have done so. Instead, they chose to deal in the answering affidavit with the issue of Memani having been appointed as a director evasively. Despite their evasiveness, they nevertheless contended, from time to time in their answering affidavit, that he had been 'removed' as a director.

[64] As Corbett J said in *Griffiths &Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd*,[50] cases should be 'decided upon their true issues rather than technical points'. In this case there was no 'real, genuine or bona fide dispute' concerning the issue of whether or not Memani had been a director of Emcom. The absence of such a dispute is one of the classic qualifications, set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,[51] to the generally simple rule that is employed in order to determine which facts form the basis for a decision in proceedings that come before a court by way of application.

[65] The high court correctly decided that the decision in this case should be based upon an acceptance of the fact that Memani had, indeed, been appointed as a director of Emcom.

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[49] *Moleah v University of Transkei & others* 1998 (2) SA 522 (TkH).At 533F-G.
[50] *Griffiths &Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) at 254C.
[51] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634I.

The non-joinder issue

[66] In view of the response of Spencer's attorneys to Memani's request for information relating to the whereabouts of MsVermeulen and MsVermeulen's own failure to seek to be joined in these proceedings, there is no merit in the complaint by Spencer and his associates that the proceedings were fatally defective by reason of her non-joinder.

The provisions of s 220 of the old Companies Act relating to the removal of a director

[67] Section 220 of the old Companies Act provides that special notice shall be lodged with a company of any proposed resolution to remove a director and that, upon receipt of this notice, the company shall forthwith deliver a copy thereof to the director concerned who shall be entitled to be heard on the proposed resolution at the meeting to consider it. That there has been non-compliance with these provisions also entitles Memani to be a director until such time as he is lawfully removed from office.

The provisions of the old Companies Act relating to the keeping of records and access to information

[68] Section 105 of the old Companies Act contains extensive provisions relating to the maintenance of the register of members of a company. Section 113 of the Act provides for liberal access thereto. Section 242 of the old Companies Act requires the directors of a company to ensure that minutes of all meetings of the directors and managers thereof be kept. Section 284 of the old Act provides a comprehensive obligation on a company to keep proper records of its business.

Access to information as a Foundational Value of our Constitution

[69] As was recognized by this court in *Clutchco (Pty) Ltd v Davis*,[52]s 32 of the Constitution has made the right of access to information a foundational value of our law. Subsection 32(1)*(b)* of the Constitution confers on everyone the right of access to 'any information that is held by another person and that is required for the exercise or protection of any rights'. The high court cannot be faulted for finding that the parties seeking the information which was the subject-matter of the application before it were entitled, as a matter of right, to it.

The questions of (i) whether the making of a declaratory order is discretionary; (ii) if so, whether the high court exercised its discretion and (iii) if so, whether it did so in a judicial manner

[70] The portion of s 19(1)*(a)*(iii) of the Supreme Court Act, upon which Spencer and his associates rely, provides that the high court has the power:

'[I]n its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

[71] Watermeyer JAsaid in *Durban City Council v Association of Building Societies*:[53]

'The question whether or not an order should be made under this section has to be examined in two stages. First the Court must be satisfied that the applicant is a person interested in an "existing, future or contingent right or obligation," and then if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'

This well-known dictum has been applied in the following cases upon which Spencer and his associates relied: *Ex parte Nell*;[54]*Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another; Maphanga v Officer Commanding, South*

[52]*Clutchco (Pty) Ltd v Davis* 2005 (3) SA 486 (SCA) para 1.
[53]*Durban City Council v Association of Building Societies* 1942 AD 27 at 32.
[54]*Ex parte Nell* 1963 (1) SA 754 (A) at 759A-B.

African Police Murder and Robbery Unit, Pietermaritzburg & others[55] and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*.[56]

[72] These principles relating to the two-stage enquiry which a court must undertake before it may make a declaratory order have been affirmed in other cases decided in this court such as *Reinecke v Incorporated General Insurances Ltd*[57]and *South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd*;[58] and have received affirmation in the Constitutional Court in *J T Publishing (Pty) Ltd v Minister of Safety and Security & others*[59] and *Rail Commuters Action Group & others v Transnet Limited t/a Metrorail & others*.[60]

[73] There are a number of deficiencies in the complaint by Spencer and his associate that, if one reads the judgment of the high court, there is nothing to indicate that it even gave consideration to the principles in *Durban City Council* or the discretion conferred upon it in terms of s 19(1)*(a)*(iii) of the Supreme Court Act, never mind having applied its mind to an examination of all relevant factors to decide whether or not to exercise its discretion.

[74] As mentioned earlier, Mr Olsen submitted that s 19(1)*(a)*(iii) of the Supreme Court Act was of no application in the present matter. His argument was that, in terms of the adjectival law on the point – which derives from our common law – his clients would have been able to approach the court and obtain an order of the kind in question. They did not need ss 19(1)(*a*)(iii) of the Supreme Court Act to empower them to do so. In *Geldenhuys*[61] Innes CJ, after a comprehensive review of the South African authorities on the matter, held that where a litigant proves that there had been an actual infringement of his rights, he is entitled to a declaration of rights on that issue.[62] That this case remains authoritative in our law was confirmed by this

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[55]*Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam & another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg & others* 1995 (4) SA 1 (A) at 14F-15F.
[56]*Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) para 16.
[57]*Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 93A-H.
[58]*South African Mutual Life Assurance Society v Anglo-Transvaal Collieries Ltd* 1977 (3) SA 642 (A) at 658H.
[59]*J T Publishing (Pty) Ltd v Minister of Safety and Security & others* 1997 (3) SA 514 (CC) para 15.
[60]*Rail Commuters Action Group v Transnet Limited t/a Metrorail & others* 2005 (2) SA 359 (CC) para 106.
[61]Fn 2 supra.
[62]At 440 to 441.

court in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others*.[63]

[75] Ever since *Dhanabakum v Subramanian & another*,[64] it has been clear that a statute must be construed in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the common law. This rule of law has been more recently affirmed in this court in *National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd*.[65] Mr Olsen is therefore correct: s 19(1)(*a*)(iii) of the Supreme Court Act supplements the common law to fill *lacunae* pertaining to the obtaining of declaratory orders. The subsection neither repeals nor replaces the common law.

[76] The shareholders' agreement may therefore well have consequences once certain information comes to light as a result of the court order. These consequences may not be intangible but may indeed also be measurable in ways with which lawyers are familiar. It cannot be said that, consequent upon the determination by the high court, Memani and the Trust would be unable to claim any relief.

[77] Sight should not be lost of the fact that the historical aversion to granting declaratory orders arose from the reluctance on the part of the courts to deal with or pronounce upon academic or abstract points of law or to act as advisers to litigants. In this regard it is helpful to read Corbett CJ's remarks in *Shoba*.[66] The absence of an 'academic' character to the relief obtained in the high court is a further indicator that, as a matter of procedure, Memani and the Trust would have been able, under our common law, to approach that court.

[78] Memani and the Trust have a right to the declaratory order in terms of the aforementioned qualifying words on s 19(1)(*a*)(iii) of the Supreme Court Act. Memani also has right, procedurally enforceable at common law, to be a director of Emcom until he is removed in conformity with both s 220 of the old Companies Act and the shareholders' agreement. Furthermore, Memani and the Trust have a right,

[63] *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7.
[64] *Dhanabakum v Subramanian & another* 1943 AD 160 at 167.
[65] *National Automobile and Allied Workers' Union (now known as National Union of Metalworkers of South Africa) v Borg-Warner SA (Pty) Ltd* 1994 (3) SA 15 (A) at 22J-23A.
[66] Supra at 14F-G.

procedurally enforceable at common law, to receive the information for which they have made application.

[79] There is no basis upon which to interfere with the order of the high court. Both sides considered it appropriate to brief two counsel. In the result, there is no reason not to allow the costs of two counsel.

[80] I should have dismissed the appeal with costs, including the costs of two counsel.

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N P WILLIS
JUDGE OF APPEAL

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