THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 253/2012

In the matter between:

JACOB MASHIKE and WILHELM CHRISTIAN ROSS NNO	**First Appellant**
TREACLE NOMINEES (PTY) LIMITED	**Second Appellant**
and	
SENWESBEL LIMITED	**First Respondent**
SENWES LIMITED	**Second Respondent**

Neutral citation: *Mashike and Ross NNO v Senwesbel* (253/2012) [2013] ZASCA 35 (28 March 2013)

Coram: Ponnan, Maya, Malan and Petse JJA and Plasket AJA

Heard: **22 February 2013**

Delivered: **28 March 2013**

Summary: **Section 38 of Companies Act 61 of 1973 – financial assistance for the purpose of or in connection with purchase of company's shares – s 85 – validity of transactions – severability of purchase and subsequent cession from giving of financial assistance – joinder of vendors – referral to evidence.**

ORDER

On appeal from: the North Gauteng High Court, Pretoria (Rabie J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

Malan JA (Ponnan, Maya and Petse JJA and Plasket AJA concurring):

[1] This is an appeal against the judgment and order of Rabie J in the North Gauteng High Court, Pretoria, dismissing an application for relief based primarily on s 38 of the Companies Act 61 of 1973. The appeal is with his leave.

[2] The appellants, Jacob Mashike and Wilhelm Christian Ross NNO and Treacle Nominees (Pty) Limited, originally applied for a declaratory order to the effect that the first respondent's (Senwesbel's) acquisition of certain shares in the second respondent (Senwes) during the period 1 May 2003 to 30 April 2005 pursuant to the acceptance of two offers made to specific categories of shareholders was invalid. The relief was primarily based on s 85 of the Companies Act but to some extent also on a contravention of s 38. The appellants further sought an order that the shares sold be cancelled in accordance with the provisions of s 85; alternatively, that Senwesbel return to the vendors the shares sold and that Senwes rectify its register of members accordingly.

[3] During the hearing before the court below the appellants amended the relief sought. The draft order proposed read as follows:

'1 It is declared that the first respondent's acquisition of the 8 221 042 shares in the second respondent (6 471 473 in terms of the First Offer made to shareholders and

1 749 569 in terms of the Second Offer made to shareholders) in the period 1 May 2003 to 30 April 2005 is invalid and of no force and effect.

2 The second respondent is ordered to cancel 58 047 shares in the second respondent which were purchased at an auction on 12 November 2004, in terms of the provisions of section 85 of the Companies Act 61 of 1973; alternatively the issue whether the 58 047 shares in the second respondent which were purchased at an auction sale on 12 November 2004 were purchased by the second respondent or by the first respondent is referred for the hearing of oral evidence.

3 The issue whether the 11 173 shares in the second respondent which were purchased at an auction sale on 3 December 2004 and the 39 858 shares which were purchased at an auction sale on 18 January 2005, were purchased by the second respondent or by the first respondent, is referred for the hearing of oral evidence.

4 A rule nisi is issued (with a return date to be determined by the Court) calling on all interested parties to show cause why the second respondent should not be ordered to rectify its share register by removing the name of the first respondent as shareholder of the 8 221 042 shares referred to in paragraph 1 above, and replacing the first respondent's name in respect of those shares with the names of the shareholders from whom the first respondent acquired such shares (the "former shareholders").

5 The first respondent is ordered to notify the former shareholders of this order in the following manner:

5.1 By forwarding, by prepaid registered post, a copy of this order to the addresses of the former shareholders to whom the offers which resulted in the acquisition of those shares, were originally communicated;

5.2 By notifying the former shareholders, by prepaid registered post, that paragraphs 1 and 4 of the order pertain to the shares which were acquired from them during the period 1 May 2003 to 30 April 2005;

5.3 Publication of the order in:

5.3.1 Die Beeld newspapers;

5.3.2 Die Landbouweekblad magazine;

5.3.3 The Farmer's Weekly magazine.

6 The respondents are ordered to pay the costs of the application, jointly and severally, which costs are to include the following:

6.1 The costs of two counsel;

6.2 The costs of the urgent application which had been reserved;

6.3 The costs of the applicants' expert forensic auditor, Mr D Sabbagh.'

[4] In their heads of argument, the appellants abandoned the relief sought in respect of the second offer. The case therefore concerns only the 6 471 473 shares acquired in terms of the first offer. Whereas the relief originally sought was based primarily on s 85 the cause of action relied upon in the replying affidavit in respect of the disputed shares is based solely on a contravention of s 38.

[5] Senwesbel was registered as a public company on 11 December 1996 with the object of being the holding company of Senwes. Senwes was established in 1997 pursuant to a resolution to convert the erstwhile Sentraal-Wes Koöperatief Beperk into a public company. During the period 2006 to 2008 the second appellant acquired 27 118 615 shares in Senwes. This constituted approximately 15 per cent of the issued shares in Senwes. At the same time Royal Bafokeng acquired approximately 17,5 per cent of the issued shares in Senwes from Senwesbel.

Terms of share purchase offers

[6] At their annual general meetings held on 3 October 2002 both Senwes and Senwesbel resolved to buy back their own shares. The shareholders of Senwes authorized the board of directors to purchase its shares 'in terms of legislation in order to increase the proportional value and net asset value of remaining shareholders' shares'. However, on 4 December 2003, the Senwes board resolved that Senwes would not purchase its own shares but rather allow Senwesbel to do so. At its meeting on 4 December 2003 the financing of the Senwes share purchases was discussed and it was resolved that Senwes would finance the purchases of both its own and Senwesbel's shares. The resolution was apparently passed in the belief that s 37 of the Act sanctioned a loan to be made to Senwesbel by the company. In accordance with these resolutions Senwes' auditors, Ernst and Young, noted in their report of 21 January 2004 that 'Senwes Limited will provide financial assistance to Senwesbel Limited to repurchase the shares'.

[7] The above resolutions led to the first offer dated 26 January 2004 being made to the relevant shareholders of both Senwes and Senwesbel. The shares to be purchased were held by shareholders with less than 10 000 Senwes shares and less than 10 000 Senwesbel shares, to shareholders who were older than 70 years of age and to shareholders who were either deceased or insolvent estates. A Senwes cheque for the purchase price was attached to every offer for the unencumbered shares ('vrye aandele'), that is shares that were not pledged or otherwise encumbered. The offer for unencumbered shares could be accepted by depositing the attached Senwes cheque into the bank account of the vendor:

'If your shares are not encumbered, and you are accepting the offer, you only have to deposit the crossed cheque attached to the offer into your bank account … However, if you do not wish to accept the offer, you may ignore the offer and either destroy the cheque or return it to the Group Sectretary.' (My translation).

In the case of shares encumbered to Senwes, the offer was accepted by not responding to the offer in which case the offer was deemed to have been accepted. The purchase price would then be paid by setting off the debt owing to Senwes against the purchase price of the shares. If –

'[Y]our shares have been encumbered to Senwes, and you wish to accept the offer, you need not react to the offer in which event it shall be deemed that you have accepted the offer'. (My translation).

[8] As a result of the first offer 5 2264 556 shares were transferred to Senwesbel and Senwesbel's loan account with Senwes debited with an amount of R4 211 644,80 in respect of Senwes shares, and R5 620 540 in respect of Senwesbel shares. The closing balance of Senwesbel's loan account on 30 April 2004 was reflected as R13 949 254,22. After the closing date of the offer was extended to 20 June 2004, Senwesbel increased its shareholding in Senwes by a further 1 206 917 shares. The loan account was debited on 19 and 23 August 2004 with the amounts of R59 647,20 and R908 283,20 respectively. It was reported at the Senwes board meeting of 2 December 2004 that an amount of some R17 million was owed by Senwesbel to Senwes in respect of the buy-back transactions financed by Senwes.

[9] The second offer was made on 15 December 2005 with a closing date of 25 February 2005. The terms of the second offer differed from those of the first in that

the second offer was not accompanied by a Senwes cheque in respect of the unencumbered shares and did not provide for set-off in respect of the encumbered shares. As I have said, the validity of the transactions pursuant to the second offer is no longer an issue between the parties. The two offers were accepted by some 3 500 shareholders of which 300 were deceased or insolvent estates.

Section 38

[10] Section 38(1) provides that:

'No company shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares of the company, or where the company is a subsidiary company, of its holding company.'

The purpose of this prohibition is the protection of creditors and shareholders of a company by ensuring that purchasers of shares do so using their own resources and not those of the company.[1] The rule was 'introduced in order to prevent the trafficking in its own shares by the Company by indirect means'.[2] The financial assistance is not confined to assistance given to a purchaser; the subsection requires only that the financial assistance be given for the purpose of or in connection with the purchase of shares.[3] Two aspects are of importance in determining whether a contravention of the section took place: first, whether the transaction resulted in the company giving financial assistance for the purchase of its own shares; and, second, whether the financial assistance was given for the purpose of or in connection with the purchase of the shares.[4]

[11] Both questions are factual, the second tends to be problematic. The 'giving of financial assistance' is not defined and the words do not have a technical meaning. It was said that:

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[1] *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A) at 818B-C; *Gardner & another v Margo* [2006] 3 All SA 229 (SCA) para 45.
[2] *Incorporated Industries Ltd v Standard Finance Corporation Ltd* 1961 (4) SA 254 (W) at 255D-E approved in *Sage Holdings Ltd v The Unisec Group Ltd* 1982 (1) SA 337 (W) at 349A-C.
[3] *Evrard v Ross* 1977 (2) SA 311 (D) at 317F-H; *Jacobson & another v Liquidator of M Bulkin & Co Ltd* 1976 (3) SA 781 (T) at 787H.
[4] See *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 799D-E; A N Oelofse 'Artikel 38 van die Maatskappywet' (1980) *TSAR* 47; and J T Pretorius, P A Delport, Michele Havenga and Maria Vermaas *Hahlo's South African Company Law through the Cases* (1999) at 136-7.

‘one must examine the commercial realities of the transaction and decide whether it can properly be described as the giving of financial assistance by the company, bearing in mind that the section is a penal one and should not be strained to cover transactions which are not fairly within it.’[5]

To determine whether the assistance was given ‘for the purpose of’ the purchase of its own shares regard must be had to the ‘direct object’ of the financial assistance and not to its ultimate goal.[6] The object is that of the company giving the financial assistance.[7] The words ‘in connection with’:[8]

‘appear to have been inserted in order to cover a situation where, although the actual purpose of the company in giving financial assistance might not have been established, its conduct nevertheless stood in such close relationship to the purchase of its shares that, substantially if not precisely, its conduct was similar to that of a company which gave the forbidden assistance with the purpose described in the section.’

[12] The section strikes only at the financial assistance, or agreement to provide it, and does not by implication invalidate the contract for the purchase of the shares.[9] Nor does it necessarily taint the real and abstract agreement of cession in terms of which the shares are transferred to the purchaser.[10] The purchase is invalid where it is inextricably interwoven with the offending transaction or both form part of a ‘single

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[5] *Charterhouse Investment Trust Ltd & others v Tempest Diesels Ltd* [1986] BCLC 1 (Ch D) at 10; *Lipschitz* at 797H-798A referring to R C Beuthin (1973) 90 *SALJ* at 213 who suggested ‘a much narrower approach to the section’.

[6] *Gradwell (Pty) Ltd v Rostra Printers Ltd & another* 1959 (4) SA 419 (A) at 424G-H, 425F-H and 426D-E; *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 799E-800D; *Gardner & another v Margo* [2006] 3 All SA 229 (SCA) para 47.

[7] *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 800; *Gardner & another v Margo* [2006] All SA 229 (SCA) para 47.

[8] *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 804G-H.

[9] See Gower and Davies’ *Principles of Modern Company Law* 7 ed at 271: ‘(b) However, the illegality of the financial assistance given or provided by the company normally does not taint other connected transactions, such as the agreement by the person assisted to acquire the shares; it would be absurd if, for example, a takeover bidder which had been given financial assistance by the company, or by a subsidiary of the company, could escape from the liability to perform purchase contracts which it has entered into with the shareholders’.

[10] See *Botha v Fick* 1995 (2) SA 750 (A) at 762E-F; *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 970I-971B.

and indivisible contract'.[11] Where it is an entirely separate agreement[12] or the purchase can be severed from the offending transaction it is not invalid.[13] But where the purchase cannot be severed from the giving of financial assistance or the agreement to do so, it is struck with the same invalidity, whether or not the parties knew of the invalidity.[14]

[13] In the court below Rabie J dismissed the application. He assumed that financial assistance had been given by Senwes to Senwesbel but found that the sales of the shares by the vendors to Senwesbel were separate and distinct transactions and 'no part of a single composite transaction with any alleged agreement to provide financial assistance'. He emphasized that there –

'must be an integral, inextricable linkage between the provision of the financial assistance and the share purchase agreement and that the provision of the assistance must in fact be a component of the share purchase'.

Appellants' contentions

[14] In terms of the first offer a Senwes cheque for the purchase price was annexed to every offer for unencumbered shares, which was accepted by depositing the cheque into the bank account of the vendor. In the case of shares encumbered to Senwes, the offer was accepted by not responding to the offer which was then deemed to have been accepted. The purchase price was then paid by setting off the debt owed by the vendor to Senwes against the purchase price. It was submitted on behalf of the appellants that in the case of the purchase of both the unencumbered and the encumbered shares the provision of financial assistance was inextricably linked to the share purchase agreements. In the case of unencumbered shares the

[11] *Crowden Products (Pty) Ltd v Gradwell (Pty) Ltd & another* 1959 (1) SA 231 (T) at 233A-B. Cf Gower and Davies 371: '(c) This, however, may be subject to a qualification if the obligation to acquire the shares and the obligation to provide financial assistance form part of a single composite transaction. The obvious example of this would be an arrangement in which someone agreed to subscribe for shares in a company (or its holding company) in consideration of which the company agreed to give him some form of financial assistance. In such a case the position apparently depends on whether the terms relating to the acquisition of shares can be severed from those relating to the unlawful financial assistance'.

[12] As in *Saambou Nasionale Bouvereniging v Ligatex (Pty) Ltd; Ex parte Stuart: In re Saambou Nasionale Bouvereniging v Ligatex (Pty) Ltd* 1976 (1) SA 868 (E) at 873A.

[13] *Lipschitz NO v UDC Bank Ltd* 1979 (1) SA 789 (A) at 807G-H; *Evrard v Ross* 1977 (2) SA 311 (D) at 315E-F; *Fidelity Bank Ltd v Three Women (Pty) Ltd & others* [1996] 4 All SA 368 (W) at 382; *Vernon & others v Schoeman & another* 1978 (2) SA 305 (D) at 307H-308B. Cf *Novick & another v Comair Holdings Ltd & others* 1979 (2) SA 116 (W) at 873A-B and see R C Beuthin 'More about Financial Assistance' (1980) 97 *SALJ* 477.

[14] *Fidelity Bank Ltd v Three Women (Pty) Ltd & others* [1996] 4 All SA 368 (W) at 382.

provision of the financial assistance (the deposit and payment of the Senwes cheque) constituted acceptance of the offer to purchase. In the case of encumbered shares payment of the purchase price and the provision of financial assistance would occur simultaneously on the closing date of the offer when set-off was to take place. The issue, they submitted, was not whether the agreement to provide financial assistance formed a single transaction with the share purchase agreement but whether the actual providing of financial assistance and the share purchases formed part of a single transaction. The second offer differed from the first in that the second offer was not accompanied by a Senwes cheque and did not provide for set-off in respect of the encumbered shares. The provision of financial assistance pursuant to the second offer, but not the first, could thus be severed from the agreement of sale.

Respondents' contentions

[15] In the urgent application that preceded the present application the respondents conceded that s 38 had been contravened: reference was made to 'technical contraventions' of s 38. The respondents were also in possession of legal opinions to that effect. In their answering papers, however, they not only disputed that s 38 was contravened but also contended that, if there had been a contravention, the agreements to buy and sell could be severed from the agreement to provide (or the actual provision of) financial assistance.

[16] The respondents contended that Senwes had resolved as part of a 'turnaround strategy' to conclude a transaction allowing for the acquisition by a black empowerment shareholder of shares in the company. To facilitate the proposed restructure Senwesbel had to acquire additional shares from other shareholders so as to make them available to the empowerment shareholder. The shares acquired by Senwesbel during 2004 and 2005 were all obtained from third party vendors and not from the company. Senwesbel had to sell at least 25,1 per cent of its shareholding in Senwes to the empowerment shareholder. Senwesbel thus undertook to acquire shares from third party vendors since it was obliged to maintain a shareholding level of at least 35,1 per cent in the company. Shares were thus purchased with the purpose of selling them to an empowerment partner so that the company could comply with national empowerment policy in this regard. In these circumstances the submission was made that the *direct object* of the financial assistance was the

restructuring of the company's capital to include an empowerment shareholder. In this respect, the deponent to the answering affidavit, Ms E M Joynt, the company's secretary, refered to the 'declared purpose' of the share purchases as the conclusion of an empowerment transaction. However, Mr F Strydom, the managing director of Senwes, referred to the 'ultimate purpose' of the loan facility granted to Senwesbel by Senwes as the implementation of the restructuring of the company which included the conclusion of an empowerment transaction. It is not entirely clear whether a distinction is made between the *purpose* of the share purchases and the *reasons* for them.[15]

[17] Senwesbel did not operate its own banking account. It had a current loan account or loan facility with Senwes which would be debited and credited from time to time. Credits would arise from the declaration of dividends and debits from the company making payments on behalf of Senwesbel. Repayment of moneys paid on behalf of Senwesbel would take place by set-off against credits entered into the account. The consideration for the shares purchased by Senwesbel in terms of the first offer was paid by means of Senwes cheques, the amounts of which were debited to Senwesbel's account. In other words, Senwes advanced the full amount for the share purchases under consideration to Senwesbel.

[18] The respondents submitted that the agreements of purchase and sale were factually and legally separated from the provision of financial assistance to the company. There was no integral, inextricable linkage between the provision of financial assistance and the share purchase agreements. None of the vendors, so the argument went, could or would have known whether the loan account was in debit or in credit at the time the purchases were concluded. It was argued that the fact that the company's cheques had been attached to the offer did not amount to the provision of financial assistance nor made payment by the company a term of the sale agreements: the company was not a party to the sale agreements and the obligation to make payment for the shares rested on Senwesbel, not on the

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[15] *Brady & another v Brady & another* [1988] 2 All ER 617 (HL) at 633. See M P Larkin 'The Capital Maintenance Rule. Should it be Maintained?' (1988) 18 *Businessman's Law* 59 and the Late Hon Mr Justice P M Meskin (former editor); the Hon Mr Justice B Galgut (consulting editor), Jennifer A Kunst, Professor Piet Delport and Professor Quintus Vorster (eds) *Henochsberg on the Companies Act* (1994) vol 1 at 75; M S Blackman, R D Jooste, J L Yeats, F H I Cassim and R de la Harpe with contributions from M Larkin and C H Rademeyer *Commentary on the Companies Act* (2002) vol 1 at 4-64.

company. Although payment was made by Senwes it was legally performance of Senwesbel's obligation to pay the price to the vendors. It was submitted that any illegality that might have affected the giving of the financial assistance did not taint the sale of share agreements or, one should add, the subsequent cession of the vendors' rights to Senwesbel. In view of my conclusion on the non-joinder by the appellants of the vendors of the shares in question, I need not resolve the above issues raised by the parties.

Joinder

[19] The relief sought by the appellants in paragraph 1 of the draft order is a declaration that the acquisition of certain shares by Senwesbel pursuant to the first offer was invalid and of no force and effect. This relief is not dependent on the relief sought in terms of paragraph 4 for rectification of the register in terms of s 115 of the Companies Act. Paragraph 4, on the other hand, is dependent on the declaration as prayed for in paragraph 1. The declaration sought in paragraph 1 is not without significance. Should it be made an order, the appellants (or at least the second appellant and other shareholders) would have the required standing to apply for an order interdicting Senwesbel to vote at company meetings or receive dividends.[16] The appellants, however, did not join the vendors in the application. They sought a rule nisi only in respect of paragraph 4 of the draft order.

[20] Where a party has a direct and substantial interest in any order a court may make, or if such order cannot be sustained or carried into effect without prejudicing that party, the joinder of that party is necessary unless the court is satisfied that that party waived his or her right to be joined or agreed to be bound by the order.[17] The enquiry as to non-joinder is a matter of substance and not of form:[18]

'The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgment of the Court in the proceedings concerned . . . .'

And in *Amalgamated Engineering Union v Minister of Labour*[19] it was said:

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[16] Cf *Trinity Asset Management (Pty) Ltd & others v Investec Bank Ltd & others* 2009 (4) SA 89 (SCA) paras 22 and 43 and cf *Communicare & others v Khan & another* (12/2012) [2012] ZASCA 180 (29 November 2012) para 38.
[17] *Aquatur (Pty) Ltd v Sacks & others* 1989 (1) SA 56 (A) at 62.
[18] *Bowring NO v Vrededorp Properties CC & another* 2007 (5) SA 391 (SCA) para 21.

'Indeed it seems clear to me that the Court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without either having that party joined in the suit or, if the circumstances of the case admit of such a course, taking other adequate steps to ensure that its judgment will not prejudicially affect that party's interests.'

A 'direct and substantial interest' in a matter connotes 'an interest in the right which is the subject-matter of the litigation and … not merely a financial interest which is only an indirect interest in such litigation'.[20]

[21] In the present matter it was argued on behalf of the appellants that there was no need to have joined the vendors because they would not be bound by any judgment given in respect of paragraph 1 of the draft order. While this is correct it is not the end of the matter. The facts in *Home Sites (Pty) Ltd v Senekal*[21] were that the seller of land had prior to the sale verbally agreed to give a servitude to a third party. The purchaser claimed specific performance and the defendant pleaded that he had given the purchaser notice of the agreement to grant the servitude before the sale was concluded. An exception was taken to the plea which was upheld. However, on appeal it was said that the third party had a direct and substantial interest in the validity of the servitude and should be given an opportunity to be heard. The question was whether a verbal agreement to grant a servitude was valid. Schreiner JA said:[22]

'[I]t is clear that in regard to the present issue, the decision of which cannot be avoided, Mrs. Baumann's interest in the validity of her servitude invites the question whether she must not be given an opportunity of being heard on the point; and once the question is raised there can, I think, be only one answer to it. It is true that if she remains outside the litigation a decision to the effect that no valid servitude had been granted would be *res inter alios acta* as far as she is concerned and would not be binding by way of *res judicata* upon her. But if such a decision were given by this Court it would be an authority on the legal issues which would be directly in point and calculated to operate with decisive effect upon her claim to be entitled to the servitude. Accordingly it seems to me that she has … a direct and substantial

[19]*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 659 and see *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs & others* 2005 (4) SA 212 (SCA) para 64.
[20]*Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169; *Aquatur (Pty) Ltd v Sacks & others* 1989 (1) SA 56 (A) at 62D-E.
[21]*Home Sites (Pty), Ltd v Senekal* 1948 (3) SA 514 (A). See *Crowden Products (Pty) Ltd v Gradwell (Pty) Ltd & another* 1959 (1) SA 231 (T) at 233H.
[22]At 520. See *Rosebank Mall (Pty) Ltd & another v Cradock Heights (Pty) Ltd* 2004 (2) SA 353 (W) para 83.

interest in the results of the decision of this issue, which cannot properly be decided without her being joined as a party.'

The present case is no different. It follows that every vendor of shares in Senwes to whom the first offer was directed should have been joined in the application.

[22] Where there is a non-joinder the court may direct that steps be taken to let the matter stand over until the interested parties have been joined or have indicated that they would be bound by the judgment.[23] One way is to let the matter stand over until interested parties have filed their consents to be bound. Another is to issue a rule *nisi* rather than compelling the applicant to start proceedings *de novo*.[24] There is no application before us for an order sanctioning either course.

The auction shares

[23] The appellants applied to have the question of whether the so-called auction shares were purchased either for Senwes or for Senwesbel referred to evidence. If they were purchased for Senwes they had to be cancelled in terms of s 85(8) of the Act:

'Shares issued by a company and acquired under this section shall be cancelled as issued shares and restored to the status of authorized shares forthwith.'

Two groups of shares are involved: the first concerns 58 047 shares purchased on 12 November 2004; and the second 11 173 and 39 858 shares that were purchased at an auction on 3 December 2004 and 18 January 2005 respectively. The court below refused to refer the matter to evidence. It found that there was no reason to doubt the version of the respondents that Senwesbel acquired some of the shares directly from vendors at auctions and that Senwes duly cancelled others in terms of s 85(8). The court found that the evidence presented on behalf of the respondents was overwhelming. Because no rebutting evidence was offered by the appellants, it held that no real dispute of fact existed and stated:

'A matter cannot be referred for evidence merely because an applicant believes that he might be able to extract favourable evidence during cross-examination.'

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[23] *Amalgamated Engineering* at 663.
[24] As in *Ex parte Sengol Investments (Pty) Ltd* 1982 (3) SA 474 (T) at 477H ff and *Ex Parte Jacobson: In re Alec Jacobson Holdings (Pty) Ltd* 1984 (2) SA 372 (W) at 377F-H.

[24] The facts relied upon by the appellants are the following. On 7 March 2003 the Senwes board resolved to authorize Messrs Dique and Gouws to purchase Senwes shares at auctions at a price not exceeding 50 cents per share. Mr Riaan du Plessis, the then senior legal advisor of Senwes, was one of the employees delegated to purchase the shares. The Senwes board resolution was 'revoked' by the Senwesbel board on 2 December 2004 when it resolved that Senwesbel be authorized to purchase Senwes shares. On 19 November 2004 Mr Gouws, the former financial director of Senwes, sent an email to inter alia Du Plessis recording the following:

'It came to my notice that all Senwesbel and Senwes shares that [Du Plessis] ... bought at auctions, were cancelled. We have to treat them in the same manner as the buy back transaction. When [Du Plessis] ... acts at auctions, he acts on behalf of Senwesbel and buys Senwesbel and Senwes shares for Senwesbel.' (My translation).

The Senwesbel resolution authorizing Senwes employees to purchase shares in Senwes was passed on 2 December 2004 and Du Plessis was only authorized to purchase Senwes shares on 19 November 2004. In these circumstances the submission was made that before 19 November 2004 the only mandate Du Plessis could have had was to purchase auction shares on behalf of Senwes.

[25] The 58 047 shares purchased on 12 November 2004 were transferred to Senwesbel on 7 December 2004. In a note to Ms Joynt dated 23 November 2004 Du Plessis confirmed that he purchased the shares on behalf of Senwesbel. The 11 173 shares purchased on 3 December 2004 were transferred to Senwesbel on 7 December 2004. In a similar note to Ms Joynt dated 3 December 2004, Du Plessis confirmed that he had purchased the shares on behalf of Senwesbel. Executed CM42 transfer forms accompanied the documentation. The 39 858 shares purchased on 18 January 2005 were erroneously, according to the affidavits filed on behalf of the respondents, put in a Senwes suspense account pending their cancellation in terms of s 85(8). When it was discovered that the shares were wrongly held in the said account arrangements were made for their transfer to Senwesbel. A note of 18 February 2005 by Du Plessis confirmed that he had bought the shares on behalf of Senwesbel.

[26] The appellant submitted that the court below incorrectly applied the *Plascon-Evans* rule[25] because, as distinct from that case, the appellants had applied for a referral to oral evidence. A court has a discretion to refer a dispute to oral evidence. Although it is undesirable to determine a genuine dispute of fact solely on the affidavits,[26] a court may, in the exercise of its discretion, refuse to do so where the probabilities on the papers do not favour the applicant.[27] To my mind, this is such a case. The application was not only brought late,[28] but the allegations made were controverted by the clear evidence of the respondents' witnesses supported by contemporaneous documentation. On the papers, no non-compliance by the company with s 85(8) of the Act was established. Even if the dispute can be characterised as a genuine dispute of fact, despite the failure by the appellants to establish a factual basis for their contentions, the probabilities in view of the uncontroverted evidence of the above witnesses are so overwhelmingly in favour of the respondents that a referral to evidence is not justified.

[27] In the result the appeal is dismissed with costs including the costs of two counsel.

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F R Malan
Judge of Appeal

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[25] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634I-635C.
[26] *Trust Bank van Afrika Bpk v Western Bank Bpk & andere NNO* 1978 (4) SA 281 (A) at 294D-295A.
[27] *Kalil v Decotex (Pty) Ltd & another* 1988 (1) SA 943 (A) at 979G-J; *Lombaard v Droprop CC & others* 2010 (5) SA 1 (SCA) paras 25, 26 and 33.
[28] *Lombaard v Droprop CC* para 53; *Law Society Northern Provinces v Mogami* 2010 (1) SA 186 (SCA) at 195C-D.

APPEARANCES:

For Appellant:	N G D Maritz SC and B H Swart SC
	Instructed by:
	Newtons Nieuw Muckleneuck, Pretoria
	McIntyre & Van der Post Bloemfontein
For 1st Respondent:	C M Eloff SC and A Ferreira
	Instructed by:
	Assheton-Smith Inc C/o S G A Attorneys Newlands, Pretoria
	Symington & De Kok Bloemfontein
For 2nd Respondent:	A Subel SC
	Instructed by:
	Coetsee Van Rensburg Inc
0	C/o Rorich Wolmarans & Luderitz Inc Brooklyn, Pretoria
	Symington & De Kok

Bloemfontein