



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF
APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 23 December 2020

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

*Sekepe Investments (PTY) LTD and Others v Government Employees Pension Fund and
Another (110/2019) [2020] ZASCA 183 (23 December 2020)*

Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Gauteng Division of the High Court, Pretoria (Rabie J), which involved a claim for specific performance and turned mainly on the issue of legal standing to enforce the provisions of a shareholders' agreement. The appeal was upheld with costs.

The matter concerned the financing of the second respondent, Magae Makhaya Housing (RF) (Pty) Ltd (MMH), a ringfenced company in the business of low-cost housing developments, of which the appellants and the first respondent, the Government Employees Pension Fund (GEPF), are shareholders. The shareholders' agreement made provision for the business activities of MMH to be funded by the profits of MMH, through loans on commercial terms, and, insofar as may be agreed by the shareholders, by shareholder loans to the company in proportion to each shareholder's interest in MMH. The first appellant holds 55%, the GEPF 25%, and the second and third appellants each 10% of the shares in MMH.

Separate agreements were concluded between the GEPF and each of the appellants, in terms of which the GEPF was to loan considerable sums of money to the appellants for the sole purpose of enabling them to, in turn, advance these precise sums to MMH as shareholder loans

under the shareholders' agreement. In terms of this arrangement the GEPF would therefore provide all of the funding – directly, i.e. through its own shareholder loan, and indirectly, through its loans to the appellants who then advanced that funding to MMH.

In September 2017, the board of MMH resolved that it required shareholder funding for various projects. Pursuant to the resolution, MMH issued utilisation notices to the GEPF, calling upon it to advance sums to the appellants under the terms of their respective loan agreements with the GEPF, to enable the appellants to make shareholder loans to MMH. When these sums were not forthcoming, the appellants' attorneys demanded from the GEPF both the payment of its proportional amount of the shareholder loan call, as is required under the shareholders' agreement, as well as the individual loans to each of the appellants so that they could meet their obligations to fund MMH.

These demands ultimately resulted in a claim for specific performance in the high court. The notice of motion sought, firstly, the payment of the GEPF's shareholder loan to MMH under the shareholders' agreement; and, second, the payment of the loans allegedly due by the GEPF to the appellants under the terms of the loan agreements and the utilisation notices. The GEPF hit back with three, essentially technical, defences: to wit, that the appellants were without legal standing to claim in terms of a wrong done to MMH; that the appellants had not fulfilled the conditions precedent under the loan agreements for any obligations of the GEPF to arise; and that its (the GEPF's) obligations *vis-à-vis* the company to make shareholder loans could only arise if the appellants were in a position to make shareholder loans to MMH simultaneously, which the appellants were not able to do.

The high court found it unnecessary to rule on the issue of standing, but found that the other defences advanced by the GEPF were sound and consequently dismissed the appellants' application.

On appeal to the SCA, it was held that the appellants had rights to the advances lent to them by the GEPF. The appellants therefore indeed had the necessary standing to seek the specific performance of the obligations owed to them under the respective loan agreements.

Secondly, in terms of the right under the shareholders' agreement to exact compliance with the duty to fund, resting on every shareholder, the SCA held that because this duty rested on all

shareholders, and was owed not only to MMH but also to every other shareholder, the duty was enforceable by shareholders *inter se*. The standing defence accordingly failed.

The GEPF also contended that no obligation to advance loans to the appellants arose in the absence of compliance with the requirements included in the loan agreements. On this score, the SCA found that a defence cannot be made out simply by reproducing the terms and conditions of an agreement and asserting that the conditions have not been fulfilled.

Finally, in respect of the simultaneous payment of shareholder loans, the SCA held that the GEPF was not entitled to rely on its own failure (that is, not to make the required advances to the appellants) and thereafter contend that the appellants are not in a position to make the shareholder loans simultaneously with the GEPF as the reason for not advancing the loans.

The GEPF's defences to the specific performance remedy therefore failed to carry the day. In the result, the appeal was upheld with costs, including those of two counsel.
