HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

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DATE SIGNATURE

Case No: 11899/2018

In the matter between:

REEZEN LIMITED Applicant

and

EXCELLERATE HOLDINGS LIMITED 1st Respondent

BOUNDARY TERRACES NO 015 (PTY) LIMITED 2nd Respondent

ZANMET TRADING 7 (PTY) LIMITED 3rd Respondent

***Case Summary*: Company Law – Companies Act 71 of 2008 – Interpretation of s 41(3). Section 38(1) empowers the board of a company to issue shares and s 41(3) limits that power and requires shareholder approval *inter alia* for (a) the issue of shares, if the voting power of the class of shares that are issued or issuable as a result of the transaction will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction; or (b) the conclusion of 'a series of integrated transactions', if the voting power of the class of shares that are issued or issuable as a result of the transaction will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction. Whether the conclusion of one indivisible share sale and subscription agreement constitutes 'a series of integrated transactions' – whether the shares issued or issuable as a result of the conclusion of the share sale and subscription agreement exceeded the 30% restriction in s 41(3) – whether share sale and subscription agreement concluded in contravention of s 41(3) ought to be declared void in terms of s 218(1).**

JUDGMENT

MEYER J

[1] The applicant, Reezen Ltd (Reezen), seeks an order that the sale by the first respondent, Excellerate Holdings Ltd (Excellerate), of 19 000 000 of its treasury shares to the second respondent, Boundary Terraces No 015 (Pty) Ltd (BT), and the issue by Excellerate of 56 892 489 new ordinary shares to BT, be set aside. Reezen is a shareholder and beneficial owner of Excellerate's ordinary shares. The third respondent, Zanmet Trading 7 (Pty) Ltd (Zanmet), is a wholly-owned subsidiary of Excellerate and it owned the 19 000 000 ordinary shares (the treasury shares) in Excellerate before they had been sold to BT.

[2] A written share sale and subscription agreement was concluded by Excellerate, Zanmet and BT, on 13 February 2018. In terms thereof, BT, in one indivisible transaction, would purchase the 19 000 000 treasury shares at a price of R5.40 per share from Excellerate's wholly-owned subsidiary, Zanmet, and subscribe to 56,892,489 new shares that would be issued to BT at a price of R5.40 per share. Reezen's case is that the share sale and subscription agreement ought to be visited with the sanction of voidness: First, it argues, that the share sale and subscription agreement contravenes s 41(3) of the Companies Act, 71 of 2008 (the Companies Act). And, second, that the directors of Excellerate exercised their power to sell and to issue the shares contrary to their fiduciary duties; they did not exercise their power *bona fide* for the benefit of Excellerate and for a proper purpose.

[3] The only questions which are capable of determination on the papers are (a) whether the share sale and subscription agreement was concluded in contravention of s 41(3) of the Companies Act and, if so, (b) whether it ought to be visited with the sanction of voidness, in whole or in part. The other issues involve the resolution of material disputes of fact, which are not capable of resolution on the papers without a referral to trial. The directors

may, in the words of Curlewis JA in *Treasure Trove Diamonds Ltd and another v Hyman* 1928 AD 464 at 480-481, satisfy the court at a trial when evidence is heard '. . . that they acted entirely *bona fide*, and that what now looks on the face of it a transaction with an ulterior motive and not for the benefit of the company, was quite genuine'.

[4] Section 38(1) of the Companies Act provides that-

'[t]he board of a company may resolve to issue shares of the company at any time, but only within the classes and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation, in accordance with section 36.'

Section 41(3) provides as follows:

'An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.'

Section 1 states that a '. . . "series of integrated transactions" has the meaning set out in s 41(4)(b)'. And s 41(4) reads thus:

'(4) In subsection (3)—

(a) for purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares is the greater of—

(i) the voting power of the shares to be issued; or

(ii) the voting power of the shares that would be issued after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued;

(b) a series of transactions is integrated if—

(i) consummation of one transaction is made contingent on consummation of one or more of the other transactions; or

(ii) the transactions are entered into within a 12-month period, and involve the same parties, or related persons; and—

(aa) they involve the acquisition or disposal of an interest in one particular company or asset; or

(bb) taken together, they lead to substantial involvement in a business activity that did not previously form part of the company's principal activity.'

[5] In terms of clause 6.1 of Excellerate's memorandum of incorporation (MOI), it is authorised to issue 60 000 0000 ordinary shares, each of which entitles the holder to vote on any matter to be decided by the shareholders of the company and to one vote in the case of a vote by means of a poll. The board may, in terms of clause 6.2 and subject to clause 6.3, resolve to issue shares at any time, but only within the classes and to the extent that those shares have been duly authorised by or in terms of the MOI. Clause 6.3 mirrors s 41(3) of the Companies Act and reads thus:

'Notwithstanding the provisions of clause 6.2, any issue of Shares, Securities convertible into Shares, or rights exercisable for Shares in a transaction, or a series of integrated transactions shall, in accordance with the provisions of section 41(3) [of the Companies Act 71 of 2008], require the approval of the Shareholders by special resolution if the voting power of the class of Shares that are issued or are issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% (thirty percent) of the voting power of all the Shares of that class held by Shareholders immediately before that transaction or series of integrated transactions.'

[6] The 2008 Companies Act has brought about significant changes in the field of company law in this country. One fundamental change, as pointed out by Carl Stein and Geoff Everingham *The New Companies Act Unlocked*, at 14, is that–

'. . . under the 1973 Act, a company could not issue any shares without shareholder approval. The Act now gives the directors the power to issue shares without shareholder approval up to a maximum of 30% of the voting power of all shares of that class. Minority shareholders of unlisted public companies do not have pre-emptive rights over these shares (i.e., the right to acquire these shares before they may be issued to any third party). These minority shareholders thus have no protection in relation to share issues up to this 30% level, unless the MOI provides otherwise.'

[7] The background facts relevant to the present inquiry are not controversial. The board of directors of Excellerate comprises three executive directors and three non-executive directors. The three executive directors are also shareholders in Excellerate. During the beginning of 2017, management of Excellerate set out to find a new strategic BEE partner. It was not until about September 2017 that management located a BEE partner that they found to be satisfactory. This partner consisted of a consortium that comprised Agile Capital (Pty) Ltd and RMB Corvest. Management and the consortium envisaged structuring the acquisition of the shares by the consortium through a scheme of arrangement under s 114 of the Companies Act. Management's goal with the proposed transaction that was to be concluded with the consortium was identified by Mr Hulley (the chief executive officer of Excellerate) in the following extract from an email that he sent to Reezen's representative, Mr Koudounaris:

'I know that most shareholders would like to continue with Excellerate into the next phase. However, as BBBEE requires 51% and management already has 38%, this would be very difficult to achieve unless management dilute. This is counter-intuitive as I feel management should be more invested rather than less, and in fact part of the plan is for management to leverage to buy up to 49%.'

It appears that the ultimate objective of the transaction involved all of the existing shareholders (other than management) being bought out by the consortium and that 11% of those shares then be sold to management - with leverage funding provided by the consortium – to increase management's shareholding in the company to 49%.

[8] On 1 November 2017, Mr Hulley distributed an 'expression of interest' to the shareholders 'with the intention of gauging shareholders support for the transaction'. Pursuant to this expression of interest, the consortium indicated that it, together with management, wishes to acquire all of the shares at a price of R3.80 per share. A successful scheme of arrangement requires the affirmative votes of 75% of independent shareholders who vote at the meeting, and Reezen's support for the transaction was thus essential. Mr Hulley and the consortium negotiated with Reezen to solicit its support and to ascertain the price at which it would be willing to sell its shares. Mr

Koudounaris, at that stage, indicated that Reezen would support the transaction at a price of R5.40 per share. On 8 December 2017, based on Reezen's indication that it would support the transaction, Mr Hulley distributed legally binding irrevocable undertakings to Excellerate's shareholders. The consortium indicated that it intended to acquire 100% of the shares (other than those held and owned by management), the price payable per share was R5.40, the transaction was to be implemented through a scheme of arrangement in terms of s 114 of the Companies Act and shareholders who signed the document irrevocably undertake to vote in favour of all resolutions put to the shareholders of Excellerate for purposes of approving and implementing the scheme of arrangement.

[9] Early in January 2018, Mr Koudounaris informed Mr Hulley that Reezen no longer considered the offer price of R5.40 to be a fair and reasonable value for its shares. It consequently decided not to sell its shares and not to sign the irrevocable undertaking. Shareholders holding approximately 27 000 000 of the voting shares signed the irrevocable undertakings. This amounts to 18.85% of the eligible voting shares (management and treasury shares excluded). Shareholders holding more than 81% of the eligible voting shares appear to have decided not to sell their shares at R5.40 and not to sign the irrevocable undertakings. Consequently, management and the consortium withdrew the proposal on 17 January 2018.

[10] On 13 February 2018, Excellerate's board, acting also on behalf of Zanmet, and BT concluded the share sale and subscription agreement without any notice to the existing shareholders and without seeking or obtaining their prior approval. Clause 3.2 of the share sale and subscription agreement reads thus:

'3.2 The Acquirer [BT] has agreed, in terms of one indivisible transaction, to:

3.2.1 firstly, purchase the Sale Shares from Zanmet and Zanmet has agreed to sell the Sale Shares to the Acquirer with effect from the Closing Date ['the day on which the last of the Conditions Precedent has been fulfilled or waived, as the case may be, or such other date as the Parties may agree in writing' (clause 2.1.5)]; and

3.2.2 thereafter, subscribe for the Subscription Shares at the Subscription Price ['an amount of R5.40 per Subscription Share" (clause 2.1.32)],
on the terms and subject to the conditions herein contained.'

And clause 15 reads as follows:

'15.1 The Parties hereby record and agree that the Sale and the Subscription constitute one single indivisible transaction.

15.2 On the Closing Date the Parties shall

15.2.1 implement the Sale as contemplated in clause 8; and

15.2.2 immediately following the implementation of the Sale as contemplated in clause 15.2.1, the Parties shall implement the Subscription as contemplated in clause 12.

15.3 The implementation of the Sale and the Subscription shall occur strictly in accordance with the sequence of events set out in clause 15.2, it being agreed that the Subscription will only be implemented if and once the Sale has been implemented in the manner contemplated in clause 8. Should the Sale have been implemented and the Subscription is not for any reason whatsoever, the Sale shall be unwound and the Parties restored to their positions prior to the implementation of the Sale.'

[11] All the suspensive conditions were timeously fulfilled and the sale transaction and the subscription transaction were implemented in accordance with the terms and conditions of the share sale and subscription agreement. On 21 February 2018, Excellerate notified all shareholders, in terms of s 122(3)(b) of the Companies Act, that BT had effected an acquisition of a beneficial interest in more than 30% of the ordinary issued shares of Excellerate. On 27 February 2018, a firm intention and announcement regarding a mandatory offer in terms of s 123 of the Companies Act was distributed to all shareholders and board members of Excellerate. The announcement records that BT had acquired beneficial ownership of 105 657 799 ordinary shares (being 42.75% of the ordinary issued shares of Excellerate) at a price of R5.40 per share, it offers to acquire all remaining shares for R5.40 each and notice is given that an independent board of Excellerate would be constituted, in terms of regulation 108 of Chapter 5 of the Companies Regulations, 2011, to consider the terms of the offer and the

report of an independent expert, which report would make recommendations as to whether the consideration of R5.40 per share was fair and reasonable.

[12] Immediately before the involvement of BT, 190 275 882 of Excellerate's shares were in issue. No voting rights attaching to the 19 000 000 treasury shares owned by Excellerate's wholly-owned subsidiary, Zanmet, might, in terms of s 48(2)(b)(ii) of the Companies Act, have been exercised while the shares were held by the subsidiary. The total voting shares in issue were accordingly 171 275 882, of which management owned 28 050 000 (16.38% of the voting shares) and 143 225 882 were independently owned (83.62% of the voting shares). Shareholders, in terms of the irrevocable undertakings, were willing to sell 29 765 310 of the issued voting shares (17.38% and 20.78% if the management–owned voting shares are excluded). The total management–owned voting shares remained 28 050 000 shares (16.38%) and the total independent voting shares owned by those not willing to sell to BT at R5.40 per share were 113 460 572 shares (66.24% and 79.22% if management–owned voting shares are excluded).

[13] Once the share sale and subscription agreement had been concluded and implemented (the issue of 56 892 489 new shares) the total issued shares increased to 247 168 371 shares. The total issued voting shares also increased to 247 168 371 (the voting rights attached to the 19 000 000 treasury shares could then be exercised by BT). The total management voting shares remained 28 050 000 shares (reduced to 11.35% of the voting shares) and BT then owned 105 657 799 voting shares (42.75%). The independently owned voting shares remained 113 460 572 (reduced to 45.90% of the voting shares). (Reezen held 19.05% of the voting shares before BT's involvement and 13.20% after the conclusion and implementation of the Share Sale and Subscription Agreement). The treasury shares were reduced to nil. The share sale and subscription agreement thus had the effect of creating a cluster of shareholders (consisting of management and BT) that can control Excellerate – it can not only pass any ordinary resolution, but it can also veto any ordinary or special resolution – and the significant dilution of

the minority shareholdings from 66.24% to 45.90% of the total issued voting shares.

[14] On 22 March 2018, Reezen launched the present application. Part A of the notice of motion comprises an urgent application for interim interdictory relief. Therein, Reezen sought to interdict BT from selling, transferring, encumbering or dealing with the shares that were transferred to it pursuant to the conclusion and implementation of the share sale and subscription agreement, from exercising any rights in respect of the shares and from making or proceeding with a mandatory offer in terms of s 123 of the Companies Act or from giving effect to any transaction pursuant to such mandatory offer, if it was made. It further sought an order interdicting Excellerate from allowing BT to exercise any voting rights at any shareholders meeting in respect of the shares and from issuing any further shares without the prior approval of the court. Finally, it sought an order interdicting the directors of Excellerate from taking into account any votes that were exercised by BT in contravention of the order it sought when determining the outcome of any shareholders' vote in terms of the Companies Act.

[15] The urgent part of the notice of motion was enrolled for hearing on 27 March 2018, when this court, by consent of all the parties, made an interim order in substitution of the relief sought in Part A of the notice of motion. BT's undertaking not to sell, transfer, further encumber or in any manner deal with the shares in question and Excellerate's undertaking not to convene or hold any meeting of shareholders for purposes of proposing or passing any resolution concerning or relating *inter alia* to the appointment of any of BT's nominees as directors to Excellerate's board, were made an order of court. The order specifically records that the undertakings shall lapse and have no further force or effect on the earlier of 30 May 2018 and the date of the determination of Part B of the notice of motion. During the course of the hearing of Part B of this application before me, the undertakings were extended until the delivery of this judgment.

[16] Reezen argues that the transactions comprising the share sale and subscription agreement, i.e. the sale and the subscription transactions,

constitute a 'series of integrated transactions' as contemplated in s 41(3), read with the definition of the phrase in s 1 and s 41(4)(b) of the Companies Act. The exact moment of calculating the 30% restriction in respect of the new shares that were issued as a result of the series of integrated transactions, so Reezen argues, is the moment immediately before the share sale and subscription agreement was concluded. If Reezen's interpretation is correct, the calculation of the 30% would be based on 171 275 882 voting shares that were held by the shareholders immediately before the conclusion of the share sale and subscription agreement. The 56 892 489 new ordinary shares that were issued then constitute 33.22% of the voting power of all the shares held by the shareholders of that class immediately before the series of integrated transactions. The approval of the shareholders by special resolution would then have been required for the 'series of integrated transactions'. It is common cause that shareholder approval was neither sought nor obtained.

[17] Excellerate, BT and Zanmet, on the other hand, argue that the sale agreement and the subscription agreement must be regarded as two independent agreements, the former having been effected before the latter. They argue that the provisions of s 41 apply exclusively to the issue of shares and govern the rights of parties, in anticipation of and pursuant to such issue of shares. The provisions of s 41, so they argue, find no application to the sale or transfer of existing shares. The sale of shares transaction concerned the transfer of treasury shares from Zanmet to BT, which shares had been issued years before the share sale and subscription agreement was concluded, and that transaction, they argue, is accordingly not struck by the provisions of s 41(3), read with s 41(4). If their interpretation is correct that the provisions of s 41(3) and of s 41(4) do not find application in the case of a sale of existing shares transaction and that the two transactions *in casu* therefore do not constitute a 'series of integrated transactions' as envisaged in s 41(3) read with s 41(4)(b), no shareholders' approval was required and the provisions of s 41(3) were not contravened. The calculation of the 30% restriction would then be based on 190 275 882 voting shares that were held by shareholders immediately after the sale agreement in the share sale and

subscription agreement had been implemented, in which event the 56 892 489 newly issued shares would constitute 29.9% of the voting power of all the shares held by the shareholders immediately before the implementation of the subscription agreement.

[18] Section 38(1) of the Companies Act empowers the board of a company to issue shares. Section 41(3) limits that power and requires shareholder approval *inter alia* for (a) the issue of shares if the voting power of the class of shares that are issued or issuable as a result of the transaction will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction; or (b) the conclusion of 'a series of integrated transactions' if the voting power of the class of shares that are issued or issuable as a result of the series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction. The board of directors of a company, therefore, has the power to issue shares without shareholder approval up to a maximum of 30% of the voting power of all shares of that class. The moment of calculating the voting power of all the shares of the relevant class held by shareholders, is 'immediately before the transaction or series of transactions'. Nothing in the context of the Companies Act detracts from the clear and unambiguous meaning of s 41(3). Its purpose is to protect shareholders in relation to share issues from and beyond the 30% level.

[19] The two transactions embodied in the share sale and subscription agreement - the sale transaction between Zanmet and BT and the subscription agreement between Excellerate and BT - conform to the definition of 'series of integrated transactions' as contemplated in s 41(3) read with s 41(3)(b) of the Companies Act. Both transactions were entered into within a 12–month period and involve related persons as contemplated in s 41(4)(b)(ii)(aa). They were entered into on the same day. BT was the acquirer in both transactions. Zanmet, being a wholly-owned subsidiary of Excellerate and therefore a related person to Excellerate, sold the treasury shares to BT pursuant to the sale transaction and Excellerate was the entity

that issued the new shares to BT pursuant to the subscription transaction. Both transactions involve the acquisition or disposal of an interest in one particular company – the shares of Excellerate.

[20] The sale transaction and the subscription transaction embodied in the share sale and subscription agreement, therefore, amount to a 'series of integrated transactions'. The 56 892 489 new shares that were issued as a result of the 'series of integrated transactions' constituted 33.2% of the voting power of all the shares held by the shareholders immediately before the series of transactions. The approval of the shareholders by special resolution was not obtained and s 41(3) of the Companies Act was thus contravened.

[21] I now turn to the question whether the share sale and subscription agreement that was concluded in contravention of s 41(3) of the Companies Act, ought to be declared void in terms of s 218(1), which section provides as follows:

'Subject to any provision in this Act specifically declaring void an agreement, resolution or provision of an agreement, Memorandum of Incorporation, or rules of a company, nothing in this Act renders void any other agreement, resolution or provision of an agreement, Memorandum of Incorporation or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision.'

[22] Excellerate, Zanmet and BT argue in the first instance that a declaration of voidness in terms of s 218(1) is not sought in the notice of motion and that the relief claimed (the setting aside of the sale of shares and the issue of shares plus ancillary relief) can thus not be granted. I disagree. The relief claimed by Reezen is predicated on a declaration of voidness by this court of the share sale and subscription agreement. This is clear from a reading of the founding papers and Reezen's heads of argument. To dismiss the application because a declaration of voidness is not explicitly sought in the notice of motion would allow form to prevail over substance and would not be in the interests of justice.

[23] Excellerate, Zanmet and BT further argue that the material facts relevant to this court's discretion to declare the transactions void or not, are in dispute and it is thus not possible for this court to exercise its (declaratory) discretion. I disagree. The contravention of s 41(3) of the Companies Act, in my view, ought to result in the share sale and subscription agreement being declared void, even if the version of Excellerate, Zanmet and BT is accepted that, in concluding the share sale and subscription agreement, the directors of Excellerate exercised their power *bona fide* for the benefit of Excellerate and for a proper purpose and that the shares were sold and issued for adequate consideration to Excellerate.

[24] In *Malasela Taihan Electric Cable (Pty) Ltd v Fidelity Security Services (Pty) Ltd* (17193/2014) [2017] ZAGPJHC 341 (18 April 2017), this court said the following in respect of the consequences for the validity of an agreement that is in conflict with a statutory prohibition:

'[42] There are many statutes which expressly provide that certain contracts are void, such as the Alienation of Land Act 68 of 1981, but there are also many which do not contain such express statement. A thing done contrary to the direct prohibition of the law is generally void and of no effect; the mere prohibition nullifies the act. (See *Schierhout v Minister of Justice* 1926 AD 99 at 109.) But, as was said by Boshoff JA in *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A) at 188G,

". . . this rule is not inflexible or inexorable. Although a contract is in violation of a statute it will not be declared void unless such was the intention of the Legislature and this is nonetheless the rule in the case of a contract in violation of a statute which imposes a criminal sanction. The legislative intent not to render void a contract may be inferred from general rules of interpretation. Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other. In the case of *Standard Bank v Estate Van Rhyn* 1925 AD 266 SOLOMON JA at 274 stated the position as follows:

"What we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As *Voet* (1.3.16) puts it – 'but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it'. Then after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in

these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow if the act itself done contrary to the law."

See also *Swart v Smuts* 1971 (1) SA 819 (A) at 829C and *Dhlamini en 'n Ander v Protea Assurance Co Ltd* 1974 (4) SA 906 (A) at 913H-914C.'

[43] The relevant legislative instruments must be interpreted in accordance with the established principles of interpretation (see *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12). Section 39(2) of the Constitution also enjoins a court to 'promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation.

[44] In *Wille's Principles of South African Law* 9th Ed Francois du Bois et al, at 761, the learned authors refer to the following factors which the courts have considered relevant in ascertaining the legislative intent not to render void a contract:

'The legislative intent not to render void a contract may be inferred from general rules of statutory interpretation. In this regard, the courts have considered the following factors to be relevant: the subject matter of the prohibition; its purpose in the context of the legislation; the remedies, if any, provided in the event of a breach of the prohibition; the nature of the mischief which the prohibition was designed to remedy or avoid; and any cognizable impropriety or inconvenience that might flow from a finding of invalidity. Where the purpose of the prohibition is merely to protect the Revenue, the inclination will be to uphold the validity of the contract; so too where 'greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law'. On the other hand, where recognition of the validity of the contract would bring about, or give legal sanction to, the very situation which the legislature seeks to prevent, the inclination will be the other way.'

(Footnotes omitted. Also see *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 SCA para 8.)

[25] The Companies Act, as I have mentioned earlier on in this judgment, now gives the directors the power to issue shares without shareholder approval up to a maximum of 30% of the voting power of all shares of that class. The objective of the legislature with and the purpose of s 41(3) in the context of the Companies Act is the protection of shareholders by restricting the directors' power to issue shares without shareholders' approval beyond

the limitation. The mischief which the prohibition contained in s 41(3) was designed to avoid is to prevent an excessive or impermissible dilution of existing shareholding without shareholders consent through the issue of shares or the conclusion of a series of transactions as a result of which shares are issued in excess of the 30% limitation. Section 41(3), therefore, also gives effect to s 7(i) of the Companies Act – 'balance the rights and obligations of shareholders and directors within companies'. A transaction in violation of s 41(3) ought to be visited with the sanction of voidness, for if it does not, the section would not serve the purpose of protecting the shareholders as it is intended to do.

[26] The civil remedies provided for in s 41(5) and s 218(2) the Companies Act in the event of a breach of s 41(3) are inadequate. Damages can hardly be said to be an adequate remedy for shareholders in instances where the shareholder-protection provisions of s 41(3) were violated and where their share in the company was unlawfully diluted. Non-compliance with s 41(3) would also not be discouraged if non-compliance only allows shareholders to claim damages.

[27] Greater 'inconveniences and impropriety' would also not flow from the rescission of what was done pursuant to the conclusion of the share sale and subscription agreement 'than would follow the act itself done contrary to the law'. Excellerate is a very profitable company. It is a cash generating business, is cash flush and is not heavily geared, i.e. it does not have significant borrowings. There is no suggestion that it would be unable to repay the money that BT had paid to it pursuant to the conclusion of the share sale and subscription agreement. The shares that were obtained by BT pursuant to the share sale and subscription agreement have been ring-fenced in terms of the consent order granted on 27 March 2018, with the result that if the share sale and subscription agreement is declared void, the parties can easily be restored to their positions immediately prior to the conclusion of that agreement.

[28] I, therefore, am of the view that the share sale and subscription agreement ought to be declared void. Legal sanction would otherwise be

given to the very situation which the legislature wishes to prevent. (See *Pottie v Kotze* 1954 (3) SA 719 (A) at 726-727.) An interpretation that the legislative intent is not invalidity, would detract from the adequate protection and safeguarding of the rights of existing shareholders of the relevant class of shares. That would undermine the purpose and object of the restriction enacted in s 41(3) and ignore the mischief it was aimed to prevent. Directors would be disincentivized from adhering to the restriction in exercising their extraordinary power to issue shares without shareholders consent. The purpose of s 41(3), on a proper construction of the Companies Act, is not sufficiently served by the civil penalties prescribed for a contravention of s 41(3).

[29] The illegal part of the share sale and subscription agreement cannot be severed from the rest of the agreement. (See *Bal v Van Staden* 1903 TS 70 at 82.) As stated by the learned authors in *Wille's Principles of South African Law* at 771, which statement of the law was accepted and applied by this court in *Malasela* para 55:

'Whether the portions of an agreement are severable or not depends in the first instance on the probable intention of the parties as appears in, or can be inferred from, the terms of the contract as a whole. Since the intention of the parties in this regard is seldom clearly expressed, the courts have devised certain guidelines to assist in arriving at such intention . . . .'

Here, the intention of the parties is clearly expressed in clauses 3.2 and 15.1 of the share sale and subscription agreement. These clauses make it plain that BT, in one indivisible transaction, purchase the shares and subscribe to the new shares. The implementation of the subscription of shares followed immediately upon the implementation of the sale of shares. It was specifically agreed that the subscription will only be implemented if and once the sale has been implemented and that should the sale have been implemented but the subscription is not, the sale shall be unwound and the parties restored to their positions prior to the implementation of the sale.

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

1. The share sale and subscription agreement is declared void and the issue by the first respondent of its shares to the second respondent and the sale

of the first respondent's treasury shares to the second respondent are set aside.

2. The security register of the first respondent is to be rectified to reflect paragraph 1 above.
3. The respondents are to pay the applicant's costs of the application, including the costs reserved in terms of the order dated 27 March 2018 and the costs occasioned by the employment of two counsel, jointly and severally, the one paying the others to be absolved.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Dates of hearing:	29-30 May and 1 June 2018
Date of Judgment:	22 June 2018
Applicant's Counsel:	A Subel SC (assisted by J Mÿburgh)
Instructed by:	Hogan Lovells (South Africa) Inc., Sandton
1st and 3rd Respondents' Counsel:	JP Daniëls SC (assisted by GW Amm)
Instructed by:	Cliffe Dekker Hofmeyer Inc., Sandton
2nd Respondent's Counsel:	C Badenhorst SC (assisted by A Lamprecht)
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