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

CASE NO: 2022/650

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

15/7/2022
DATE

J Moorcroft
SIGNATURE

In the matter between:

SIYAKHULA SONKE EMPOWERMENT CORPORATION (PTY) LTD	First Applicant
ARENDSE, FREDERICK SAM	Second Applicant
and	
REDPATH MINING (SOUTH AFRICA) (PTY) LTD	First Respondent
REDPATH AFRICA LIMITED	Second Respondent

JUDGMENT

MOORCROFT AJ:

Summary

Application for leave to appeal - Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 – Relief sought moot – event sought to be interdicted in the past - No reasonable prospect of success or other compelling reason why appeal should be heard – Application dismissed

Joinder – Direct and substantial interest – Private company - Shareholder – entered as such in securities register - has to be joined in application to interdict a scheduled meeting of shareholders

Order

[1] I make the following order:

1) *The application for leave to appeal is dismissed;*

2) *The applicants for leave to appeal are ordered to pay the costs of the application, including the costs of three counsel in respect of the first respondent, jointly and severally the one paying the other to be absolved.*

Uniform Rule[1] 49(1)(b)

[2] This is an application for leave to appeal. The judgment sought to be appealed was handed down and published on Caselines on 25 April 2022. A version to which a summary had been added was subsequently uploaded and the date reflected as 8 May

[1] All references to Rules are to the Uniform Rules of Court.

2022. The notice of application for leave to appeal was filed on 27 May 2022.

[3] I am satisfied that the legal representatives for the applicant had the date of 8 May 2022 in mind when preparing the notice of the application and that they were *bona fide* in doing so, hence the absence of an application for condonation. No prejudice was occasioned. Good cause has been shown and the period of fifteen days is hereby extended in terms of Rule 49(1)(b).

The test in an application for leave to appeal

[4] In *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd*[2] Wallis JA said:

> *"The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. "*

[5] Section 17(1)(a)(i) and (ii) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration. Once such an opinion is formed leave may not be refused.

[6] An appeal may be dismissed purely on the ground that the issues are of such a nature that the decision sought will have no practical effect or result. The question whether the decision would have no practical effect or result is to be determined without

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[2] 2013 (6) SA 520 (SCA) para 24.

reference to any consideration of costs unless the exceptional circumstances of the case dictate otherwise.[3]

[7] .In *KwaZulu-Natal Law Society v Sharma*[4] Van Zyl J held that the test enunciated in *S v Smith* [5] still holds good:

> *"In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

[8] The test for leave to appeal is however more stringent under the Superior Courts Act of 2013 than it was under the repealed Supreme Court Act, 59 of 1959.[6]

Analysis

[9] The applicants sought an order in the Urgent Court interdicting a shareholders' meeting of the first respondent. I held that the application was not urgent, and that the

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3 S 16(2)(a) of the Superior Courts Act, 10 of 2013.
4 2017 JDR 0753 (KZP), [2017] JOL 37724 (KZP) paras 29 to 30.
5 2012 (1) SACR 567 (SCA) para 7.
6 *Mont Chevaux Trust (IT 2012/28) v Tina Goosen* 2014 JDR 2325 (LCC), [2014] ZALCC 20 para 6; *S v Notshokovu* [2016] ZASCA 112 para 2. See also Van Loggerenberg and Bertelsmann *Erasmus: Superior Court Practice* A2-55; *The Acting National Director of Public Prosecution v Democratic Alliance* [2016] ZAGPPHC 489, JOL 36123 (GP) para 25; *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Services* [2017] ZAGPPHC 340 para 5; *Lakaje N.O v MEC: Department of Health* [2019] JOL 45564 (FB) para 5; *Nwafor v Minister of Home Affairs* [2021] JOL 50310 (SCA), 2021 JDR 0948 (SCA) paras 25 and 26.

application was rendered fatally defective by the non-joinder of the third shareholder. The other two shareholders were the first applicant and the second respondent.

[10] I deal with the issues raised under headings below.

The joinder of all shareholders in an application to interdict a meeting that shareholders are entitled to attend and to participate in

[11] I held that the right to receive proper notice of shareholders' meetings is a statutory right[7] and gives rise to a direct and substantial legal interest.[8] A shareholder must be joined in an application such as the present one to interdict the meeting that it is entitled to attend. This is not a mere financial interest. In the application for leave to appeal, the applicant argues that:

> *"The Court erred in finding that all shareholders in a company must be joined to an application seeking to interdict a shareholder's meeting as a matter of general principle."*

[12] The applicants argue that the decision is novel and far reaching, and that the principle established is likely to cause practical difficulties especially in the case of a

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7 S 62 of the Companies Act, 71 of 2008.

8 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2011 (4) SA 337 (SCA) 359D; *Standard Bank of SA Ltd v Swartland Municipality* 2011 (5) SA 257 (SCA) 259E–260A; *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) 317A; *Judicial Service Commission v Cape Bar Council* 2013 (1) SA 170 (SCA) 176H–I; *In re BOE Trust Ltd NNO* 2013 (3) SA 236 (SCA) 241H–I; *Absa Bank Ltd v Naude NO* 2016 (6) SA 540 (SCA) 542I–543C; *South African History Archive Trust v South African Reserve Bank* 2020 (6) SA 127 (SCA) para 30; *115 Electrical Solutions (Pty) Ltd v City of Johannesburg Metropolitan Municipality* [2021] JOL 50031 (GP) para 76.

company with a large number of shareholders whose identity might not be known.

[13] The failure to join a party with a direct and substantial legal interest cannot be condoned because of practical difficulties with service. In any event, and as will be shown below the practical difficulties foreseen by the applicants are not substantial and the identity of shareholders can be ascertained.

13.1 The right to be joined applies only to shareholders as defined, in other words shareholders whose names appear in and publicised by the securities register.[9] Their identity is determinable.

13.2 In appropriate cases a Court may choose to issue a rule *nisi* and may also give further directions as to service in terms of Rule 4(10).

13.3 In urgent applications[10] the court or a judge may dispense with the forms and service provided[11] for in the rules of court, and condone service by alternative means such as telefax, electronic mail, text messages known as sms's[12] or the other commonly used and commercially available services.[13]

13.4 In non-urgent applications the court can similarly authorise substituted service in accordance with Rule 4(2).

13.5 Where the shareholders are not in South Africa edictal citation can be

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9 See the definition in s 1 of the Companies Act. The judgment does not deal with persons who may exercise voting rights but who are not shareholders. See s 57(1) of the Companies Act.
10 Rule 6(12).
11 Rule 4.
12 From *'Short Message Service.'*
13 Such as *whatsapp* or *messenger*.

ordered in accordance with Rule 5, if necessary in combination with substituted service.[14]

[14] The applicants argue that the proposition that a shareholder has a direct and substantial interest in a shareholders meeting is not supported by authority. The judgment however accords with well-established principles and is neither novel nor far-reaching. In the judgment I referred to relevant authorities and I was referred also to *Remgro Limited v Unilever South Africa Holdings (Pty) Limited.*[15]

[15] The fact that a company is a legal entity independent of its shareholders is not a relevant consideration that deprives those shareholders of their legal interest. The company *"bears its own rights and obligations"* as argued by the applicants but in evaluating the need to join the shareholders it is the interest of the shareholders that must be considered. A shareholder invited to attend a company meeting is affected by an application to court to interdict the meeting from taking place.

[16] In bringing the application to interdict the meeting of shareholders, the first applicant relied for *locus standi*[16] on the fact that it is a shareholder of the first respondent. It is in the same position as the second respondent and the second respondent's interest is the same as the interest of the shareholder not joined.

[17] It was confirmed in in *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd*[17] that under the appropriate circumstances a shareholder is entitled to an interdict to prevent a company meeting from proceeding. The separate legal personality of the company is not a bar to the interdict. Nor is the distinction that the applicants seek to

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14 *E.g.*, service on an electronic mail address where the respondent is overseas.
15 2016 JDR 0016 (KZP) para 31.
16 The judgment does not deal with the *locus standi* of the second applicant.
17 2009 (4) SA 89 (SCA) para 38.

draw between meetings called by shareholders and meetings called by directors a valid distinction. Shareholders' meetings are generally called by the board of the company.[18]

[18] It was also argued that that the third shareholder was not a party to the shareholders' agreement between the other parties and that for this reason it had no legal interest in the meeting called to discuss a rights issue. The distinction is not a valid one. The legal interest arises from the status as shareholder, not from the shareholders' agreement.

[19] Different or additional factual considerations than those dealt with in the judgment might apply in the case of a listed company.[19] Each case must be decided on its own facts.

Mootness

[20] The matter is moot. The interdict sought relates to an event in the past, namely a shareholders' meeting that has already taken place. If the appeal were to be upheld, there is no order that a court of appeal can make. The horse has bolted.

[21] It was argued on behalf of the applicants that the court of appeal will be able to fashion alternative relief. The alternative relief was not identified by the applicants but would require a court of appeal to sit as a court of first instance.

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18 S 61 of the Companies Act.
19 See also the Financial Markets Act, 19 of 2012.

[22] I conclude therefore that the appeal would have no practical effect and would be an appeal on costs only.

[23] In support of the argument that the matter is not moot I was referred to *Letseng Diamonds Ltd v JCI Ltd; Trinity Asset Management (Pty) Ltd v Investec Bank Ltd*[20] and *Trinity Asset Management (Pty) Ltd v Investec Bank Ltd*.[21] In these two matters in the Witwatersrand Local Division an interim order was made by consent whereafter the relief sought was amended. The question of *locus standi* was dealt with separately in terms of Rule 33(4) and Blieden J held that the applicants, Letsing and Trinity, did not have *locus standi*.[22] Trinity's appeal against the decision was upheld in a majority judgment.[23] In the majority judgment by Farlam JA he set aside the order of Blieden J and granted an order that the applicants did have *locus standi*. The application was postponed. The *Trinity* matter is not authority for a court of appeal breathing new life into a matter that is moot by granting alternative relief.

The failure to deal with the merits of the application

[24] The judgment is also criticised because I failed to deal with the merits of the application. When the non-joinder point was upheld it was not necessary nor was it desirable to give a judgment on the merits of the interdict sought. The merits were not argued save in the context of the issue of joinder.

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20 2007 (5) SA 564 (W).
21 2009 (4) SA 89 (SCA).
22 Para 65 of the judgment in the Witwatersrand Local Division, par 4 of the majority judgment in the Supreme Court of Appeal.
23 Paras 42 to 45 of the majority judgment in the Supreme Court of Appeal.

Conclusion

[25] The judgment sought to be appealed is neither novel nor far-reaching. It accords with well-established principle. There are no reasonable prospects of success. There are no compelling reason why the appeal should be heard and the decision sought will have no practical effect or result.

[26] I therefore make the order set out in paragraph 1 above.

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

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **15 JULY 2022**

COUNSEL FOR THE APPLICANTS	V MALEKA SC T SCOTT T POOE
INSTRUCTED BY:	CLIFFE DEKKER HOFMEYR INC
COUNSEL FOR FIRST RESPONDENT:	S SYMON SC T MOTAU SC

	A MILOVANOVIC- BITTER
INSTRUCTED BY:	KAMPEL KAUFMAN ATTORNEYS
COUNSEL FOR SECOND RESPONDENT:	J BLOU SC
INSTRUCTED BY:	WERKSMAN ATTORNEYS
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