

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: **✓**

Date: **15th November 2022** Signature: _____

A handwritten signature in black ink, appearing to be "P. M. M.", is written over the signature line.

CASE NO: A3034/2020

In the matter between:

ZELBREE INVESTMENTS (PTY) LIMITED
OUTSPAN PLACE (PTY) LIMITED
EMZED PROPERTIES (PTY) LIMITED
ZELRICH INVESTMENTS (PTY) LIMITED
M RICH PROPERTIES (PTY) LIMITED

First Appellant
Second Appellant
Third Appellant
Fourth Appellant
Fifth Appellant

and

THEUNISSEN, ROBIN NEILL

Respondent

Coram: Adams J et Van Aswegen AJ

Heard: 28 July 2022 – The 'virtual hearing' of the Full Bench Appeal was conducted as a videoconference on *Microsoft Teams*.

Delivered: 15 November 2022 – This judgment was handed down electronically by circulation to the parties' representatives *via* email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 14:30 on 15 November 2022.

Summary: Appeal – company – director’s entitlement to remuneration and the amount thereof – director not as of right entitled to same — Companies Act 71 of 2008, s 66(9) – remuneration may be paid only in accordance with a special resolution approved by the shareholders.

Special plea – non-compliance with s 66(9) – should have been upheld.

Appeal succeeds and upheld.

ORDER

On appeal from: The Johannesburg Regional Court (Regional Magistrate Dosio sitting as Court of first instance):

- (1) The first to fifth appellants’ appeal against the order of the court *a quo*, relating their second special plea, is upheld with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -
 - ‘(a) The first to fifth defendants’ first special plea is dismissed, with costs.
 - (b) The first to fifth defendants’ second special plea is upheld, with costs.
 - (c) The plaintiff’s claim for remuneration for services rendered by him in his capacity as a director of the first to fifth defendants, as formulated in his particulars of claim, is dismissed with costs.’
- (3) The respondent shall pay the first to fifth appellants’ costs of the appeal, such costs to include the costs consequent upon the employment of Senior Counsel.

JUDGMENT

Adams J (Van Aswegen AJ concurring):

[1] On 18 April 2012, the respondent¹ ('Mr Theunissen'), who is qualified and practising as a Chartered Accountant, accepted an appointment as a co-director – together with a Ms Selma Rich ('Ms Rich') – of all five of the appellants², which are related companies in that they are all owned by two trusts, namely 'the Emzed Trust – Sharon' and 'the Emzed Trust – Stephen'. The appointment of and the acceptance by Mr Theunissen of such appointment were pursuant to and in terms of a Consent Order of this Court (per Willis J) of 22 March 2012.

[2] Soon after his appointment, Mr Theunissen was to realise that he had landed himself something of a hot potato. He described what he found at the companies as 'a mess', with interested parties and their legal representatives openly antagonistic towards him and towards each other. Matters came to a head on 5 July 2015, when, at the instance of the appellants, Mr Theunissen was removed by an Order of this Court (per Victor J) as a co-director of the said companies.

[3] In an action in the Regional Court, Mr Theunissen claimed from the appellants an amount of R475 586.34, which he alleged was in respect of his professional fees relating to the duties he performed from 13 April 2012 to 5 July 2015 'as a director of each the companies' and services he rendered to them 'as required in terms of the [Willis J Order], the applicable law, the rules of his profession'. From the foregoing it appears that there are two bases on which Mr Theunissen claimed the said amount, one being that the total or a portion thereof represents or relates to his director's fees. The second basis on which the amount is claimed relates to his reasonable fees for professional services rendered at the special instance and request of the appellants, pursuant to and in terms of an entirely independent 'partly written and partly oral agreement, alternatively a tacit

¹ The plaintiff in the court *a quo*;

² The first, second, third, fourth and fifth defendants in the court *a quo*;

agreement'. In that regard, in his particulars of claim, Mr Theunissen pleaded his case as follows: -

'15.1 On or about the 17th day of April 2012 and at Johannesburg, the plaintiff [Mr Theunissen] and the companies [the appellants] concluded a partly written and partly oral agreement, alternatively, a tacit agreement ("the agreement") that the plaintiff be paid remuneration at an hourly rate of R2 309 for his professional services rendered to the companies from 1 April 2012, and to be rendered to the companies, plus VAT, or such subsequent hourly rate agreed to by the South African Institute of Chartered Accountants ("SAICA") and the Auditor-General of South Africa ("AGSA") from time to time for work performed by chartered accountants on behalf of AGSA, alternatively, that the plaintiff be paid a fair and reasonable compensation for his professional services rendered from 1 April 2012, and to be rendered to the companies, plus VAT.'

[4] In response to Mr Theunissen's claim for payment of Director's fees, the appellants raised a special plea – based on the provisions of section 66(9) of the Companies Act, Act 71 of 2008 ('the Companies Act') – to the effect that Mr Theunissen is not entitled to claim director's fees as there had not been compliance with the requirement that the shareholders should have passed a special resolution authorising and approving the amount or amounts of his director's fees. Section 66(9), so the appellants contended, precludes a director of a company from being paid any remuneration unless that remuneration has been approved by a special shareholders' resolution within the previous two years.

[5] Mr Theunissen disputed the appellants' special plea. In a nutshell, his case in the Regional Court on this legal point was to the effect that s 66(8) and (9) does not find application in this matter, as, so the argument went, the claim by him was not just for his Director's fees, but also for his professional services not *qua* director. The parties proceeded to trial on this special plea, as well as on another special plea of prescription, which is not relevant for present purposes. And on 28 April 2020, the Regional Court dismissed the appellants' first special plea, as well as their second special plea, with costs. It is that portion of the order relating to the second special plea, which the court *a quo* dismissed, which the appellants appeal to this Full Bench of the Division.

[6] In issue in this appeal is whether the Regional Court was correct in not upholding the second special plea. Crystallized further, the question to be considered is whether, in light of the common cause fact that no special resolution was passed by the shareholders of the appellants, approving the amount or amounts of Mr Theunissen's director's fees or, for that matter, his entitlement to such remuneration, the prohibition in s 66(9) kicks in. That issue is to be decided against the factual backdrop, to be gleaned from the evidence led during the trial, and which can by and large be regarded as common cause. Mr Theunissen was the only witness called during the hearing of the appellants' special plea and the common cause facts arise from a number of material concessions made by him especially during cross-examination.

[7] I interpose here to briefly mention that, as regards the first special plea of prescription raised by the appellants relative to the claim by Mr Theunissen in respect of professional services rendered not *qua* director, there was a dispute between the parties as to whether the Regional Court ought to have considered and decided that special plea. The appellants contend that, after the evidence in the trial court was completed, it was clearly indicated by them that, for reasons which are not important for purposes of this judgment, that special plea was not being persisted with. It was therefore not competent for the court *a quo* to in any way deal with the said special plea, which was nevertheless dismissed with costs. All the same, during the hearing of the appeal before us, Mr Mundell SC, who appeared on behalf of the appellants, indicated that the appellants accept that the first special plea was correctly dismissed by the Regional Court and there is no need for us to interfere in any way with that part of the court *a quo*'s order. We intend doing exactly that.

[8] As already indicated, Mr Theunissen's claims against the appellants have its genesis in an order granted by this Court (per Willis J) on 22 March 2012, which directed that the Chief Executive Officer for the time being of the Independent Regulatory Board of Auditors ('IRBA') be requested, as a matter of urgency, to nominate a qualified person to accept an appointment to act – with Ms Selma Rich as co-director – of the first to fifth appellants. That person was Mr Theunissen.

[9] At that time, the shareholders in equal shares in each of the five appellant companies were the Emzed Trust – Sharon ('the Sharon Trust') and the Emzed Trust – Stephen ('the Stephen Trust'), each holding fifty percent shareholding in each of the said companies, whose sole director was Ms Rich. Disputes had arisen between the Sharon Trust and the Stephen Trust, in their capacities as co-shareholders in the five appellant companies, regarding the management of the businesses of those companies by Ms Rich. The appellant companies held certain investments with Discovery Life Investments Services (Pty) Ltd ('Discovery Life') and Ms Rich, so it was alleged by the Stephen Trust, sought to utilise the proceeds of those investments for her benefit and that of her husband, Mr Rich. The dispute that served before Mr Justice Willis was, essentially, an application by the appellants for leave to effectively 'cash-in' the Discovery Life investments. This is the context in which Willis J, seeking to ensure the continued and efficient conduct of the business of the appellant companies by the introduction of an independent director to assist Ms Rich in their management and administration and, primarily, to determine what reasonable monthly sums would be withdrawn from the Discovery Life investments for the maintenance of Mr and Mrs Rich, granted the order of 22 March 2012.

[10] The purpose of Mr Theunissen's appointment as a co-director of the appellants was to give effect to the provisions of the said order. On 16 April 2012 Mr Theunissen accepted his appointment as a director of each of the five appellants. He did so in writing in a letter dated 17 April 2012, in which he also quoted his hourly rate 'for services to be rendered as a director'. On 5 July 2015, as alluded to above, Mr Theunissen was removed from his position as a director of the five appellants by order of this Court.

[11] In his particulars of claim, Mr Theunissen pleads that, over the period from 13 April 2012 to 5 July 2015, he performed his duties as a director of each of the five appellant companies as required by the order of Willis J. Moreover, so it is pleaded by Mr Theunissen, the services for which he has claimed payment all took place in accordance with the said court order. The special plea raised by the appellants was specifically directed against the Mr Theunissen's claim for

director's remuneration pursuant to the Willis J order, paragraph 5 of which reads as follows: -

'(5) The new director will, following on his appointment, be remunerated by the companies at a reasonable hourly rate consistent with his qualifications. To the extent required by section 66(9) of the Companies Act 71 of 2008 the trustees of the Emzed Trust - Sharon and the Emzed Trust – Stephen will, within ten days of having been called upon to do so by the new director, furnish approval by those trusts of special resolutions, authorising the requisite remuneration.'

[12] The requirement for the special resolution referred to in paragraph 5 of the Willis J order arises from the provisions of section 66(9) of the Companies Act. That sub-section precludes a director of a company from being paid any remuneration unless that remuneration has been approved by a special shareholders' resolution within the previous two years. It may be apposite at this juncture to cite in full the provisions of s 66(8) and (9) of the Companies Act, Act 71 of 2008, which reads as follows: -

'(8) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).

(9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.'

[13] If regard is had to the evidence led during the hearing of the special plea before the Regional Court, it has to be accepted as common cause between the parties that no special resolution as contemplated in section 66(9) of the Companies Act was ever passed by the Sharon Trust and the Stephen Trust in their capacities as shareholders of the five appellant companies. This follows a concession made by Mr Theunissen when he gave evidence in the court *a quo*. In that regard, the extract from the record of the proceedings in the Regional Court reads as follows in the relevant parts: -

'Mr Mundell: Sorry, it is bundle B, page 15. Will you agree with me, reading through that document, Mr Theunissen, that there is no resolution by that trust or party of the special resolution authorising any payment to be made to you?

Mr Theunissen: I do agree with you.

Mr Mundell: Let me ask perhaps a simpler question, Mr Theunissen. Did you ever receive a response to your letter dated 25 September which appears at B26 from the trusts, authorising you to receive director's emoluments and at the particular rate?

Mr Theunissen: No.'

[14] It bears emphasising that at no point was a special resolution passed by the shareholders of the appellant companies, in terms of which director's fees payable to Mr Theunissen were approved or the amount thereof authorised. At first blush, therefore, the provision of s 66(9) was not complied with. This much was conceded by Mr Theunissen's Counsel, Mr Van Wyk, at the hearing in the Regional Court as well as during the hearing of the appeal before us.

[15] In that regard, Mr Van Wyk submitted in his written Heads of Argument that Mr Theunissen does not rely on a special resolution approved by the shareholders for the approval of his remuneration. Also, so it is submitted, the provisions of section 66(9) of the Companies Act, 2008, are not relevant to the remuneration claimed by Mr Theunissen, as it is not claimed as director's remuneration for services as a director. His claim, so the submission continues, is for services rendered to the appellants, which they have failed to pay.

[16] Therefore, the only question remaining is, in my view, whether it makes any difference that in terms of the Willis J order, Mr Theunissen following on his appointment, was to be 'remunerated by the companies at a reasonable hourly rate consistent with his qualifications'. I think not. On the contrary, this is precisely why the Willis J order further directed the shareholders to pass a special resolution, authorising the requisite remuneration.

[17] Moreover, as correctly submitted by Mr Mundell, a director *qua* director is not an employee of a company and is not entitled to the standard rights flowing from an employment contract. It follows that a director is not entitled to be remunerated for his services as a director simply because he holds that position. In the event that a director concludes an employment contract with a company he will be entitled to the rights that flow from the employment contract as he would then stand in the position of both an employee and a director in relation to the

company. As a director, however, he is not automatically entitled to be remunerated for his services in that capacity.

[18] The point about s 66(9) is that, as a matter of policy, the decision of whether or not a director is to be remunerated is placed exclusively in the hands of the shareholders of the appellant companies and not in the hands of the board of directors or any other party. The rationale for this requirement is to encourage good corporate governance and to curtail excessive remuneration of directors. This point remains despite the fact that Mr Theunissen's appointment as a director of the appellant companies was pursuant a court order.

[19] What is more is that Mr Theunissen was aware of and appreciated the requirement that, for the purposes of him obtaining remuneration as a director, the written approval (in the form of a special resolution) of the shareholders of the appellants was to be obtained. This is evidenced by the fact that on a number of occasions he himself requested such written approval, which was not forthcoming. So, for example, Mr Theunissen, on the day following his acceptance of the appointment, in a letter dated 17 April 2012 in which he confirmed his appointment as co-director of the five appellant companies, set out his 'hourly rate for services to be rendered as a director' (emphasis added). One day later, in a letter dated 18 April 2012 to the legal representatives of the shareholders, he sought confirmation that the necessary shareholders' resolution would be passed appointing him as a director of the five companies. Even more telling is a further letter dated 25 September 2013 addressed to the Sharon Trust and the Stephen Trusts, in which he sought written confirmation from the trusts – as shareholders – of the hourly rate at which he (the new director) would be remunerated by the companies, which request accorded with the request for a special resolution referred to in the Willis J order.

[20] In sum, I conclude that there was merit in the second special plea raised by the appellants to the effect that, in the absence of a special resolution by the Sharon Trust and the Stephen Trust, Mr Theunissen was not entitled to be remunerated for the duties he performed as a director of the appellants. As rightly submitted by Mr Mundell, the proper course to have been adopted by

Mr Theunissen should have been to demand from the shareholders that they provide him with the necessary shareholders' resolutions appointing him as a director and approving his remuneration for the duties to be performed by him in his capacity as a director of the said companies. The recourse available to him was to refuse to render any services as a director of the five appellant companies until the shareholders in those companies had complied with the terms of the Willis J order – and s 66(9) – and passed the necessary special resolution.

[21] All of the foregoing translate into not only the appellant's special plea having to be upheld, but also Mr Theunissen's claim for director's fees not succeeding. The special plea is well taken and the evidence supports a conclusion that the claim based on that cause of action should be dismissed.

[22] Where would that then leave Mr Theunissen's case? As already indicated, in his particulars of claim, he pleads a cause of action based on a separate and an independent agreement concluded directly with the five appellant companies in terms of which he was to provide professional services at an agreed hourly rate. That claim, in my view, is still alive and remains unaffected by the issue which the Regional Court and this Appeal Court were required to consider in relation to the second special plea.

[23] In all of these circumstances, I am of the view that the learned Magistrate should have upheld the appellants' second special plea and that Mr Theunissen's claim for director's remuneration should have been dismissed with costs.

[24] Finally, there are two issues raised on behalf of Mr Theunissen, albeit rather belatedly in 'supplementary Heads of Argument', which were filed on 2 August 2022, that is after the date of the hearing of the appeal on 28 July 2022. I now turn my attention to deal briefly with those issues.

[25] Firstly, Mr Van Wyk submits in these supplementary Heads of Argument that the order dismissing the second special plea is not appealable.

[26] Secondly, it is contended by Mr Van Wyk, on behalf of Mr Theunissen, that the order proposed by the appellants in their written Heads of Argument, to the effect that, in addition to the special plea being upheld, the court should also order a dismissal of Mr Theunissen's claim for director's fees, is incompetent because

it is not the order sought in the court *a quo*, where the appellants, in their special plea, asked also for a dismissal of Mr Theunissen's claim in its entirety. Additionally, so it is contended by Mr Van Wyk, the order sought in this appeal, which is a declaratory order, which cannot competently be granted by the Regional Court, is rendered unnecessary by Mr Theunissen's allegation in his replication that the services rendered by him to the appellant companies were not subject to the provisions of subsections 66(8) and 66(9) of the Companies Act.

[27] There is no merit in any of these submission. The proposed order, in terms of which Mr Theunissen's claim for remuneration for duties performed by him as a director of the appellants, would be dismissed, cannot possibly be said to be a declaratory order. It is an order dismissing a claim by a plaintiff. It is also of no moment that the order sought in the appeal is at variance with the order sought in the special plea. Importantly, the order sought on appeal is 'less' than the order sought in the special plea, which means that there cannot be any possible prejudice to Mr Theunissen if such an order is granted as against the one prayed for in the special plea. As regards the point that the order sought is rendered unnecessary by the case pleaded in the replication to the effect that s 66(8) and (9) does not find application, this point is defeated by the allegation in the particulars of claim that Mr Theunissen performed 'his duties as a director', which means that the claim for director's fees, which, as indicated *supra* is bad in law, is still very much alive and should have been dealt with by the Regional Court.

[28] The second point is therefore not sustainable and stands to be rejected.

[29] As regards, the appealability of the court *a quo*'s order, it is submitted by Mr Van Wyk that the said order is not a judgment or an order as contemplated in s 48 of the Magistrates Court Act, as it is not an order having final effect. There is no merit in this submission. The order has the effect of finally disposing of that aspect of the case relating to the appellants' liability for Mr Theunissen's charges for professional fees rendered in his capacity as a director. How then can it be suggested that that order is not final in effect?

[30] For all of these reasons, the appeal of the appellants should succeed.

Costs of Appeal

[31] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See *Myers v Abramson*³.

[32] I can think of no reason to deviate from the general rule. The respondent should therefore pay the appellants costs of the appeal.

Order

[33] In the result, the following order is made: -

- (1) The first to fifth appellants' appeal against the order of the court *a quo*, dismissing their second special plea, is upheld with costs.
- (2) The order of the court *a quo* is set aside and in its place is substituted the following: -
 - '(a) The first to fifth defendants' first special plea is dismissed, with costs.
 - (b) The first to fifth defendants' second special plea is upheld, with costs.
 - (c) The plaintiff's claim for remuneration for services rendered by him in his capacity as a director of the first to fifth defendants, as formulated in his particulars of claim, is dismissed with costs.'
- (3) The respondent shall pay the first to fifth appellants' costs of the appeal, such costs to include the costs consequent upon the employment of Senior Counsel.


L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

³ *Myers v Abramson*, 1951(3) SA 438 (C) at 455

HEARD ON:	28 th July 2022 – in a ‘virtual hearing’ during a videoconference on <i>Microsoft Teams</i> .
JUDGMENT DATE:	15 th November 2022 – judgment handed down electronically
FOR THE FIRST TO FIFTH APPELLANTS:	Advocate A R G Mundell SC
INSTRUCTED BY:	Marie-Lou Bester Incorporated, Saxonwold, Johannesburg
FOR THE RESPONDENT:	Adv A M Van Wyk
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