IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
15/12/16 . [signature]
DATE SIGNATURE

15/12/16.

CASE NO: 51393/2010 & 55587/2011

APPEAL CASE NO: A943/2014

In the matter between:

HANS MICHAEL HARRI	First Appellant
SILONQUE (PTY) LTD	Second Appellant
DR HARRI-JOUBERT N.O.	Third Appellant
C F ZIMMERMAN N.O.	Fourth Appellant
PJ JOUBER N.O.	Fifth Appellant
H D HARRI-CALACA N.O.	Sixth Appellant
V C CALACA N.O.	Seventh Appellant
JWBA STERK N.O.	Eighth Appellant
P STERK N.O.	Ninth Appellant
XIHARI AFRICAN SAFARIS (PTY) LTD	Tenth Appellant

and

SILONGQUE LANDOWNERS ASSOCIATION First Respondent
(Association Incorporated under Section 21)
(known as Mahlathini Landowners Association)

STEVEN NEIL GRIBBIN Second Respondent

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Third Respondent

Corum: **Tolmay J; Mothle and Janse van Nieuwenhuizen JJ**
Date of hearing: 2 November 2016
Date of judgment: December 2016

JUDGMENT

MOTHLE J

Introduction

1. This is an appeal before the Full Court of the Gauteng Division, Pretoria, against the judgment and order delivered by the Honourable Mr Justice Fourie on 20 September 2013 ("*the Court a quo*"). The judgment concerns two applications by the Appellant involving the same Respondents and for a similar course of action under cases number 51393/2010 and 55587/2011. These applications were heard together and the Court *a quo* delivered one judgment and orders for both applications.

2. The Appellants were the successful party before the Court *a quo*. However, they contend that the honourable Mr Justice Fourie erred in fashioning the order in paragraph 1 of the orders and failed in his judgment to deal with some of the relief sought in the applications. They then applied for leave to appeal and the Respondents also lodged an application for leave to counter appeal the Judgment and orders of the Court *a quo*. Both applications were dismissed and only the Appellants approached the Supreme Court of Appeal, where they were successful. The Respondent did not apply to the Supreme Court of Appeal for leave to appeal or counter appeal. The Supreme Court of Appeal referred Appellants' appeal to the Full Court of the Gauteng Division.

Application for condonation

3. At the hearing of the Appeal, the Appellants requested the Court's ruling on a written application for condonation. The condonation is sought for the failure to timeously lodge the Powers of Substitution of the Appellants in terms of rule 7(2) as well as failure to furnish security in terms of rule 49(13)(a). They tendered the costs of this application, if not opposed by the Respondents, in which instance, the Respondents be ordered to

pay such costs. The provision of the rules in contention having being complied with, and the Respondents indicating that they are not opposed to the application, the Court granted the application.

Background facts

4. The facts of the appeal appear in the judgment and are largely common cause. By way of background, they are stated succinctly as follows:

4.1 The First Respondent is a company limited by guarantee and previously classified as a non-profit company in terms of the old Companies Act[1] as well as Section 8(1) of the new Companies Act,[2] read together with provisions of Schedule 1 of the new Act. It has as its members, persons owning portions of land in a property known as Silonque;

4.2 The Appellants, together with other persons, including the Second Respondent are members of the First Respondent;

4.3 A dispute arose between the Appellants and the First and Second Respondents, the latter being the Chairperson of the

[1] Section 21 of the Companies Act 61 of 1973.
[2] The Companies Act 71 of 2008.

First Respondent. The dispute related to the acceptance by the Second Respondent as well as the First Respondent of proxy votes in the decision-making and election of office bearers of the First Respondent. One of the decisions resulted in a proposal that the name of the First Respondent be changed and the necessary documentation was submitted to the Third Respondent.[3]

4.4 The Appellants objected to the acceptance of proxies in the Annual General Meetings (AGM) held on 26 September 2009, 26 March 2011 and 15 October 2011. Two applications were brought by the Appellants namely the first one in 2010 and the second in 2011 as referred to in paragraph 1 of this judgment. At the hearing it was agreed that both applications be heard together; and

4.5 The Court *a quo* declared invalid all the decisions that were taken at these Annual General Meetings. In the judgement, the Court *a quo* found that the Articles of Association of the First Respondent specifically, required the decisions to be taken by show of hands and not proxies.

4.6 In granting the orders, the Court *a quo* stated thus:

[3] The Company and Intellectual Property Commission.

1. *All decisions and resolutions taken* ***by a show of hands*** *and adopted at the Annual General Meetings of the first respondent (Shilonque Land Owners Association) held on 26 September 2009, 26 March 2011 and 15 October 2011 (also referred to as* ***the 2009, 2010 and 2011 AGM)*** *be and are hereby declared invalid and are accordingly set aside;*

2. *The purported special resolution of the first respondent dated 29 June 2010 and registered on 12 July 2010 by the third respondent (Change of Name) be and is hereby declared invalid and is accordingly set aside; and*

3. *The cost of both applications (Case number 51393/2010 and 55587/2011) shall be paid by the first respondent (Shilonque Landowners Association) such costs to include the costs of 2 counsel").* Appeal Court's emphasis.

4.7 The Appellants contends, amongst others, that paragraph 1 of the Court orders is inconsistent with the prayers sought in the Notices of Motion, the reasoning and finding by the Court *a quo* as expressed in the judgment. It is further contended by the Appellants that the Court a quo erred in the judgment, in

not dealing with and deciding on the other prayers in the notices of motion.

4.8 The applications for leave to appeal ensued as described in paragraph 2 of this judgment.

4.9 The Appellant mainly contends that the whole of paragraph 1 of the Court *a quo's* Court order, should be deleted and replaced by the following two sub-paragraphs in accordance with the relief sought and the findings by the Court *a quo*:

1.1 Under case number 51393/2010, all decisions and resolutions adopted at the purported annual general meetings on 26 September 2009 be and are hereby declared invalid and accordingly are set aside;

1.2 Under case number: 55587/11, all decisions and resolutions adopted at the purported annual general meetings on 26 March 2011 and 15 October 2011 be and are hereby declared invalid and accordingly are set aside;

5. The Respondents in their heads of argument oppose the appeal on the basis that:

5.1 They intend to deal (discuss and canvass) "*the grounds relied upon by the Appellants in this appeal;*" and

5.2 "*to prove or to demonstrate to this Court that the first respondent was entitled to conduct its affairs as provided for in*

its Articles of Association and the provisions of the old and new Companies Acts."

Grounds of appeal

6. There are in essence three grounds stated in the notice of appeal. The first is that paragraph 1 of the orders fashioned by the Court *a quo* in the judgment is not correct in that it invalidates the correct procedure of voting by show of hands, contrary to the findings by the Court *a quo*. Further, the judgment does not deal with the invalidation of all voting pursuant to the invalid Annual General Meeting of 2009.

7. The second ground is to the effect that the Court a quo should have, as a consequence of its findings, held that the exclusion of certain landowners or their representatives from voting at the 2011 Annual General Meeting rendered the meeting invalid and liable to be set aside.

8. The third and last ground is a prayer that was not dealt with by the Court *a quo* in its judgment concerning the removal at the general meeting of the applicant's entrenched right of veto created in the deeds of sale of land.

9. I now turn to deal with these grounds.

10. The first ground is confined to the correction of the order no. 1 granted by the Court *a quo* as sought in the applications brought to that Court. The Respondents' submissions in their heads of argument seem to misconstrue this first ground of appeal. The adjudication of this ground of appeal does not provide a basis for re-consideration of the reasoning and findings by the Court *a quo* on the merits. This ground calls on the court to correct paragraph 1 of the Court order such that it is consistent with the reasoning and findings by the Court *a quo.*

11. The Respondents in their heads of argument still quibble about the validity or otherwise of the voting by proxy. This issue has been considered and dismissed by the Court *a quo*. In the absence of an appeal lodged by the Respondents, this Full Court cannot entertain further argument concerning the validity or otherwise of the proxies, as there is no basis to suggest that the Court a quo erred in its finding.

12. Further, there is no indication by the Respondents in the papers as to why, if still aggrieved by the decision of the Court *a quo*, they did not lodge an application for leave to appeal or a counter

appeal with the Supreme Court of Appeal. In the matter of ***Minister of Safety & Security v Mustafa Mohamed*** [4] the Supreme Court of Appeal rejected the notion that it is permissible for a party to seek to extend the grounds of appeal at the hearing, when prior leave to do so had not been obtained.

13. In regard to the second and third grounds, it seems that the Court a *quo* did not specifically make findings in the judgment. However these two grounds are clearly implied in the order. By invalidating all the decisions and resolutions taken by proxy at these meetings, all decisions and resolutions emanating from the meetings are invalidated. Conversely, in fashioning the orders, the Court *a quo* did not expressly dismiss the prayers for the two grounds in both notices of motion in the two applications.

14. There is nowhere in the judgment where the Court *a quo* specifically dismisses any of these prayers. The only exception is where the Court *a quo* stated as follows in the penultimate paragraph on page 11 of the judgment:

> *"The applicants implied also that the 2009, 2010 and 2011 AGM be declared invalid. In addition to this it should also be directed that in* **future all meetings** *of members should be conducted in accordance with the provisions of the Articles*

[4] (598/10) [2011] ZASCA 134 (21 September 2011).

of Association and applicable legislation. I have considered this approach carefully, but I am of the view that such an order is not necessary. One should not lose sight of the fact that this is a private society where the general public is not involved. One should therefore strive not to extend the issue with regard to voting to include all procedures at a meeting unnecessarily."

15. This is the only instance where the Court a quo demonstrated that it is not inclined to grant that particular relief as sought by the Appellants. However, it is not the relief against which this appeal was lodged. If indeed it was the Court's intent to decline some or other prayers, it would have expressed that intent in clear terms and would have given reasons for doing so. Consequently, if it was the Respondents' intend to attack the Court *a quo's* reasoning and findings, particularly as regards the first ground; it should have sought leave to appeal *alternatively* to counter appeal, from the Supreme Court of Appeal.

16. During the hearing, counsel for the Respondents submitted that amendment of paragraph 1 of the Court orders would have no practical effect, more so that the First Respondent has already moved on with a number of decisions that have been taken since the matter was heard. The Appellants in reply referred the

Full Court to the matter of ***Louw v SA Mohair Brokers Ltd***[5] where the court held that to deny shareholder participation in the decision-making of a company, in particular at an AGM is unlawful. The Appellants were entitled to be heard at the AGM and it does not matter whether the relief sought is, as the Respondents contend, of no practical effect.

17. It is clear from a proper reading, that paragraph 1 of the orders of the Court *a quo* is inconsistent with and contrary to the findings in the judgment and prayers in the applications. The first sentence of paragraph 1 of the order of the Court *a quo,* as quoted in paragraph 7.6 of this judgment, erroneously invalidates the decisions and resolutions taken *by a show of hands*, instead of *by proxy* as found by the Court *a quo* in its judgment. The Court *a quo* has clearly erred in this regard.

18. It also follows, as a consequence to the declaration of invalidity of the votes by proxy, that the decision to remove the Appellants' veto rights as entrenched in the deed is also invalid.

[5] [2011] 1 All SA 328 (ECP)

19. Consequently, the appeal should succeed and paragraph 1 of the order of the Court *a quo* should be set aside and replaced by the proposed amendment.

20. In the premises I make the following order:

1. The appeal succeeds;
2. Paragraph 1 of the Court order of the Court *a quo* is set aside and it is replaced by the following:

1. It is ordered;

1.1Under case number 51393/2010, that all decisions and resolutions adopted at the purported annual general meeting on 26 September 2009 be and are hereby declared invalid and accordingly are set aside;

1.2 Under case number: 55587/11, that all decisions and resolutions adopted at the purported annual general meetings on 26 March 2011 and 15 October 2011 be and are hereby declared invalid and accordingly are set aside;

3. The removal of the Appellant's entrenched right to veto is declared invalid.

4 The two remaining orders granted by the Court *a quo* are upheld and incorporated in this order;

5 The Appellants are ordered to pay the costs of the application for condonation.

6 The First and Second Respondents are ordered to pay the costs of the applications for leave to appeal in the Court *a quo* and the Supreme Court of Appeal; and

7 The Respondents are further ordered to pay the costs of this appeal, including the costs of counsel.

S P Mothle
Judge of the High Court
Gauteng Division, Pretoria.

I agree:

R Tolmay
Judge of the High Court
Gauteng Division, Pretoria.

I agree:

N Jansen van Nieuwenhuizen
Judge of the High Court
Gauteng Division, Pretoria

For the Appellants: **Adv. I Miltz SC**

Instructed by: **Messrs Rothbart Inc**

c/o Du Randt Du Toit Pelser Inc

Hilda Law Chambers

Hatfield,

Pretoria.

For the Respondents: **Adv. F W Botes SC**

Instructed by: **Coetzee van der Merwe Attorneys**

c/o Barnard Patel Attorneys

Clydesdale,

Pretoria.