



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

CASE NO: 2022/650

- (1) REPORTABLE NO
(2) OF INTEREST TO OTHER JUDGES
(3) REVISED WITH SUMMARY

25/4/2022
DATE

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

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

The applicant, one of three shareholders of the first respondent, a private company, sought to interdict a shareholders' meeting of the first respondent from taking place. It cited one other shareholder but not the third. The respondents raised non-joinder of the third shareholder in limine.

It was held that the failure to join the third shareholder was fatal to the application and the application was dismissed for non-joinder. All shareholders i.e. holders of shares issued by a private company such as the first respondent and who is entered as such in the certificated or uncertificated securities register has a direct and substantial interest in a shareholders' meeting called to decide on resolutions placed before the shareholders, and therefore also in proceedings to prevent the meeting from taking place. All shareholders must be joined to an application seeking to interdict a shareholder's meeting.

Order

[1] In this application I made the following order on 20 April 2021:

"1. The application is dismissed;

2. The applicants are ordered to pay the costs of the respondents, including the costs of three counsel in respect of the first respondent and the costs of two counsel in respect of the second respondent, jointly and severally the one paying the other to be absolved."

[2] The reasons for the order follow below.

Introduction

[3] The applicants sought an order (either in the form of a final order or an interim order) in the Urgent Court that a shareholders' meeting of the first respondent scheduled for 20 April 2022 at 14h00 be interdicted from taking place. Irrespective of the form such an order would be final in effect as the meeting would not take place.

[4] At the commencement of argument and after debating the matter with counsel in the present matter and in the related matter under case number 2022/517 between the first applicant and the present respondents, with the Companies and Intellectual Property Commission as the 3rd respondent, I ruled that the two matters be argued together and that the question of urgency in both matters be dealt with first, together with the respondents' *in limine* argument on joinder in this matter.

[5] The application under case number 2022/517 is referred to as the "*business rescue application*" while this application is referred to as the "*interdict application*."

Joinder

[6] The applicant and the second respondent are both shareholders of the first respondent. The respondents argue that the third of the three shareholders of the first respondent, Redpath South Africa Employee Empowerment Company NPC ("Redpath SA"), is not cited in this application and that the failure to cite this company is fatal to the application. I agree for the reasons set out below.

[7] Section 62 of the Companies Act, 71 of 2008, stipulates that a private company¹ must deliver a notice of a shareholders' meeting to all the shareholders of the company as at the record date for the meeting at least ten days before the

¹ Section 62 (1) (a) of the Companies Act, 71 of 2008.

meeting is due to begin, subject to longer or shorter notice periods prescribed in the Memorandum of Incorporation.

[8] A notice of a shareholders meeting must be in writing² and must include the date, time and place, and the record date for the meeting, the general purpose of the meeting, and any specific purpose contemplated in section 61(3)(a) if applicable, and a copy of any proposed resolution of which the company has received notice.

[9] An immaterial defect in the form or manner of giving notice or an accidental or inadvertent failure in the delivery of the notice to a particular shareholder does not invalidate any action taken at the meeting.³

[10] A shareholder is defined⁴ as the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register that a company such as the first respondent is required to establish and maintain.

[11] The right to receive proper notice of shareholders' meetings is a statutory right and gives rise to a legal interest. A shareholder entitled to receive notice 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.

[12] The question whether a shareholder would have something to say at a shareholders meeting, would want or need to make a contribution, or would feel aggrieved should it not be invited is of no moment. The Companies Act requires notice to be given to each shareholder and that is really the end of the matter. It is for the shareholder concerned to decide how it will react to the notice.

² Section 62 (3).

³ Section 62 (6).

[13] It is common cause that Redpath SA is a registered shareholder of the first respondent. This was pointed out in the answering affidavits delivered by both respondents. The argument that this shareholder is not an interested party cannot stand.

[14] Ignoring the express provisions of the Act referred to above for a moment it can in any event hardly be argued that a shareholder is not an interested party in a Court application to prevent a meeting of shareholders.

[15] Joinder must be evaluated from the point of view of the potential effect of the order on the parties not joined, rather than the subject matter of the litigation.⁵ The

⁴ Section 1. A shareholder acquires the rights of a shareholder when its name is entered in the company's securities register. See section 37(9)(a)(i) of the Companies Act.

⁵ *Collin v Toffie* 1944 AD 456 at 464; *Tshandu v Swan* 1946 AD 10 at 24–5; *Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A) 521; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) 657; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) 226F–227F; *Burger v Rand Water Board & Another* 2007 (1) SA 30 (SCA); *Haroun v Garlick* [2007] 2 All SA 627 (C); *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) ; *City of Johannesburg v SALA* (2015) 36 ILJ 1439 (SCA).

test is always whether the party to be joined has a direct and substantial interest,⁶ in other words a legal interest rather than a mere financial interest.

[16] It can hardly be disputed that a shareholder who is entitled to attend shareholders' meetings has a legal interest in meetings that it is entitled to attend. It has a direct and substantial interest in the right which is the subject matter of litigation.

[17] The fact that an applicant does not recognise a shareholder as such does not justify not joining the shareholder.

[18] I conclude therefore that the failure to join the third shareholder is fatal to the application and the application must be dismissed on the ground of non-joinder. Costs should follow the result. The applicant employed three counsel.; the first respondent employed three counsel and the second respondent employed two counsel; the employment of two or three counsel was clearly justified in such a complex matter. A punitive cost order is not justified in my view.

Urgency

[19] I deal with urgency cursorily. Rule 6 (12) (b) requires an applicant to set forth explicitly *“the circumstances which is averred render the matter urgent and the*

⁶ *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 and Others* 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) paragraph [30]; *115 Electrical Solutions (Pty) Ltd & Another v City of Johannesburg Metropolitan Municipality & Another* [2021] JOL 50031 (GP) paragraph [76].
reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”

[20] In *East Rock Trading*, Notshe AJ said that:⁴

“It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial

⁴ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd* [2012] JOL 28244 (GSJ), [2011] ZAGPJHC 196. See also *Export Development Canada & Another v Westdown Investments Proprietary Limited & Others* [2018] JOL 39819 (GJ) paragraph [8] by Kathree-Setiloane J , and *In re Several Matters on the Urgent Court Roll* 2013 (1) SA 549 (GSJ) paragraphs [6] and [7] by Wepener J.

redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard."

[21] The shareholders' meeting sought to be interdicted was called to consider a resolution that the first respondent's Memorandum of Incorporation be amended, that a conversion of shares be adopted, that the share capital be increased, and that a rights offer to acquire the new shares be made to all shareholders pro rata their existing shareholding, and related relief.

[22] There is a pending dispute between the parties under case number 2021/55896 relating to the shareholding of the applicant and the second respondent in the first respondent. The present applicant contends that a previous rights offer undertaken in 2021 was unlawful, invalid, and is to be set aside by the court. The next step in the pending application will be the filing of a replying affidavit.

[23] Should the present applicant be successful in the pending application everything done pursuant to the first right offer will be undone. The applicant will then enjoy substantial redress in due course.

[24] The applicant does not make out a case for urgent relief in terms of Rule 6 (12).

[25] On these grounds I made the order set out in paragraph 1 above. I add for the guidance of the taxing master that 50% of the time was spent arguing the interdict application and 50% arguing the business rescue application.

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 **25 April 2022**

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DATE OF THE HEARING: 20 April 2022

DATE OF ORDER: 20 April 2022

DATE OF JUDGMENT: 25 April 2022

