

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 38204/2022

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 1 March 2023 E van der
Schvff

In the matter between:

Jose Luis Rodriques Baptista *N.O.*

First Applicant

Jaco van Rooyen *N.O.*

Second Applicant

Jorge Mendonca Velosa *N.O.* of the Best Trust
Company (JHB) (Pty) Ltd

Third Applicant

and

Quickstep 684 (Pty) Ltd

First Respondent

Edward Eduman Milne

Second Respondent

Paul Heslop

Third Respondent

Adriaan Combrinck

Fourth Respondent

Christopher Riley

Fifth Respondent

JUDGMENT

Van der Schyff J

Introduction

- [1] In July 2022 the applicants, as the trustees of the LLL One Trust (the Trust), issued an urgent application seeking an order that a meeting of the first respondent's shareholders which took place on 24 May 2022 be declared unlawful and invalid, and that the resolutions adopted at the meeting be declared of no force and effect.
- [2] The respondents' answering papers were voluminous, and the Deputy Judge President referred the application to be heard as a special motion on the third court roll.

Background

- [3] The applicants contend that the impugned shareholders meeting of 24 April 2022, although purported to be a shareholders' meeting, was invalid for the following reasons:
- i. the duty of convening a shareholders' meeting lies with the board of directors and not with the shareholders, at the time of the dispatch of the notice of the shareholders' meeting set down for 24 May 2022, Quikstep's board was constituted by the applicant, Ian Peach, Lynne Hardy, and the 5th respondent;
 - ii. the notice of the meeting was dispatched one day short of the required three-week notice;

iii. neither of the second to fifth respondents was a shareholder of the first respondent (Quickstep) and thus not allowed to vote in favour of the resolutions passed.

[4] The respondents deny that this matter is indeed urgent. The urgency question has, in my view, become redundant and moot due to the effluxion of time. The application is currently enrolled as a special motion and stands to be dealt with. Neither party can state that they did not have sufficient time to place all the relevant information before the court because they were pressed for time to prepare their respective cases. More than eight months have passed since the application was issued. The issue of the initial urgency is only relevant in so far as liability for the wasted costs, reserved in the urgent court, is to be determined.

Point in limine

[5] The respondents raised a *point in limine*. They submit that the application is fatally defective owing to the fact that the applicants have not cited or joined all the shareholders who were either present or represented at the impugned shareholders' meeting of 24 May 2022 (the meeting), or all the directors who were appointed at the said meeting.

[6] The minutes of the meeting reflect that shareholders provided proxies to other shareholders or unrelated individuals to vote their shareholding in favour of the resolutions. The minutes reflect that ten individuals participated in the meeting either in person or through TEAMS. Fourteen shareholders were either present or represented. Of these, only three are cited as respondents to this application. The respondents contend that the shareholders 'overwhelmingly passed the resolutions to remove the first applicant, Peach and Harding as directors and to appoint the second to fifth respondents, together with two other individuals who are not cited, as the new directors of Quickstep. As such, the shareholders who have not been cited in this application have a direct and material interest in the outcome of the

relief sought by the applicant. In failing to cite those shareholders, the application is fatally defective and stands to be dismissed with costs.

[7] The applicants contend that the proposition of non-joinder is misconceived. None of the shareholders present or represented at the meeting who are not cited has a 'direct and material interest' in the subject matter of the application, 'being a legal interest which may be affected prejudicially by the judgment of this court.' The applicants contend that the issue in this application is the right of the opposing respondents, as shareholders in Quickstep, to have called for and or convened the impugned shareholder's meeting. The applicants explain that the notice of the special general meeting is signed by the second to fifth respondents and it is their right as shareholders, or shareholders' representatives to convene the impugned meeting that is challenged. It is their alleged failure to comply with the prescripts of ss 61 and 62 of the Companies Act 71 of 2008 (the CA) which gave rise to this application. The consequence of the second to fifth respondents' chosen *modus operandi*, the applicants' argument goes, is that as a matter of law, the shareholders' meeting that occurred is invalid because it was not convened by the board of directors, and short notice, and nothing any of the non-cited shareholders can put before this court can change this reality. In addition, counsel for the applicants submitted that the shareholder's right to call for a shareholders' meeting, and their right to remove the first respondent's directors by an ordinary resolution adopted at a properly convened shareholder's meeting, are not prejudicially affected by the relief sought in this application.

[8] In order to consider the point *in limine*, it is necessary to determine the meaning of 'direct and material interest' in the context of joinder applications. Is it the circumstances that gave rise to the litigation in question, or the consequence of the relief sought, if granted, that determines whether a party can be said to have a direct and substantial interest in the litigation that requires it to be a party to the proceedings?

[9] In *Amalgamated Engineering Union v Minister of Labour*,¹ it was held that:

‘the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . on the manner in which, and the extent to which, the court’s order may affect the interests of third parties.’

This has been found to mean that if the order or ‘judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests’ of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.² In this context, the question is thus whether the order can be carried into effect without profoundly and substantially affecting the non-joined shareholders’ interests.³ The question of whether the potentially affected interest is a direct and substantial interest that constitutes a legal interest needs to be determined on a case and context-specific basis.⁴

[10] In *Siyakhula Sonke Empowerment Corporation (Pty) Ltd and Another v Redpath Mining (South Africa) (Pty) Ltd and Another*,⁵ the applicants sought an order in the urgent court that a shareholders’ meeting of the first respondent scheduled for 20 April 2022 be interdicted from taking place. The applicant only cited two of three shareholders as respondents in the application. Moorcroft AJ held that the failure to cite the third shareholder was fatal to the application. He held, *inter alia*, that the right to receive proper notice of shareholder’s 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.’⁶ Moorcroft AJ further said:

¹ 1949 (3) SA 637 (A) 657.

² *Gordon v Department of Health: Kwazulu-Natal* 2008 (6) SA 522 (SCA) at para [9].

³ *Ibid.*

⁴ *Minerals Council South Africa v Minister of Mineral Resources and Another* (20341/19) [2020] ZAGPJHC 171 (30 June 2020) at para [10].

⁵ (2022/650) [2022] ZAGPJHC 283 (25 April 2022).

⁶ *Supra*, para [3].

‘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*’. (My emphasis)

The converse is also true. If a shareholder who is entitled to attend shareholders’ meetings has a legal interest in meetings that it is entitled to attend, such shareholder likewise has an interest in litigation where the validity of a shareholder’s meeting it attended, is contested, irrespective of the reason for such contestation.

- [11] The learned authors of Hennochsberg on the Companies Act 71 of 2008 in their commentary of s 61 of the Companies Act, explained with reference to caselaw that ‘General meetings are ordinarily convened by the directors, and a majority shareholder cannot usurp this power’. In *Heatherview Estate Extension 24 Home Owners Association (NPC) v Mahlatse Trading Enterprise CC and 101 Others*,⁷ one of the authorities relied on by the learned authors, Ranchod J, however, contextualizes the order he came to when he said:⁸

‘It is not the respondents’ case that they are empowered by the MOI (or the AOA for that matter) or any rules of the applicant to convene a shareholder’s meeting.’

- [12] In *casu*, the second to fifth respondents specifically claim that the first respondent’s Memorandum of Incorporation (MOI) provides for shareholders’ meetings to be convened by shareholders. All the shareholders of the first respondent have a direct and substantial interest in proceedings wherein the provisions of the first respondent’s MOI stand to be interpreted. The legal question as to whether the MOI does in fact provide for shareholders not only to call a meeting, but to convene a meeting in the existing statutory regulatory context is a question that cannot be considered without providing all the shareholders with the opportunity to participate in the proceedings.

⁷ [2019] JOL 44922 (GP) para [20].

⁸ *Supra*, para [19].

- [13] In *Makanda and Others v Mosotho and Others*,⁹ an application to declare the first to fourth respondents delinquent directors, the court expressed the view that the shareholders of a company have a substantial interest in the tenure of the directors 'simply because they appoint them'. If the shareholders have a direct interest in the appointment of directors, they have an interest when they are declared delinquent or placed under probation. I am of the view that shareholders likewise have an interest in proceedings wherein the validity of a meeting where it was decided to remove and replace the company's directors, is contested.
- [14] It is trite that the main duty of shareholders is to pass resolutions by voting in their shareholders' capacity. This duty is important because it allows the shareholders to exercise their ultimate control over the company and how it is managed. Any litigation aimed at invalidating and setting aside decisions taken by shareholders has the potential to be prejudicial to each shareholder's right to manage the company, and as a result, each shareholder who participated at the impugned meeting has a direct and substantial interest in the outcome of the litigation and is a necessary party to the proceedings. I am of the view that any of the shareholders who attended and participated in the impugned shareholders' meeting will be able to appeal a decision that the meeting is declared to be unlawful and invalid and that any resolutions adopted at the meeting are declared to be of no force and effect and set aside, because they have a direct and substantial interest in the company's affairs as determined at the meeting, wherein they participated. The basis for such a declaration of invalidity, if it exists, is of no consequence for the determination as to whether the shareholders have a direct and substantial interest in the litigation. As a result, the point *in limine, of non-joinder* stands to be upheld.
- [15] I am, however, not of the view that the application is fatally defective for reason of non-joinder. The application can merely not proceed in the absence of all the shareholders and purported shareholders who participated in the shareholders'

⁹ (4153/2016) [2018] ZAFSHC 7 (9 February 2018).

meeting of 24 May 2022. These shareholders stand to be joined to the proceedings.

[16] The two non-shareholding directors who are not cited also have a direct and substantial legal interest in the proceedings as their directorship is intrinsically linked to the validity of the impugned meeting

[17] There is no reason why costs should not follow the result. The applicants were forewarned of the *point in limine* and did not attempt to ensure that all the parties were invited to the table. The applicants are thus liable for the wasted costs. As for the wasted costs relating to the urgent court proceedings, the parties submitted that these costs were reserved. I am of the view that the court that will finally determine the application, is the appropriate court to determine liability for the wasted costs incurred in regard to the urgent court proceedings.

ORDER

In the result, the following order is granted:

- 1. The point *in limine* regarding non-joinder is upheld;**
- 2. All the shareholders and purported shareholders of the first respondent who are not currently cited as respondents, and the directors purportedly elected at the meeting of 24 May 2022, must be joined as respondents to the application;**
- 3. All papers filed of record are to be served upon the said shareholders and purported shareholders and directors within 15 days of the date of this order;**
- 4. The joined respondents are afforded 15 days from the date of service of the papers within which to deliver a notice of intention to oppose;**
- 5. Answering affidavits must be filed within one month of notifying the applicants of the intention to oppose;**

6. **The applicants and the first to fifth respondents may file replying affidavits to the answering affidavits of the joined respondents within 15 days of receipt of the answering affidavits;**
7. **The applicants, jointly and severally, one to pay the other to be absolved, are to pay the wasted costs of this special motion.**

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicants:	Adv. A. R. G. Mundell SC
Instructed by:	AC Schmidt Inc.
For the second to fifth respondents:	Adv. A. N. Kruger
Instructed by:	Frese Gurovich Attorneys
Date of the hearing:	28 February 2023
Date of judgment:	1 March 2023