

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: 2 May 2024 E van der Schyff

In the matter between:

Jose Luis Rodrigues Babtista N.O.

1st Applicant

Jaco van Rooyen N.O.

2nd Applicant

Jorge Mendoca Velosa N.O.

(Of the Best Trust Company (JHB) (Pty) Ltd)

3rd Applicant

and

Quickstep 684 (Pty) Ltd

1st Respondent

Edward Eduman Milne

2nd Respondent

Paul Heslop

3rd Respondent

Adriaan Combrinck

4th Respondent

Christopher Riley

5th Respondent

Gillian Claire Milne	6 th Respondent
Sarah Heslop	7 th Respondent
Wellness Property Company (Pty) Ltd	8 th Respondent
Recem Trust	9 th Respondent
J Calitz	10 th Respondent
Peter Errol Bouwer	11 th Respondent
J Ginder	12 th Respondent
Martie Kuhn N.O.	13 th Respondent
Proplan Holding	14 th Respondent
Martin Van Achterbergh	15 th Respondent
Eric Truebody	16 th Respondent
Norman Nicholson	17 th Respondent
Renee Hawkrige	18 th Respondent
Environmental Management CC	19 th Respondent
Misty Lake Trade and Investment 69	20 th Respondent
40/50 Investments CC	21 st Respondent
Charmaine Phillip	22 nd Respondent
Lynn Hardy	23 rd Respondent
Dion Barnard Holding	24 th Respondent
Jacobus Phillipus de Villiers	25 th Respondent
Argontoula Pleaner Holding	26 th Respondent
Willem Christoffel Van Wijk N.O. and	27 th Respondent
Petronella Jacoba van Wijk N.O.	
Robjohn CC	28 th Respondent
Rainer Schuerger	29 th Respondent
Jimoto Bushvel Investments	30 th Respondent

Willem du Preez	31 st Respondent
Jackie Howard	32 nd Respondent
Hillary Oats	33 rd Respondent
Nich Rosenberg	34 th Respondent
Margaret Ann Callen and E Callen	35 th Respondent
Pamela Ann Bouwer	36 th Respondent
Bruno de Castro	37 th Respondent
Toney Vey Family Trust	38 th Respondent
Istermar Game Farm CC	39 th Respondent
Ian Lawrence Peach N.O.	40 th Respondent
Ivan James Roodt N.O.	41 st Respondent
Jonathan Peach	42 nd Respondent
Anna-Mare Peacj N.O.	43 th Respondent
JVH Krüger N.O.	44 th Respondent
Ivan James Emmett N.O.	45 th Respondent
Combrinck Incorporated	46 th Respondent

JUDGMENT

Van der Schyff J

Introduction

[1] The applicants are the trustees of the LLL One Trust (the Trust), a shareholder of the first respondent, Quickstep 684 (Pty) Ltd (Quickstep 684). The applicant seeks an order declaring a shareholders' meeting of Quickstep 684, which took place on 24 May 2022, unlawful and invalid and declaring the resolutions adopted at the meeting of no force and effect.

Background

- [2] The application has a protracted history. The Trust issued an urgent application in July 2022. The answering papers were voluminous, and the Deputy Judge President referred the application to be heard as a special motion. The Trust initially cited only the first to fifth respondents as respondents in the application, and when the special motion was heard on 28 February 2023, the second to fifth respondents raised non-joinder as a *point in limine*. The Trust contended that the application was fatally defective because the Trust failed to join all the shareholders who were present or represented at the impugned shareholders' meeting of 24 May 2022 (the meeting) and all the directors appointed at said meeting.
- [3] I upheld the *point in limine* and ordered that all the shareholders and purported shareholders of Quickstep 684 and the directors purportedly elected at the meeting of 24 May 2022 who were not cited as respondents had to be joined as respondents to the application. All papers of record were to be served upon said shareholders, purported shareholders, and directors. In the event that these parties wanted to oppose the litigation, they had to file notices of intention to defend.
- [4] The Trust's attorney of record subsequently filed an affidavit setting out how the interested and affected persons were traced, and the application and court order were served on them. Without going into detail regarding the content of this affidavit, it suffices to say that it is evident that the Trust went to lengths to trace the shareholders, purported shareholders, and elected directors.
- [5] The second to fifth respondents subsequently issued an application in terms of Rule 30, taking issue with the manner in which the joinder of the 'new' parties was effected. The application was dismissed, and a written judgment was handed down. After considering the modes of service and the respective returns of service, I am satisfied that notice of these proceedings would have come to the knowledge

of all interested and affected parties. The papers were effectively served. One person could not be traced. His purported ignorance of the proceedings is not material in light of the relief sought.

[6] None of the parties joined elected to participate in the proceedings.

Issues for determination

[7] The issue to be determined is whether the shareholders' meeting that occurred on 24 May 2022 was properly called and convened and whether proper notice was given. The applicants accept that a factual dispute exists regarding the validity of sale of shares agreements but submit that resolving these factual disputes is unnecessary. They limit their challenge to the impugned meeting and, subsequently, the resolutions taken at the meeting, to two bases: (i) the impugned shareholders meeting, although purported to be a shareholders meeting, was invalid as it was not convened by Quickstep's board of directors, or shareholders, and (ii) on the assumption that there had been proper notice of the meeting in the terms contemplated in the Companies Act, 2008, there was a short notice of the meeting. As a result, the failure to properly convene the shareholders' meeting invalidates it.

[8] I pause to note that the company's administration seems to be in turmoil. The signatories to the notice of the shareholders' meeting, Messrs. Combrinck, Riley, Heslop, and Milne, were directors of the company but, with the exception of Mr. Riley, were removed as directors at a meeting on 6 April 2022. The validity of the April meeting is questioned, although no legal proceedings were instituted to set aside the meeting and the resolutions taken.

[9] The main issues for consideration in this matter as it emanates from the founding affidavit are:

- i. Whether Quickstep 684's shareholders could call and convene a shareholders' meeting;
- ii. Whether the notice of the shareholders meeting dispatched to shareholders on 3 May 2022 is invalid for being delivered one day short;
- iii. Whether the second to fifth respondents are shareholders of Quickstep 684 and were thus empowered to call a shareholders' meeting;

Could Quickstep 684's shareholders call and convene a shareholders meeting?

[10] Section 61 of the Companies Act 71 of 2008 (the Act) provides that a shareholders meeting may be called by the board of a company or any other person specified in the company's Memorandum of Incorporation (MOI). Clause 4.6 of Quickstep 684's MOI authorizes the Board and any shareholder of the company to call a Shareholders' meeting.

[11] To differentiate between a meeting being called and a meeting being convened is to split hairs. In the context of the MOI, the words are synonyms. There is no merit in declaring the shareholders' meeting invalid on this ground.

Is the notice of the shareholders' meeting dispatched to shareholders on 3 May 2022 invalid because it was delivered one day short?

[12] The meeting, called for on 3 May 2022, was a meeting of the shareholders of Quickstep 684. The applicants contend that the notice was one day short. They claim that a 3-week notice period is required in terms of the Rametsi Shareholders Agreement. The meeting was scheduled for 24 May 2022. The second to fifth

respondents agreed that the notice was one day short but submitted that the short notice is irrelevant and is a matter of form over substance. They rely on *David Garth Millar v Natmed Defence (Pty) Ltd.*¹ In this case, the court stated as follows:²

‘Though short of what is statutorily required, the notice period did not prejudice the Applicant to warrant the setting aside [of] the shareholders’ decision in exercising a statutory right that they possess. Nothing in section 71 deprives the Applicant of the right he may have at common law or otherwise to claim damages for of office as a director for non-compliance with the required notice period.’

[13] In accordance with the *stare decisis* principle, I am bound to adhere to precedents from this Division when making decisions unless I am of the view that the precedent is wrong. In my view, the principle flowing from *Millar v Natmed* is wrong. In *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others*³ Mathopo J stated:

‘In my view, unless a shareholders meeting was properly convened, in the absence of waiver or ratification by all the shareholders, the notices are a nullity. This is especially so because of the general rule that an irregularity in regard to the convening of or proceedings at a general meeting will render invalid resolutions passed at that meeting.’

[14] The legislature acknowledged that short notice may occur and provided for conducting a valid meeting despite notice of a shareholders meeting being short in section 62(2A) of the Act. ‘The absence of an allegation as to prejudice suffered’ is not mentioned in this section as a reason to condone short notice. The legislature explicitly provided:

¹ 2022 (2) SA 554 (GJ).

² Ap para [41].

³ (43825/2012) [2013] ZAGPJHC 40 (13 March 2013).

‘A company may call a meeting with less notice than required by subsection (1) or by its Memorandum of Incorporation, but such a meeting may proceed only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda-

(a) Is present at the meeting; and

(b) Votes to waive the required minimum notice of the meeting.’

- [15] To the extent that the time period required for notice of meetings as set out in the Rametsi Shareholders Agreement, as contended by the applicants and conceded by the respondents, applies, this is the end of the matter.

The remaining issue

- [16] In dealing with the final issue raised for the sake of completeness, it suffices to state that either the factual dispute relating to the validity of the sales of share agreements or the ‘less than ideal record-keeping’ resulted in the failure to amend or update Quickstep 684’s shares register. As a result, a cloud of uncertainty covers the entitlement of Mr. Combrinck, Mr. Milne, and Mr. Heslop to act on behalf of any ‘shareholder’. The term ‘shareholder’ is defined to denote the holder of shares who is entered as such in the securities register. Combrinck Incorporated and Recem Trust alienated their shares and are no longer holding shares despite still being contained in the shares register. These entities do not meet the first requirement for being registered as a shareholder. In any event, Mr. Riley indicates that he signed the notice as Istemar’s representative. He adds, as an afterthought, alternatively as representative of Recem Trust. It is evident, however, from the gist of the answering affidavit that he opined that Recem Trust sold its shares – he did not, when signing, purport to act on behalf of Recem Trust.
- [17] Neither Wellness Property Company (Pty) Ltd nor Portion 7 Alsef (Pty) Ltd is registered in the shares register. These entities do not meet the second

requirement for meeting the definition of a shareholder.⁴ The Act provides the necessary mechanism to address this situation, and the holders of shares would be remiss not to utilise these mechanisms. Istemar Game Farm CC (Istemar) is the only shareholder registered in the shares register who also holds shares.

[18] The company's MOI was placed before the court. While clause 4.6 authorises any shareholder to call a shareholder's meeting, clause 4.7 states that the MOI does not specify a lower percentage of voting rights than the percentage specified in section 61(3) of the Act required for the requisitioning by shareholders of a shareholder's meeting. Section 61(3) requires 10% of the voting rights. Istemar holds 16 shares out of a possible 1000.

ORDER

In the result, the following order is granted:

- 1. The shareholders' meeting of 24 May 2022 is declared unlawful and invalid;**
- 2. The resolutions adopted at the shareholders' meeting of 24 May 2022 are declared to be of no force and effect and set aside;**
- 3. The second to fifth respondents are ordered to pay the costs of the application jointly and severally, one to pay the other to be absolved.**

E van der Schyff
Judge of the High Court

⁴ Section 37(9)(a) of the Act is clear that a person acquires rights associated with any particular securities of a company when that person's name is entered in the company's securities register.

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 emailed to the parties/their legal representatives.

For the applicants:	Adv. ARG Mundell SC
Instructed by:	AC Schmidt Inc.
For the second to fifth respondents:	Adv. AN Kruger
Instructed by:	Frese Gurovich Attorneys
Date of the hearing:	19 February 2024
Date of judgment:	2 May 2024