

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: 27 May 2024 E van der Schyff

In the matter between:

Edward Eduman Milne

1st Applicant

Paul Heslop

2nd Applicant

Adriaan Combrinck

3rd Applicant

Christopher Riley

4th Applicant

And

Jose Luis Rodrigues Babtista N.O.

1st Respondeny

Jaco van Rooyen N.O.

2nd Respondent

Jorge Mendoca Velosa N.O.

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

3rd Respondent

In re:

Jose Luis Rodrigues Babtista N.O.	1 st Applicant
Jaco van Rooyen N.O.	2 nd Applicant
Jorge Mendoca Velosa N.O. (Of the Best Trust Company (JHB) (Pty) Ltd)	3 rd Applicant
and	
Quickstep 684 (Pty) Ltd	1 st Respondent
Edward Eduman Milne	2 nd Respondent
Paul Heslop	3 rd Respondent
Adriaan Combrinck	4 th Respondent
Christopher Riley	5 th 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 Petronella Jacoba van Wijk N.O.	27 th Respondent
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 Krùger N.O.	44 th Respondent

Ivan James Emmett N.O.

45th Respondent

Combrinck Incorporated

46th Respondent

JUDGMENT

Van der Schyff J

Introduction

[1] This is an application for leave to appeal against the whole judgment and order dated 2 May 2024 in the abovementioned matter. The second to fifth respondents in the main application are the applicants in this application for leave to appeal. Three main grounds of appeal are raised:

- i. The first ground of appeal is that I erred in finding that short notice of the shareholders' meeting was fatal to the validity of the shareholders' meeting and that the principle laid down in *Van Zyl v Nuco Chrome Bophuthatswana (Pty) Ltd and Others*¹ and not the principle laid down in *Millar v Natmed Defence (Pty) Ltd*² applies and that *Millar v Natmed* is wrong insofar as it allows for the condonation of short notice of shareholders' meetings outside the parameters of section 62(2A) of the Companies Act 71 of 2008 (the 2008 Companies Act);
- ii. The second ground of appeal is that I erred in finding that the papers were effectively served on all interested and affected parties;
- iii. The third ground of appeal is that I erred in finding that neither Recem Trust nor Portion 7 Alsef (Pty) Ltd qualified as shareholders as defined in the Companies Act. The applicants in this application for leave to appeal contend that I should have found that if regard is had to the extended meaning of section 57(1) of the 2008 Companies Act, Recem Trust or Portion 7 Alsef (Pty) Ltd qualified as a shareholder.

¹ (43825/2012) [2013] ZAGPJHC 40 (13 March 2013).

² 2022 (2) SA 554 (GJ).

- [2] A written judgment was handed down containing the reasons for the order granted on 2 May 2024. There is no need to revisit these reasons. Having considered the grounds of appeal raised, I am not of the view that the appeal would have a reasonable prospect of success. As a general proposition, I agree with the applicants in this application that it is important and necessary that the extended meaning of the term shareholder, as provided for in section 57(1) of the 2008 Companies Act, be interpreted and traversed by the Supreme Court of Appeal. In this case, however, the undisputed factual finding that Mr. Riley signed the impugned notice as the representative of Istemar Game Farm CC and not in his capacity as trustee of Recem Trust renders the extended definition of the term shareholder as contained in section 57(1) an interesting academic issue only.
- [3] A court is not concerned with what a party 'would have' or 'could have' done, but with what the court finds, on a proper evaluation of the facts placed before the court, a party did, in fact, do.
- [4] *In casu*, it is important to have regard to the fact that natural persons and juristic persons represent two distinct categories of legal subjects. The differentiation between natural and juristic persons is not a mere legal technicality. It is vital to protect the distinction between the two categories of legal subjects. Company Law is complicated, and natural persons who venture into the legal labyrinth comprising the legal principles governing Company Law in order to draw the benefits it brings, must be aware of the risks it poses. On the facts, Mr. Riley could, in theory, probably have represented Recem Trust when he signed the notice calling for the shareholders' meeting, the question is whether he did, in fact, represent Recem Trust. He states in the answering affidavit:³

'Accordingly, the notice convening the shareholders meeting of 24 May 2022, [w]as signed by me in my representative capacity of Istemar, the only shareholders I represented, alternatively, accepting the applicants (*sic*) contention that Recem share sale agreement with

³ Paragraph 15.9.

Alsef is void, then the shares vested with Recem and as such I appended my signature to reflect that I was also acting on behalf of Recem.'

- [5] Mr. Riley did not provide the court with any proof that he was, in fact, representing Recem Trust. He did not attach a resolution from Recem Trust authorising him to call the meeting on the Trust's behalf. It cannot be found that he acted on behalf of TRecem trust when he signed the impugned notice.
- [6] Portion 7 Alsef (Pty) Ltd does not meet the requirements for being regarded as a shareholder in terms of the Act.

Costs

- [7] The respondents in this application sought a costs order that includes the costs of senior counsel. The Rules Board for Courts of Law recently issued amendments to the Uniform Rules of Court which took effect on 12 April 2024. One of the material amendments relates to Rule 67A. The rule, among others, provides that a bill of costs submitted for taxation shall be for advocates in accordance with the tariff in rule 69. I sought supplementary heads of argument from the parties dealing with the costs issue. I considered the supplementary heads filed, the complexity and significance of the matter.

ORDER

In the result, the following order is granted:

- 1. The application is dismissed with costs, counsel's fees to be recovered in accordance with the maximum tariff provided for in as provided for in Scale B to Rule 69.**

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 emailed to the parties/their legal representatives.

For the applicants in the application

For leave to appeal:

Adv. L. Morris SC

Instructed by:

Frese Gurovich Attorneys

For the respondents in the application

for leave to appeal:

Adv. ARG Mundell SC

Instructed by:

AC Schmidt Inc.

Date of the hearing:

20 May 2024

Date of judgment:

27 May 2024