THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number 574/07

In the matter between:

TRINITY ASSET MANAGEMENT (PTY) LIMITED FIRST APPELLANT
TRINITY ENDOWMENT FUND (PTY) LIMITED SECOND APPELLANT
ELJAY INVESTMENTS INCORPORATED THIRD APPELLANT

and

INVESTEC BANK LIMITED FIRST RESPONDENT
JCI LIMITED SECOND RESPONDENT
LEXSHELL 658 INVESTEMENTS (PTY) LTD THIRD RESPONDENT

Neutral citation: *Trinity Asset Management (Pty) Ltd v Investec Bank* (574/07) [2008] ZASCA 158 (27 November 2008).

CORAM: FARLAM, MTHIYANE, JAFTA, MAYA et CACHALIA JJA

HEARD: 26 AUGUST 2008

DELIVERED: 27 NOVEMBER 2008

SUMMARY: Companies – shareholders – accuracy in circular convening meeting regarding validity of contract to which company is party – *locus standi* of shareholder to obtain declarator as to accuracy of circular.

ORDER

On appeal from: Johannesburg High Court (Blieden J sitting as court of first instance).

1. The appeal succeeds with costs, including those occasioned by the employment of two counsel.

2. The order made by the court *a quo* is set aside and replaced by the following:

'In the Trinity application:
1. It is declared that the applicants have *locus standi* to raise the following issue:
That the ILA lapsed due to non-fulfilment of suspensive conditions in the ILA and the disposal agreement.

2. The application is postponed *sine die.*

3. The first respondent is ordered to pay the costs of the applicants in regard to the separated dispute regarding *locus standi,* which costs are to include those of two counsel.'

JUDGMENT

FARLAM JA (Mthiyane, Maya et Cachalia JJA concurring)

[1] This is an appeal from a judgment of Blieden J, sitting in the Johannesburg High Court, in which he dismissed with costs the appellants' application for certain relief. The relief sought included: (a) an order declaring that a loan agreement concluded on the one hand between Investec Bank Ltd, the first respondent, and on the other JCI Ltd, the second respondent, and Lexshell 658 Investments (Pty) Ltd (whose name was changed to JCI Investment Finance (Pty) Ltd and which is a wholly owned subsidiary of the second respondent), the third respondent, was void for vagueness and/or impossibility of performance; (b) alternatively to (a) an order declaring that conditions precedent to the agreement had not been met; (c) an order interdicting the first respondent 'from in any way implementing or benefiting from' the loan agreement; and (d) an order ordering the first respondent to restore the second and third respondents into the position that they would have been in had the loan agreement not been concluded; alternatively such order as to the restitution of the parties *inter se* as the court may deem fit. In what follows I shall call the first respondent 'Investec' and the second respondent 'JCI'.

[2] The appellants' application was heard by the court *a quo* together with another application brought by Letseng Diamonds Ltd (which I shall call in what follows 'Letseng') in which that company also sought certain relief against the same three respondents, arising from the same loan agreement. The relief sought in what may be called the 'Letseng application' included declarations to the effect that the loan agreement was void or voidable on various grounds, as well as an interdict restraining the second respondent from tabling certain resolutions at a general meeting of its shareholders which it had called and at which the shareholders were asked to ratify the loan agreement. (The wording of the agreement which was to be ratified was amended from time to time as reference was made to further agreements by which it was amended but the details thereof are not relevant for the purposes of considering the issues arising for decision in this matter.)

[3] Save for one aspect, the loan agreement was implemented on both sides. Amounts totalling more than R1 billion were lent and advanced by Investec to JCI, and subsequently repaid with interest. The aspect outstanding related to the payment of what was described in the agreement as 'a raising fee', amounting to R50 million or 30 per cent of the aggregate increase in the value of the assets which JCI furnished as security for its indebtedness (whichever was the greater on the agreed due date of repayment). Although JCI was in a parlous state, staring bankruptcy in the face when the original loan agreement was concluded, it recovered significantly after it received the loans made to it by Investec. As a consequence the value of the assets it furnished as security increased to such an extent that at the time of the application before the court *a quo* it was calculated that the 'raising fee' amounted to a sum substantially in excess of R400 million.

[4] Before the two applications were argued before him Blieden J had, at the first respondent's instance, ordered in terms of Rule 33(4) of the Uniform Rules, that the question as to whether the appellants and the applicant in the Letseng application had *locus standi* to raise certain issues which arose in the two cases should be argued and decided separately. He did so because he was of the view that if his decision on this point went in favour of the respondents it would be dispositive of the appellants' application and would determine the majority of the issues between the parties in the Letseng application. Having heard argument on the *locus standi* point he decided it in favour of the respondents and accordingly dismissed the appellants' application. He also ordered that the Letseng application be postponed for the remaining issues arising therein, which were not covered by his judgment on the *locus standi* point, to be adjudicated.

[5] His judgment has been reported: see *Letseng Diamonds Ltd v JCI Ltd and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2007 (5) SA 564 (W).

[6] As far as concerned the appellants (whom the judge collectively described as 'Trinity') the

issue to be decided separately was whether the loan agreement had lapsed due to non-fulfilment of suspensive conditions in it and another agreement, which was referred to as 'the disposal agreement' and which followed on and was dependent upon it.

[7] It was common cause before us that the learned judge had correctly approached the *locus standi* point on the assumption that all allegations of fact relied upon by the appellants and Letseng are true.

[8] In para [7.14] of his judgment (at 570C-E) Blieden J characterised the issue before him as follows:

'In short, the present proceedings are concerned with the right of two shareholders of JCI, being Letseng and Trinity, to have a suite of agreements, including the [loan agreement], to which neither of them is a party, declared invalid one and a half years after their implementation, apart from the payment of the raising fee. The parties to the agreements, JCI and Investec, have at all times regarded all the agreements to be binding on them.'

[9] The judge then proceeded to consider what he described as 'the relevant general legal principles applicable to the position of shareholders in companies' (paras [15] to [22] of the judgment (at 572D-574D)).

[10] The conclusion to which he came (at 573D-G (paras [19] and [20])) was that (save for limited exceptions not here relevant) 'a shareholder is a stranger to the company in its dealings with third parties' and he or she cannot interfere in the terms and conditions contained in an agreement between the company and a third party. Persons in the position of the appellants and Letseng, he said, had no right as shareholders to attack the loan agreement: this could be done only by JCI, the management and control of the business of which vest in the directors whose functions cannot be usurped by individual shareholders.

[11] The judge (in para [27] at 575D-G) referred to E*x parte Ginsberg* 1936 TPD 155 in which it was held that it was not open to a litigant to bring an application for declaratory relief merely to be advised of his legal position and not where the order sought would not have the effect of binding some parties.

[12] The judge also held (in para [38] of his judgment at 578C-D) that the appellants had only a 'financial interest', and not a 'legal interest', in the declaratory relief they claimed: in this regard he referred with approval to the distinction between direct legal interests and indirect financial interests in litigation upheld in *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) and *United Watch & Diamond Co (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 409 (C).

[13] In para [41] of his judgment (at 579A-B) the judge said that 'both JCI and Investec have

expressed their wish to be bound by the documents concerned, even though various clauses in such documents and agreements are *prima facie* incapable of performance, and the resulting contracts can be said to be voidable at the instance of any of the contracting parties.'

[14] He continued (in paras [42] and [43], at 579B-E):

'[42] As is plain from the legal principles relating to declaratory orders to which reference is made above, a court is not entitled to give advice unless such advice is binding on some party. In the present case whether the agreements are binding or not, is not the question, it is whether the applicants, Letseng and Trinity, as individual shareholders of JCI, are entitled to have them set aside in the face of the two affected parties, JCI and Investec, adopting the stance that such contracts are binding. In my view they have no *locus standi* to do this.

[43] The shareholders, such as Letseng and Trinity, have full knowledge of all the facts, so much is plain from the affidavits filed on their behalf. Whatever order they wish the Court to make cannot affect the agreement between Investec and JCI. It is only the decision of the general meeting that can have influence on the ratification or otherwise of the agreements concerned. There is nothing to stop either of the applicants informing the shareholders of JCI of their views before the general meeting and canvassing the individual shareholders at the meeting to refuse to ratify the actions of the board in regard to the agreements concerned.'

[15] Does the case raise the simple question to which the judge referred in para [7.14] of his judgment which I have quoted in para 8 above?

[16] Mr *Cilliers,* who appeared together with Mr *Rubens,* Mr *Blou* and Mr *Rowan* for Investec, contended that it did. He submitted that the question whether the appellants had the right to have the loan agreement and the other agreements which followed it declared invalid had to be answered by having regard to the memorandum and articles of JCI, which constitute the so-called 'company contract' between the company and its members created by s 65(2) of the Companies Act 61 of 1973, as amended. There is no provision, he said, in the memorandum and articles which entitles a shareholder to meddle in the contracts of the company.

[17] On the other hand, Mr *Loxton,* who appeared with Mr *Janisch* on behalf of the appellants, contended that the judge had mischaracterised the question. The true question was not whether, in abstract as it were, the appellants had the right to have declared invalid a contract between the company of which they were members and another. It was, as he formulated it, this: whether in circumstances where the shareholders had been invited to attend a general meeting of the company to vote on the question whether a contract concluded between the company and another should be ratified and the validity of the contract sought to be ratified was a material consideration in that process, an individual shareholder has the right to seek a declarator to the effect that the contract is invalid.

[18] Mr *Loxton* submitted that when the question is posed in this way it becomes clear that the appellants have the right to claim the declarator they seek and the judge's decision that they lacked *locus standi* was incorrect.

[19] Mr *Cilliers* sought to meet this argument by submitting that the circumstances to which Mr *Loxton* pointed did not change the position. The fact, he said, that shareholders are required to vote at a general meeting convened for the purpose of ratifying an agreement cannot change the rights a shareholder has.

[20] Mr *Williamson,* who appeared on behalf of the second and third respondents, confirmed during the hearing of Letseng's appeal against the judgment in the court *a quo,* which was heard by this court on the day before the present appeal was argued, that his clients wanted the issue dealt with. During this appeal he stated that if the court were to hold that the loan agreement is invalid then they would not pay the 'raising fee' because to do so would constitute making a gratuitous payment.

[21] It is appropriate at this stage to point out that the judge's statement at 579 A-B (in para [41]) of his judgment, which I have quoted in para 13 above, that 'both JCI and Investec have expressed their wish to be bound' by the agreements even though they 'can be said to be voidable at the instance of any of the contracting parties' is not strictly correct. During the course of the argument before us Mr *Cilliers* said, in answer to a question from the bench, that the directors of JCI do not say that they will regard their company as bound under the loan agreement even if the points taken by the appellants and Letseng are correct. He referred in this regard to the second sub-paragraph of paragraph 2 of the supplementary circular, which is quoted in para 37 below, and conceded that all this indicated was that the directors of JCI regarded the loan agreement as binding even if the meeting of shareholders refused to ratify it.

[22] In my opinion Mr *Loxton* was correct in submitting that the court *a quo* mischaracterised the main question before it. It was not appropriate to approach the issue raised in the request for a declarator in the abstract without reference to the factual situation in which it arises. I say this because in my view the appellants' right to seek the declarator was triggered by the fact that a meeting had been called at which the members were asked to ratify the loan agreement. Before the shareholders could decide whether to attend the meeting to vote for or against the resolutions, or to give proxies to others to vote for or against on their behalf, or to do none of these things and to leave it to the majority to decide, they needed to have sufficient information to be able to come to an intelligent conclusion on the matter on which they were asked to vote. This right arises from a term implied in the company contract: see Blackman *et al, Commentary on the Companies Act,* vol 1 p7-37, where reference is made to *Bulfin v Bebarfald's Limited* (1932) 38 SR (NSW) 423 at 440-441, a case which has been frequently followed in Australia, where it has been described as 'the foundation for subsequent

decision' (see *Shears v Chisholm* [1994] 2 VR 535 at 624).

[23] The *Bulfin* case concerned a meeting called to consider a modification of the rights of preference shareholders and in the passage cited Long Innes CJ in Eq said:

'The contract contained in the articles of association confers certain rights upon the different classes of shareholders: Article 49 provides that the rights and privileges attached to each class may be modified in a particular manner; and it is a term of the contract implied by law that there is a duty resting upon the directors, when advising or urging any such class to agree to a modification of such rights and privileges, as *Vaughan Williams LJ* said in *Peel v London and North Western Railway Company* [[1907] 1 Ch 5 at 14], "to take care that a sufficient statement of the facts which will have to be considered by the shareholders at the coming meeting is also placed before the shareholders." The duty in this respect resting on the directors is the same, in my opinion, whichever of the alternative courses provided by Article 49 is adopted. In the present proceedings the plaintiff is consequently not seeking to avoid the contract into which she, and the class of shareholders upon whose behalf she sues entered, but to affirm and enforce it. She is not repudiating her contract but approbating it; she is not claiming to be relieved from the contract on the ground that she was induced to enter into it by misrepresentation, whether express or involved in a non-disclosure of a material fact; but is seeking equitable relief on the ground that the defendant directors have committed a breach of a term implied in the contract contained in the articles of association.'

[24] In my view this principle is not limited to decisions to modify the rights of particular shareholders but applies generally to resolutions to be tabled at meetings of a company.

[25] Down the years the requirements as to what information must be put before the members have been developed and extended as the circumstances in which meetings are held and decisions taken have changed.

[26] It is convenient to begin by referring to a case, with interesting Southern African connections, decided in 1893, *the Matabeleland Company Limited v The British South Africa Company* (1893) 10 TLR 77 (Ch and CA), the facts of which resemble in some ways those of the present case. It concerned an application brought for an injunction to restrain Cecil John Rhodes and his co-directors of the British South Africa Company from representing to the shareholders that a certain agreement allegedly concluded between the company and the Central Search Limited (the shareholders of which were practically identical with Rhodes and the other promoters of the British South Africa Company), which provided that half of the British South Africa Company's profits derived from the Rudd and Rhodes concessions were to be handed over to Central Search Limited, existed or was valid. The question as to whether there was an agreement or whether it was valid was the subject of a pending action between the applicant and the company and its directors. The directors had called a meeting of the company to consider a resolution that the agreement be ratified. Stirling J dismissed the motion. He is reported to have said:

'It was true there was a dispute as to the existence and validity of the agreement. It was true also that it was asserted on the face of the notice convening the meeting that the agreement did exist and was valid. The complaint was that the directors had not stated that there was any dispute. There was, however, no suggestion that it was proposed to deprive the plaintiffs, or any other shareholders, of the opportunity of informing the shareholders of the existence of such dispute, and it seemed to his

Lordship that that was all the plaintiffs were entitled to. The directors took one view and the plaintiffs took another, and it was for the shareholders to consider the question, assuming that all the facts would be properly brought before the meeting. Assuming, therefore, that nothing would occur at the meeting which would give rise to the jurisdiction of the Court to interfere, then the whole question would be before the shareholders, and they would be able to say whether there was an agreement, and, if so, whether it should be acted upon. The Court ought not to assume that the directors would act otherwise than fairly.'

[27] The next day the Court of Appeal (Lindley and A L Smith LJJ) heard and dismissed an appeal from this judgment. Lindley LJ said that in substance 'it was an application to the Court not to restrain the defendants from carrying out an agreement alleged to be beyond their powers, but to restrain the directors from convening a meeting to discuss certain matters on the ground that the notice convening the meeting contained misrepresentations which would mislead the shareholders. Assuming that to be true, the answer to the application would be, "Go and tell the shareholders they are being deceived; go and expose the misrepresentations."' He added: '[S]uppose that, though that agreement was not binding in point of law upon the company, the company thought it would be a breach of faith not to act upon it, was it a lie to tell the shareholders that, though that agreement was not binding in law, it was binding in honour, and was it wrong to ask them to act as in honour bound? To hold that would be outrageous.'

[28] The next case to which I wish to refer is a judgment of Kekewich J, delivered in 1899 and still quoted in current textbooks (see eg, Gower and Davies, *Principles of Modern Company Law,* 8 ed, p 454 and Blackman *et al, op cit.,* 7-37), viz *Tiessen v Henderson* [1889] 1 Ch 861 (Ch D). This was also a case with Southern African connections. It was an application for an interim injunction to restrain the defendants from carrying into effect certain resolutions passed at an extraordinary general meeting of a company, Violet Consolidated Gold Mining Co Ltd, which was formed to work certain gold-mining claims near Krugersdorp. The resolution related inter alia to the reconstruction of the company. Although the directors of the company were personally interested in the adoption of the scheme and were to be renumerated by means of a call on shares this fact was not disclosed in the notice convening the meeting. Kekewich J held that this fact should have been disclosed in the notice and granted the injunction to prevent the resolutions being carried into effect without there being another meeting. He commenced his judgment as follows (at 866-7):

'The application of the doctrine of *Foss v Harbottle* [(1843) 2 Hare 461] to joint stock companies involves as a necessary corollary the proposition that the vote of the majority at a general meeting, as it binds both dissentient and absent shareholders, must be a vote given with the utmost fairness – that not only must the matter be fairly put before the meeting, but the meeting itself must be conducted in the fairest possible manner. . . . . There is no question of conduct here, either on the part of Mr Henderson [the first defendant] or anybody else. The question is merely whether each shareholder as and when he received the notice of the meeting, in which I include the circular of the same date, had fair warning of what was to be submitted to the meeting. A shareholder may properly and prudently leave matters in which he takes no personal interest to the decision of the majority. But in that case he is content to be bound by the vote of the majority; because he knows the matter about which the majority are to vote at the meeting. If he does not know that, he has not a fair chance of determining in his own interest whether he ought to attend the meeting, make further inquiries, or leave others to determine the matter for him.'

[29] Later in his judgment he said (at 870-871):

The man I am protecting is not the dissentient, but the absent shareholder – the man who is absent because, having received and with more or less care looked at this circular, he comes to the conclusion that on the whole he will not oppose the scheme, but leave it to the majority. I cannot tell whether he would have left it to the majority of the meeting to decide if he had known the real facts. He did not know the real facts; and, therefore, I think the resolution is not binding upon him.'

[30] I notice that in the Law Journal report ((1899) 68 LJ Ch 353 at 356) there appears a sentence before the sentence beginning 'There is no question' in the above extract which reads as follows: 'If you are to apply that rule in its entirety – that the vote of the majority controls the minority, and of course also the absent shareholder – it is a matter of absolute necessity that there should be the most perfect straightforwardness and openness throughout.' I do not know why Kekewich J deleted this sentence from his judgment when he revised it for the official reports but I am satisfied that it makes a point as valid today as it was in 1899.

[31] The assumption on which the judgments in the *Matabeleland* case were based, that the dissentient shareholders can put the matter right, as it were, by 'informing the shareholders of the existence of the dispute' (as it was put by Stirling J) or that they could 'go and expose the misrepresentations' (as it was put by Lindley LJ) became more and more unrealistic as time went by and the circumstances in which company meetings were held changed. In 1933 Maugham J dealt with the position as follows in *In re Dorman Long and Co Ltd; In re South Durham Steel and Iron Co Ltd* 1934 Ch 635 (Ch D) at 657:

'It may be observed that when the Joint Stock Companies Arrangement Act, 1870, was passed, in the majority of cases all the persons concerned with an arrangement could go to the meeting, listen to what was said and vote for or against the arrangement according to the views which they were persuaded to take. In these days, in many of the cases that come before me, only a fraction of the persons who are concerned can get into the room where the meeting is proposed to be held, and in the great majority of cases the proxies given to the directors before the meeting begins have in effect settled the question of the voting once for all. It is perhaps not unfair to say that in nearly every big case not more than five per cent of the interests involved are present in person at the meeting. It is for that reason that the Court takes the view that it is essential to see that the explanatory circulars sent out by the board of the company are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote.'

[32] In *Garvie v Axmith* [1962] OR 65; 31 DLR (2d) 65, a decision of the Ontario High Court of Justice, Spence J considered the test to be applied in determining the adequacy of a notice sent to shareholders inviting them to attend a general meeting held to approve an agreement. The test which he approved was as follows: 'the notice to shareholders must contain such particulars as will permit them to exercise an intelligent judgment upon the proposition'. He pointed out that the shareholders in the case before him 'might well be [at] any place on the American continent, or overseas' and said that they 'should be able to sit down with the material and come to an intelligent conclusion'. The test formulated in *Garvie v Axmith, supra,* was approved by the Ontario Court of Appeal in *Goldex Mines Ltd v Revill* [1974] 54 DLR (3d) 672 at 679.

[33] Earlier on the page the following was said:

'In *Charlebois et al v Bienvenu et al,* [1967] 2 O.R. 635 at p 644, 64 D.L.R. (2d) 683 at p 692, Fraser J held that the holding of an annual meeting and election of directors after the sending out of a misleading information circular by the directors was a breach of the directors' fiduciary duty to the company. We hold that such an act is also a breach of duty to the other shareholders. If the directors of a company choose, or are compelled by statute, to send information to shareholders, those shareholders have a right to expect that the information sent to them is fairly presented, reasonably accurate, and not misleading.'

[34] The matter has also been considered in Australia in a number of cases of which it is only necessary to refer to one, *Fraser v NRMA Holdings Ltd* (1995) 127 ALR 543 (Fed C of A – Full Court). This case concerned the adequacy of the prospectus issued by the NRMA on its proposed demutualisation. At 554 the court (Black CJ, Von Doussa and Cooper JJ) stated, after referring to a number of cases in England, Ireland and Canada, including some which I have cited above:

'A duty to make disclosure of relevant information arises as part of the fiduciary duties of the directors to the company and its members in relation to proposals to be considered in general meeting and under s 1022 of the [Corporations] Law in respect of the contents of a prospectus. The fiduciary duty is a duty to provide such material information as will fully and fairly inform members of what is to be considered at the meeting and for which their proxy may be sought. The information is to be such as will enable members to judge for themselves whether to attend the meeting and vote for or against the proposal or whether to leave the matter to be determined by the majority attending and voting at the meeting . . . . A proper discharge of the duty may require that the directors take reasonable steps to ascertain relevant information for communication to members if that information is not known to the board. Directors must not consciously refrain from seeking relevant information or turn a blind eye to relevant material in order to avoid placing before members information which may contradict or qualify any particular position taken or advocated by the directors or a majority of them.'

[35] The principles enunciated in the cases I have cited are in my view in accordance with our law. Indeed in the argument before us counsel on both sides referred freely to English and Australian cases and never suggested that our law differed from the law in those jurisdictions.

[36] It is clear that a shareholder's right to information regarding a proposition to be voted on at a general meeting has developed and been extended down the years, particularly since the practice of giving proxies has become so widespread. As I have said a shareholder's right to receive the necessary information arises from an implied term in the company contract. Regard being had to the fact that an individual shareholder will be bound by the votes of the majority it must follow that the shareholder's rights extend not only to his or her being furnished with the necessary information but that all his or her fellow-shareholders also receive such information. It also follows that a shareholder has the right flowing from the company contract to insist that he or she and his or her fellow-shareholders do not receive information which is inaccurate and to enforce such right by applying for an interdict to prevent a meeting from proceeding.

[37] In the circumstances of this case, it will be recalled, the assertions made by the appellants, whose *locus standi* is being challenged, have to be accepted as correct. Thus we must assume, for the purposes of considering whether the appellants have *locus standi,* that their assertion that the

loan agreement is invalid is correct. If that is so they must be able to apply to interdict the holding of the meeting before which materially incorrect information regarding the legal status of the agreement has been put by the directors. The supplementary circular sent to the shareholders of JCI dated 15 November 2006, refers to the original circular sent to the shareholders on 14 September 2006 and calls it 'the Letseng circular'. Paragraphs 2 and 6 of the supplementary circular read as follows:

'2. 'SHAREHOLDER RATIFICATION

JCI shareholders are referred to paragraph 1 of the Letseng circular, which recorded the following:

"In terms of the JSE Listings Requirements, the sale by JCI and certain of its subsidiaries of the assets to JCIIF on loan account and the cession and pledge of such assets, and related loan accounts to Investec as security for the facility and the subscription by JCI for Western Areas shares in terms of the Western Areas rights offer and the underwriting by JCI of a portion of the Western Areas rights offer up to a maximum of R250 million have been categorised as Category 1 transactions. In terms of a ruling by JSE, such transactions require ratification at a general meeting of JCI shareholders."

Should shareholders not ratify the Category 1 transactions, and Investec executes its security in terms of the loan agreement the company may be in breach of JSE Listings Requirements. However, JCI and Investec are nevertheless entitled to and will regard the Investec loan agreement, which has been implemented as valid, binding and enforceable.'

'6. DIRECTORS' RESPONSIBILITY STATEMENT

The directors, whose names are given on page 11 of this document collectively and individually accept full responsibility for the accuracy of the information given relating to the JCI group and certify that to the best of their knowledge and belief there are no facts that have been omitted which would make any statement false or misleading, and that all reasonable enquiries to ascertain such facts have been made.'

[38] In my view whether the loan agreement is valid or invalid is clearly a material factor which the shareholders are entitled to know before voting. On the assumption to which I have referred, the paragraphs I have quoted from the supplementary circular are incorrect and the appellants would, as I have said, be entitled to an interdict stopping the meeting until the incorrect information is removed from the circular and replaced by information that is correct. It is accordingly clear that the validity or otherwise of the loan agreement would be a triable issue in an application brought by the appellants for an interdict.

[39] Does the fact that the court below, in terms of rule 33(4) of the Uniform Rules, separated the appellants' claim for declaratory relief from the other relief claimed, including the interdict, make a difference?

[40] In *Nguza v Minister of Defence* 1996 (3) SA 483 (Tk SC) Pickering J, after a full discussion of the cases on the point, held (correctly in my view) following the judgment of Shearer AJ in *Safari Reservations (Pty) Ltd v Zululand Safaris (Pty) Ltd* 1966 (4) SA 165 (D), that a court is entitled to make a declaratory order even where other remedies are available but not sought, although the

availability of other remedies could be taken into account when the court was exercising its discretion in deciding whether or not to make the declaration. That such a procedure can have its advantages appears from such a case as *Standard Bank of South Africa Ltd v Trust Bank of Africa Ltd* 1968 (1) SA 102 (T), a dispute between two banks as to whether a pledge of certain deposit vouchers to the defendant bank became inoperative with the result that the plaintiff bank was entitled to present them for payment. Hill J said (at 106 B-C) that it was clear from the correspondence that they wished to avoid legal proceedings and the possibility of a judgment for payment of money being granted against the defendant and stated:

'(t)he present proceedings provide an expeditious method of setting the dispute between the parties as otherwise three months' notice would be required in respect of each of the eight vouchers before an action for payment could be instituted.'

[42] That the appellants have brought their application for declaratory relief with a view *inter alia* to preventing the holding of the meeting called to ratify the loan agreement appears from prayer 3.2 of their notice of motion where they ask that JCI be interdicted and restrained, pending the final determination of their application, 'from continuing to convene the shareholders' meeting postponed to 30 November 2006 or from tabling any resolution notifying or endorsing' the loan agreement.

[43] For the reasons I have given I am satisfied that the court *a quo* wrongly held that the appellants have no *locus standi* to bring their application and that it had to be dismissed.

[44] I also do not think that the court *a quo* was correct in saying (at 584F-H (para [65])) that the appellants 'are attempting to usurp the functions of the general meeting and [trying to] anticipate the result of such a meeting.' They are entitled to stop the meeting from taking the decision on materially inaccurate information. The fact that the issues raised by their complaint about the circular concern the validity of the agreement cannot prevent them from approaching the court as they have done. That question arose because of inaccurate statements in the circular which I have quoted and which they are entitled to seek to controvert.

[45] Whether they would be entitled to approach the court for a decision as to the validity of the agreement (which decision would bind all parties joined) in the absence of the statements which I have quoted from the circular, or for an order compelling JCI or its directors to seek such relief, pursuant to their duty to put relevant information before the meeting (cf the dictum from *Fraser v NRMA, supra,* quoted in para 34 above) does not strictly arise for decision in this case and I express no opinion upon it.

[46] The following order is made:

1. The appeal succeeds with costs, including those occasioned by the

employment of two counsel.

2. The order made by the court *a quo* is set aside and replaced by the following:

'In the Trinity application:
1. It is declared that the applicants have *locus standi* to raise the following issue:
That the ILA lapsed due to non-fulfilment of suspensive conditions in the ILA and the disposal agreement.

2. The application is postponed *sine die.*

3. The first respondent is ordered to pay the costs of the applicants in regard to the separated dispute regarding *locus standi,* which costs are to include those of two counsel.'

IG FARLAM
JUDGE OF APPEAL

JAFTA JA dissenting

[47] I have read the judgment of my colleague Farlam JA. Regrettably I am unable to agree with the order he proposes and the reasons given therefor. In my view the appeal must be dismissed.

[48] The relief sought by the appellants, set out fully in Farlam JA's judgment, could not vindicate their rights in relation to the shareholders meeting to which they were invited. They sought to set aside the agreements forming the subject matter of the meeting. They also sought an order interdicting JCI from performing in terms of the agreements, instead of asking for an order which would oblige JCI's directors to furnish them with full and accurate information.

[49] The court a quo was called upon to decide whether the appellants could challenge the validity of the concerned agreements on the basis that the loan agreement between JCI and Investec had lapsed due to non-fulfilment of suspensive conditions. In this case the enquiry was narrower than in Letseng's application, even though in that case, too, the *locus standi* enquiry was limited to the claim for a declaratory relief.

[50] The sort of *locus standi* we are concerned with here does not relate to the appellants' capacity to institute proceedings but to their competence to claim particular relief. In other words the question is whether the appellants have a direct and substantial interest in the agreements which they seek to be declared invalid. The direct and substantial interest does not include mere financial interest which is taken to be indirect interest.[1]

[1] *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O) at 169 and *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotel Ltd and Another* 1972 (4) SA 409 (C) and *Aquatus (Pty) Ltd v Sacks and*

[51] In the context of the present case the question whether the appellants had *locus standi* must be considered with reference to the relief they sought and the right on which they based their claim.[2] The right on which the appellants rely is the right to full and accurate information. They contended that they needed such information so that they could exercise their vote either against or in favour of ratification, at the general meeting. There can be no doubt that the appellants were entitled to demand full and accurate information from JCI's directors. If the directors had breached the duty to furnish such information, as it was alleged in the present case, the appellants would have legal standing to claim compliance. The relief they could have been entitled to would, however, be an order instructing JCI directors to supply them with full and accurate information, which would include a statement to the effect that the agreements were invalid for reasons raised by the appellants. Perhaps they could have been entitled also to an order interdicting the meeting until there had been compliance with the duty to make full and accurate disclosure. This much is clear from the cases referred to in Farlam JA's judgment.

[52] The appellants' counsel argued that the court below mischaracterised the issue relating to *locus standi*. He submitted that the correct issue was whether shareholders, who had been invited to a general meeting to ratify an agreement, the validity of which is material to ratification, have the right to claim an order declaring such agreement invalid. Although I am not convinced that the court below mischaracterised the issue, I am willing to assume in the appellants' favour that it did. The test for determining competence to claim relief is whether the claimant possesses the right which gives rise to the relief sought and that such right has been infringed or there was a threat to infringe it.[3] The relief to which the aggrieved party is entitled depends on the infringed right and is consequential to such infringement. Such relief must fall within the scope of the right. In *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board*[4] Watermeyer CJ said:

'[T]he ordinary Courts of Law, before the enactment in 1935 of the General Law Amendment Act, had refused to make declaratory orders in claims or disputes brought before them which had not yet ripened to a stage which may for convenience be called the stage of actionable maturity, that is the stage at which an infringement of the legal rights of one of the parties, which gives the other a right to claim consequential relief has taken place.'

[53] The only right the appellants have established in these proceedings is the right to full and accurate disclosure. The question that arises is whether such right entitled them to the relief sought.

Others 1989 (1) SA 56 (A) at 62.

[2] *Wood and Others v Ondangwa Tribal Authority and Another* 1975 (2) SA 294 (A) at 312F.

[3] Compare *Director of Education, Transvaal v McCagie and Others* 1918 AD 616 at 621.

[4] 1950 (2) SA 420 (A) at 424.

In my view it does not give them legal standing to challenge the validity of the agreements on the basis that suspensive conditions were not complied with. As observed by the court below it is only the contracting parties who can raise that challenge.[5]

[54] In reaching the conclusion that the appellants have failed to point to a right justifying the invalidity order, I have assumed in their favour though with some reservations, that in determining the *locus standi* issue the allegations made by the appellants, as to invalidity of the concerned agreements, must be taken as correct. It appears doubtful to me that the approach followed in deciding exceptions can be adopted in applications such as the present where evidence has been placed before the court. It will be recalled that in the case of an exception, no evidence would have been led.[6] In the present matter not only were the pleadings closed, the parties had placed evidence before the court. I can think of no reason warranting the disregard of such evidence and for the court to decide the matter on an assumption.

[55] Moreover, even in the case of exceptions, the assumption is not made in every matter. Where the factual averments made in the particulars are improbable or false, the court deciding the exception cannot assume that they are correct.[7]

[56] Relying on s 34 of the Constitution, counsel for the appellant argued that the common law principles on *locus standi* are at variance with the values underlying s 34. He submitted that such principles need to be reviewed. The distinction between a 'direct and substantial interest' which qualifies a party to have legal standing and a 'mere financial interest' which does not, he submitted, may be inconsistent with s 34. A party which has a financial interest, so he concluded, must be allowed to have access to courts where considerations of justice and equity demand that its dispute be entertained.

[57] Section 34 of the Constitution provides:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

[5] *Letseng Diamonds Ltd v JCI Ltd and Others, Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2007 (5) SA 564 (W) at para 19 and the authorities there cited.
[6] *Anrudh v Samdei and Others* 1975 (2) SA 706 (N) at 708 A-B and *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) at 553.
[7] *Voget and Others v Kleynhans* 2003 (2) SA 148 (C) at para 9 and *Van Zyl NO v Bolton* 1994 (4) SA 648 (C) at 651E-F.

[58] The main purpose of s 34 is to confer on litigants the right of access to courts and other independent and impartial tribunals. The section places an obligation on the State to establish such fora. But it does not purport to define the category of litigants who qualify to take disputes to courts, nor does it describe the nature of relief a party can competently seek. It will be recalled that the issue of *locus standi* in this matter arose in the context of the appellants' competence to claim the relief they sought. Their right of access to courts was not affected in any way. Indeed, they were able to approach the court below for relief. I conclude, therefore, that their s 34 rights were not infringed by the court a quo's ruling. Accordingly reliance on s 34 was misplaced.

[59] Under the Constitution the question of *locus standi* is dealt with in s 38. It provides:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach the court are –

(a) anyone acting in their own interest;
(b) anyone acting on behalf of another person who cannot act in their own name;
(c) anyone acting as a member of, or in the interest of, a group or class of persons;
(d) anyone acting in the public interest; and
(e) an association acting in the interest of its members.'

[60] It is clear that s 38 does not apply in the present case. The appellants did not allege that, by failing to furnish them with full and accurate information, JCI's directors infringed or threatened to infringe a right in the Bill of Rights. But it is important to note that for the applicant's competence, the section requires as a bare minimum, that it be alleged that a right in the Bill of Rights has been infringed. It is the infringement or a threat to infringe a right that entitles the applicant to relief. It speaks of the infringement of a right and not interest. On this score the common law is consistent with the Constitution.

[61] The above finding makes it unnecessary, in the circumstances of the present case, to embark on a review of the common law principles. The expanded approach to legal standing is more suited to constitutional litigation because there the relief granted may affect people who were not parties to particular litigation. On the other hand relief granted in a private litigation such as the present, affects only the parties before the court. In the celebrated decision of *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell No and Others*[8] O'Regan J said:

[8] 1996 (1) SA 984 (CC) at para 229.

'This expanded approach to standing is quite appropriate for constitutional litigation. Existing common – law rules of standing have often developed in the context of private litigation. As a general rule, private litigation is concerned with the determination of a dispute between two individuals, in which relief will be specific and, often, retrospective, in that it applies to a set of past events. Such litigation will generally not directly affect people who are not parties to the litigation. In such cases, the plaintiff is both the victim of the harm and the beneficiary of the relief. In litigation of public character, however, that nexus is rarely so intimate. The relief sought is generally forward-looking and general in its application, so that it may directly affect a wide range of people…. In recognition of this, s 7(4) [of the Interim Constitution] casts a wider net for standing than has traditionally been cast by the common law.'

[62] The competence to grant a declaratory relief in the circumstances of this case remains for consideration. Relying on *Nguza v Minister of Defence*[9] Farlam JA held that it was open to the court below to grant a declarator, although other remedies were available to the appellants. While this may be so, the anterior question is whether the requirements for the granting of a declarator have been met. Apart from failing to show that they had a direct and substantial interest in the concerned agreements, the appellants have not established that the declaratory order sought was going to be binding. Instead, during argument we were informed that it will still be open to JCI's shareholders to consider and ratify the agreements in question, regardless of the order declaring them invalid. It was submitted that the appellants were merely entitled to know the status of these agreements before the meeting could be held.

63] Although the granting of a declaratory order is discretionary it can be granted only upon a judicial exercise of the discretion. There can be no proper exercise of such discretion if essential elements of a declarator are not fulfilled. In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[10] this court said:

'Although the existence of a dispute between the parties is not a prerequisite for the exercise of the power conferred upon the High Court by the subsection [s 19(1)(a)(iii) of the Supreme Court Act 59 of 1959], at least there must be interested parties on whom the declaratory order would be binding…

[T]he two stage approach under the subsection consists of the following. During the first leg of the enquiry the Court must be satisfied that the applicant has an interest in an "existing, future or contingent right or obligation". At this stage the focus is only upon establishing that the necessary conditions precedent for the exercise of the Court's discretion exist. If the Court is satisfied that the existence of such conditions has been proved, it has to exercise this discretion by deciding either to refuse or grant the order

[9] 1996 (3) SA 483 (Tk SC).
[10] 2005 (6) SA 205 (SCA).

sought. The consideration of whether or not to grant the order constitutes, the second leg of the enquiry.' [11]

[64] In this matter the court below was not satisfied, during the first leg of the enquiry, that conditions for the exercise of its discretion were established. Having referred to *Cordiant Trading* and other decisions of this court,[12] it declined to grant the declarator. In my view the approach by the court below cannot be faulted. It follows that the appeal must be dismissed.

[65] For these reasons I would dismiss the appeal with costs, including the costs of two counsel.

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C N JAFTA
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[11] Ibid at paras 16 and 18.
[12] *Durban City Council v Association of Building Societies* 1942 AD at 32 and *Ex parte Nell* 1963 (1) SA 754 (A).

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