THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 580/07

In the matter between:

LETSENG DIAMONDS LIMITED	APPELLANT

and

JCI LIMITED	FIRST RESPONDENT
INVESTEC BANK LIMITED	SECOND RESPONDENT
JCI INVESTMENT FINANCE (PTY) LIMITED	THIRD RESPONDENT

Neutral citation: *Letseng Diamonds Ltd v J C I Limited* (580/07) [2008] ZASCA 157 (27 November 2008).

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

HEARD: 25 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 of the court below in so far as it relates to the appellant's application in that court is set aside and replaced by an order in the following terms:

'In the Letseng application:

1. It is declared that the applicant does have *locus standi* to raise the issues referred to in the Investec separation application dated 20 April 2007 (as quoted in paragraph 9 of the judgment in this application).

2. The main application is postponed *sine die* in order for the other issues stated therein to be adjudicated.

3. Investec is ordered to pay the applicant's costs in regard to the separation application, such costs are to include the costs 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, who held that the appellant, Letseng Diamonds Ltd, did not have *locus standi* to raise certain issues which he had ordered, in terms of Rule 33(4) of the Uniform Rules, should be separated from the other issues in an application brought by the appellant against the three respondents, JCI Ltd, Investec Bank Ltd and JCI Investment Finance (Pty) Ltd.

[2] The relief originally sought by the appellant, which is a shareholder in the first respondent, was for an order interdicting a general meeting of the first respondent's shareholders from considering two resolutions in which they were asked to ratify certain agreements between the first and second respondents and also interdicting the first respondent from paying what was described as a 'raising fee' to the second respondent pursuant to the main agreement between them. In what follows I shall call this agreement 'the

loan agreement'.

[3] Subsequently the appellant amended its notice of motion, *inter alia,* to claim a declaration that the loan agreement and seven other agreements between the first and second respondents were void and of no effect. At the hearing of the application the prayer for the declaration was amended by the addition of the words 'alternatively voidable' after the word 'void'.

[4] On the same day that the appellant amended its notice of motion to introduce its prayer for the declaratory relief, three other shareholders in the first respondent, Trinity Asset Management (Pty) Ltd, Trinity Endowment Fund (Pty) Ltd and Eljay Investments Incorporated, brought an urgent application against the respondents, seeking, *inter alia,* a declaration that the loan agreement was void for vagueness and/or impossibility of performance, alternatively that the suspensive conditions to which it was subject had not been fulfilled. In what follows I shall call the application brought by these shareholders 'the Trinity application'.

[5] The applications brought by the appellant and by the other three shareholders were heard together in the court *a quo* and in this court they were argued on consecutive days.

[6] At the start of the hearing in the court *a quo* the learned judge heard an application brought by the second respondent for an order separating the question whether the appellant had *locus standi* to raise certain issues from the other issues in the application. There were five issues in respect of which the appellants' *locus standi* was challenged. They all related to the validity of the loan agreement and the other agreements linked thereto. One of them, relating to the contention that the loan agreement had lapsed due to non-fulfilment of suspensive agreements in it and another agreement linked to it, also arose in the Trinity application.

[7] Blieden J granted the order for the separation of issues and after hearing further argument he decided the issues in favour of the respondents. As he considered the issue which arose in both the appellant's application and the Trinity application to be dispositive of the latter, he dismissed it with costs. As far as concerned the appellant's application he declared that the appellant had no *locus standi* to raise the five issues set out in the order he made in terms of Rule 33(4) and he postponed what he called the main application *sine die* in order for the other issues to be adjudicated. He also ordered the appellant to pay the first and second respondents' costs in regard to the separation applications, including the costs of two counsel. His judgment has been reported: see *Letseng Diamonds Ltd v JCI and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2007 (5) SA

564 (W).

[8] At 570C-E (para [7.14]) of his judgment Blieden J said:

'In short, the present proceedings are concerned with the right of two shareholders of JCI, being Letseng [the appellant in this case] and Trinity [for the purposes of his judgment he referred collectively to the three applicants in the Trinity application as 'Trinity': there were thus in reality four shareholders altogether, not two], 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 raising fee. The parties to the agreements, JCI and Investec, have at all times regarded all the agreements to be binding on them.'

[9] In the judgment I have prepared in the Trinity matter, which is being delivered at the same time as this judgment, I consider the question as to whether the question arising for decision is quite as simple as that and uphold the contention that the judge mischaracterised the question to be decided. I proceed to give my reasons for being of the view that the Trinity applicants had *locus standi* to raise the separated issue and that their application was wrongly dismissed on the ground of their alleged lack of *locus standi.* For those reasons, which apply with equal force in this appeal, I am satisfied that this appeal must, like the appeal in the Trinity matter, succeed.

[10] The following order is made:

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

2. The order of the court below in so far as it relates to the appellant's application in that court is set aside and replaced by an order in the following terms:

'In the Letseng application:

1. It is declared that the applicant does have *locus standi* to raise the issues referred to in the Investec separation application dated 20 April 2007 (as quoted in paragraph 9 of the judgment in this application).

2. The main application is postponed *sine die* in order for the other issues stated therein to be adjudicated.

3. Investec is ordered to pay the applicant's costs in regard to the separation application, such costs are to include the costs of two counsel.'

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IG FARLAM

JUDGE OF APPEAL

JAFTA JA dissenting

[11] I have had the opportunity of reading the judgment of my colleague Farlam JA. I am unable to agree with the conclusion that the appeal ought to succeed and the reasons given therefor. In my view the appeal must be dismissed on the basis that the appellant – as a shareholder – had no locus standi to raise any of the issues relevant to the determination of the validity of agreements between JCI Limited (JCI) and Investec Bank Limited (Investec).

[12] During the period between September 1997 and August 2005 JCI had experienced financial difficulties. It was unable to pay its creditors. It was facing litigation against a number of creditors and had been served with a writ of execution for the payment of more than R60 million. As a result it was on the verge of bankruptcy. Its directors had tried to raise loans from financial institutions in this country and abroad, without success. Due to lack of credibility in the market place and the negative reputation JCI had, none of the financial institutions was willing to lend it money. Eventually Investec agreed to lend it an amount in excess of R1.1 billion on condition that the loan would be repaid with interest plus a 'raising fee' which exceeded R400 million.

[13] On 19 August 2005 the Johannesburg Stock Exchange (the JSE) on which JCI was listed, suspended its listing for failure to produce audited financial statements. The JSE's Listing Requirements obliged listed companies to obtain approval of their shareholders before implementing a certain category of transactions. In terms of these requirements the companies were required to include, as a condition for implementing such transactions, prior approval of the shareholders.

[14] To regulate the loan between JCI and Investec, the parties signed a suite of agreements. Some of those agreements fell within the category for which approval of shareholders was needed in terms of the Listing Requirements. As JCI urgently required cash to stave off liquidation, it requested the JSE to exempt its transactions from shareholder approval. The JSE permitted the parties to implement the agreements subject to ratification by JCI's shareholders. The appellant is one such shareholder.

[15] Investec advanced the money JCI required and the latter's financial fortunes improved to the extent that it was able to repay the entire loan with interest. The raising fee had not become payable by September 2006 when the appellant launched an urgent application to interdict a general meeting of JCI's shareholders. The meeting was called specifically to consider two resolutions in terms of which shareholders were asked to ratify agreements referred to above. The appellant also sought an order interdicting JCI from paying the raising fee. When the matter came before the court a quo, the interdict was granted by consent.

[16] Further papers were later filed and the appellant amended its relief and asked that, in addition to the interdict, the relevant agreements be declared invalid. Since the interdict had

already been granted, the declaratory relief was the only aspect of the appellant's case which required consideration by the court.[1]

[17] Meanwhile, Investec launched an interlocutory application in terms of which it challenged the appellant's locus standi to seek the declaratory relief. It listed the issues in relation to which it claimed that the appellant had no locus standi. Those issues are (para 9 of the court a quo's judgment):

'1. That the question whether Letseng has locus standi to raise the following issues be separated from and heard in advance of any other issue in the Letseng application:

1.1 That the JCI directors at all relevant times constituted a "rogue board" or a "supine board", which, to the knowledge of Investec was not capable of performing and did not perform its fiduciary duties, hence the ILA [Investec Loan Agreement] and disposal agreement are void.

1.2 That the resolution of the JCI Board which was quorate on 23 August 2005 is invalid and in any event did not in its terms authorise the signatories of the ILA and Disposal Agreement to sign such agreements on behalf of JCI.

1.3 That the resolution of the JCI board which was quorate on 23 February 2006 is invalid.

1.4 That the ILA lapsed due to non-fulfilment of suspensive conditions in the ILA and the disposal agreement.

1.5 That the implementation of the ILA would breach the provisions of the Competition Act, 1988.

2. That the question whether Trinity has locus standi to raise the issue set out in 1.4 above be separated from and heard in advance of any other issue in the Trinity application.'

[18] By agreement between the parties the court a quo was asked to determine only the question of locus standi and to defer the other issues for consideration at a later date. Having reviewed the relationship between the company and its shareholders, in the context of contracts concluded by the company with other parties, the court a quo held that, as a stranger to the impugned agreements, the appellant did not have locus standi to seek the

[1] *Letseng Diamonds Ltd v JCI Ltd and Others; Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd* 2007 (5) SA 564 (W) para 7 (at 569J-570A).

declaratory relief. In this regard the court a quo said:

'To put it another way: a third party cannot interfere in the terms and conditions contained in an agreement between two other parties. It is between them and them alone, and the terms of the agreement only operate between them and no one else…. In the world of company law the above principle is sometimes described as the rule in *Foss v Harbottle* (1843) 2 Hare 461 (67 ER 189) when referring to the relationship between shareholders and a company. This rule preventing strangers from interfering in contracts is fundamental to any rational system of jurisprudence.

From what has already been said, save for the specified and limited exceptions mentioned above, a shareholder is a stranger to the company in its dealings with third parties.

The consequence of the rule is that an individual shareholder cannot bring an action to complain of an irregularity (as distinct from illegality) in the conduct of the company's internal affairs provided that the irregularity is one which can be cured by a vote of the company in general meeting.'[2]

[19] The issue in this appeal is whether a shareholder, who has been invited to a general meeting of a company for the purpose of ratifying an agreement entered into by the company and another party, is entitled to seek an order declaring the concerned agreement invalid. Being a stranger to the agreement, as was observed by the court a quo, such shareholder cannot base its right to seek a declarator on the agreement itself.

[20] Counsel for the appellant argued that a shareholder who has been invited to ratify an agreement in a general meeting is entitled not only to full disclosure of the relevant facts, but also to accurate information relating to the agreement to be ratified. Invoking the JSE Listing Requirements, counsel submitted that the duty to make full disclosure is buttressed by the Listing Requirements which stipulate that a notice of a meeting must contain all information necessary to allow the shareholders to make an informed decision. The circular inviting JCI shareholders to a meeting, argued counsel, omitted to mention facts relating to the rogue board; non-compliance with suspensive conditions contained in the agreements in question; the inquoracy of the board and its impact on the suite of agreements and the requirements of the Competition Act. Therefore the appellant was, he concluded, entitled to enforce compliance with the duty.

[21] On the assumption that the omitted facts were established, there can be no doubt that the above submissions are sound. A shareholder whose right or entitlement to full and accurate information is infringed, is entitled to enforce compliance with the duty. But this

[2] Above n 1 paras 19-21.

argument cannot avail the appellant in circumstances of the present case because the relief sought here is not enforcement of compliance with the breached duty. Instead the issue here is whether the appellant is entitled to seek an order declaring the impugned agreements to be invalid, on the grounds mentioned in para [17] above. It would be entitled to do so only if it had a direct and substantial interest in those agreements. But since it was not a party thereto and the agreements were not concluded for its benefit, it did not have such interest. As a stranger to the agreements it could therefore not impugn them.[3]

[22] The fact that the appellant was invited to ratify the concerned agreements does not change its status in relation thereto. When it came to those agreements, the appellant was not a contracting party and consequently it was a stranger, albeit with limited rights concerning full disclosure. These rights could, however, entitle the appellant to an order instructing JCI directors to comply with the requirement of full disclosure by including the omitted information in the circular. The breach of the duty to make full and accurate disclosure cannot found a claim for a declaration that the agreements are invalid. We were not referred to any authority that says it can nor could I find one.

[23] The general rule is that if two parties enter into an agreement and there has been non-compliance with its terms, it is only the contracting parties who can challenge the validity of the agreement. In *Hillock*[4] this court rejected argument by a third party to the effect that a particular agreement was invalid because of non-compliance with a condition in another agreement to which it was not a party. In that case Muller JA said:

'In my judgment this argument has no merit. The object of clause 8 of the lease was to render an assignment concluded by the lessee (Hirba) with a third party, without the prior written consent of the lessor, not binding on the lessor. It is unnecessary to decide whether, as was contended before us, the provisions of clause 8 were inserted also for the benefit of the lessee. For present purposes I shall assume, without deciding, that they were. What is clear, however, is that those provisions, and indeed also provisions of clause 31, were intended to operate only as between the parties to the agreement, namely, the lessor and lessee. A third party, such as National Exposition in the present case, cannot seek to rely on the provisions in question, unless it has become a party to the agreement, for example by assignment.'[5]

[24] Relying on *Claude Neon Ltd v Germiston City Council*[6], counsel for the appellant

[3] *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) and *Absa Bank Bpk v C L von Abo Farms BK* 1999 (3) SA 262 (O).
[4] Above n 3.
[5] *Hillock* above n 3 at 515 A-E.
[6] 1995 (3) 710 (W). See also *Hencor SA Ltd v Transitional Council for Rustenburg and Environs* 1998

argued that courts in our law do permit litigants to challenge the validity of contracts to which they were not parties. The reliance placed on *Claude Neon* is clearly misplaced. That case dealt with a different situation: the application of administrative law to contracts based on administrative decisions such as an award of a tender. The primary focus of the challenge in such cases is the validity of the tender award which constitutes administrative decision. Such decision, in turn, is a precondition for the conclusion of contracts between the state and other parties. Once the tender is set aside, the foundation of the contract is removed and the court granting the order setting aside the tender may, if it is just and equitable to do so, cancel the agreement concluded in consequence of the tender concerned. In this instance a challenge based on illegality or irregularity is directed solely at the tender award and not the subsequent contract.

[25] In *Claude Neon* the court was asked to review and set aside a tender and a contract concluded pursuant to the tender concerned. The applicant challenged the validity of the tender on the ground that it was unfairly awarded following the wrongful exclusion of its proposal on the basis that it was lodged late. It contended that the city council had undertaken to inform it about the tender and that it had a legitimate expectation to be advised of the closing date for lodging tenders. The city council failed to advise it of the closing date and as a result its tender proposal was submitted after the deadline. Relying on s 24 of the interim Constitution, the applicant argued that its right to procedurally fair administrative action, where its legitimate expectations were affected, was infringed. Upholding this argument Zulman J said:

'As a matter of law, the first respondent [the city council], having created a "legitimate expectation" in favour of the applicant in accordance with s 24(b) of the Constitution to have "procedurally fair administrative action", the first respondent did not have the power to ignore the right given to the applicant by the Constitution and then to award the tender to the second respondent as it did. Put differently, I believe that the applicant is correct in its contention that, until such time as the applicant's tender was duly and properly considered by the first respondent, it had no right to enter into any binding contractual arrangements pursuant to the award of the tender with the second respondent. In considering the tender submitted to it by the second respondent and in refusing to consider the tender of the applicant on its merits, the first respondent exercised a "purely administrative function". … The conduct of the first respondent, which the applicant complains of in this regard, amounted to a failure of "administrative justice" within the meaning of s 24 of the Constitution. Such failure justifies this Court in setting aside the contract entered into between the first and second respondents. This is so even although the second respondent may be an innocent party in this regard'.[7]

(2) SA 1052 (T).
[7] Ibid at 720H-721B.

[26] The dictum above makes it clear that Zulman J relied on the infringement of the right to procedurally fair administrative action to set aside the contract. Since the tender award which formed the foundation underpinning the contract was set aside, the learned Judge held the view that the contract itself ought to be set aside. This was done in order to enable the city council to call for fresh tenders and to enter into a new contract with the successful tenderer, without any uncertainty which could arise if the first contract was left intact. This provides no authority for the proposition that a stranger to a contract can seek a declaration for its invalidity. Nor does *Claude Neon* and similar cases confer legal standing on such strangers to challenge the validity of a contract. The applicant's legal standing in *Claude Neon* was based on its right to procedurally fair administrative action and not on the contract concluded pursuant to the tender award. Without challenging the tender award, the applicant was not entitled to the relief it sought.

[27] In a further attempt to find support for the proposition that a stranger can impugn the validity of a contract, counsel for the appellant invoked cases dealing with contracts of suretyship. He argued that a surety who is permitted to raise defences available to the principal debtor is also allowed to impugn the validity of the contract between the creditor and the principal debtor even though the surety was not a party to such contract. There is no merit in this submission. Although the surety's liability arises out of the suretyship agreement and not the main agreement, to some extent the suretyship agreement introduces the surety as a debtor in relation to the main debt. The surety becomes a co-principal debtor jointly liable with the principal debtor for the latter's debt. The suretyship contract is accessory to the main agreement.[8]

[28] Counsel for the appellant further argued that a stranger is permitted to seek an order invalidating an employment contract on the basis that it violates a restraint of trade covenant. The reference to restraint of trade contracts is not helpful. Ordinarily in cases involving the restraint of trade agreement, the covenantee seeks to enforce the restraint against the covenantor. If enforced, the restraint has the effect of nullifying the subsequent agreement entered into by the covenantor and another party. The convenantee's legal standing is not based on the agreement between the covenantor and the other party, but on the restraint of trade agreement to which he or she was a party.

[29] As regards the alleged impropriety by the directors of JCI pertaining to the conclusion of the impugned agreements, the court below reasoned that the company's articles vested the management and control of the business of the company in the directors and such control included the power to enter into the impugned agreements. Accordingly, the court found, if the company's directors had conducted its business improperly by entering into the impugned

[8] See *Kilroe Daley v Barclays National Bank Ltd* 1984 (4) SA 609 (A) at 623 and the authorities there cited.

agreements, it was the company itself, and not the individual shareholders, which was entitled to seek relief arising from the improper conduct of the directors. If individual shareholders were allowed, concluded the court, to interfere and impugn contracts concluded by a company with third parties, there would be chaos.

[30] Counsel for the appellant criticised the above reasoning. He submitted that a shareholder may institute a personal action to enforce its individual right as a member of a company. I agree with this proposition. But counsel went further to argue that the rule that says the company itself is the only person who can sue does not apply to the present matter because the appellant was suing as a shareholder to protect its personal rights. Relying on *Petersen and Another v Amalgamated Union of Building Trade Workers of SA*[9] counsel submitted that where a shareholder is seeking to prevent an *ultra vires* transaction or seeking to enforce its personal rights, the wrong committed is against the shareholder itself and not the company. Consequently the rule in *Foss v Harbottle* has no application in such a case.

[31] I accept that where a company enters into an agreement which is *ultra vires* its articles of association, a shareholder has a right to institute proceedings in its own name. The conclusion of such agreement violates the contractual relationship between the company and the shareholder as evidenced by the articles of association.[10] I agree also that where an individual right of a particular shareholder is breached by the company in which it is a shareholder, such shareholder has a right to sue in its own name to protect its right. This was the position in *Petersen*. In that case the applicants, members of the respondent trade union, were expelled from the union. They brought an application for their reinstatement and an interdict against the union. Invoking the rule in *Foss v Harbottle*, the union argued that the applicants could not seek the relief claimed. Kannemeyer J held that the expulsion did not constitute a wrong committed against the union but was an act which violated the applicants' personal rights and as a result they were entitled to sue in their own names to protect those rights.[11]

[32] In this case, however, it was common cause that in entering into the impugned agreements, the directors of JCI acted *intra vires*. For the declaratory relief, the appellant relied on the breach of the duty to make full and accurate disclosure. I have already found that such breach cannot constitute a basis for the declarator sought.

[33] Regarding the claim for a declaratory order, the court below held that the requirements therefor were not established. It concluded correctly in my view, that the

[9] 1973 (2) 140 (E).
[10] See *Gohlke & Schneider v Westies Minerale (Edms) Bpk and Another* 1970 (2) SA 685 (A) at 692.
[11] *Petersen* above n 4 at pp 144-5.

appellant had no substantial and direct interest in the agreements in question and that a declaratory order will not be binding in the circumstances of this case. The court relied, among others, on decisions of this court in *Ex parte Nell*[12] and *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*.[13] In *Cordiant Trading* 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, at least there must be interested parties on whom the declaratory order would be binding.'

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

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C N JAFTA
JUDGE OF APPEAL

[12] 1963 (1) SA 754 (A).
[13] 2005 (6) A 205 (SCA).

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