

SOUTH AFRICA / JUDGMENT

**Basson NO and Others v Magistrate AK
Amos, Stellenbosch Magistrate's Court
and Others (20158/2012, 20157/2012)
[2012] ZAWCHC 381 (6 December 2012)
[2012] ZAWCHC 381**

COURT

Western Cape High Court, Cape Town

BEFORE

Baartman

CASE / FILE NUMBER

20158/2012, 20157/2012

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case Number: 20158/2012 20157/2012

In the matter between:

Hendrik Johannes Basson N.O. in his

capacity as trustee of the Handre Basson Trust (IT2216/1997)First Applicant

Karin Basson N.O. in her capacity as trustee

of the Handre Basson Trust (IT 2216/1997)Second Applicant

Wilhelm Johannes Basson N.O. in his

capacity as trustee of the Basson Familie Trust (IT1198/93)Third Applicant

Elizabeth Marlene Basson N.O. in her

capacity as trustee of the Basson Familie Trust (IT1198/1993) ..Fourth applicant

Frederik Hendrik Basson N.O. in his capacity as trustee of the Basson Familie Trust
(IT1198/1993)Fifth Applicant

and

Magistrate AK Amos, Stellenbosch Magistrate's CourtFirst Respondent

The Master of the Western Cape High Court	Second Respondent
Stephen Malcolm Gore N.O.	Third Respondent
Ryno Engelbrecht N.O.	Fourth Respondent
Tirhani Sitos De Sitos Mathebula N.O.	Fifth Respondent
Orcrest Investment (Pty) Ltd	Sixth Respondent
investee Bank Limited	Seventh Respondent

JUDGMENT DELIVERED ON THURSDAY 6 DECEMBER 2012

Baartman, J

- [1] On 10 July 2012, Dynmar Twaalf (Pty) Ltd (Dynmar) was placed in final liquidation. Dynmar's first members' meeting and creditors' meeting were set for 14 September
2012. The applicants did not file a power of attorney or a resolution 24 hours prior to the meeting. The magistrate ruled that the failure was a contravention of regulation : 12(2) of the Winding-up and Judicial Management of Companies Regulations issued in terms of the Companies Act, 61 of 1973 (the Regulations) and that the applicants were therefore precluded from voting at the meeting. The applicants seek to have that decision reviewed and set aside.
- [2] Only the sixth respondent, Orcrest Investment (Pty) Ltd (Orcrest), at whose instance Dynmar was put into liquidation, opposed: the application.

BACKGROUND

- [3] The following relevant background was common cause:
- (a) The applicants are trustees of the Handre Basson Trust and the Basson Familie Trust. The 2 trusts together with the Haibets Trust and Mr Van Breda are the members of Dynmar.
- (b) On 10 July 2012, Dynmar was placed in final liquidation. The Master of the High Court (the Master), the second, respondent, by notice in the Government Gazette of 3 August 2012, convened Dynmar's first members' and creditors' meeting for 14 August 2012.
- (c) On 13 August 2012, the applicants first became aware of the date of the proposed meeting when their attorney received e-mail correspondence from; Orcrest's attorney indicating that the meeting would be postponed at Orcrest's instance.

- (d) The first applicant, in his capacity as director of Dynmar and trustee of the Handre Basson Trust, and the fifth applicant in his capacity as trustee of the Basson Familie Trust, together with their attorney, attended the first meeting. They handed to the presiding magistrate (the first respondent) written resolutions from the two trusts authorising the first and fifth applicants to represent the 2 trusts. In terms of the resolutions,
- the first and fifth applicants were authorised to vote on behalf of the trusts they represented.
- (e) It was common cause, that the resolutions were not lodged 24 hours before that first members' meeting. No objections were raised to the filing of the resolutions and the first respondent postponed that meeting to 22 August 2012, on which date, the proceedings were further postponed to 12 September 2012 at the instance of the applicants.
- (f) However, on the subsequent date, Orcrest submitted that the resolutions had: not-been timeously filed, which objection caused the first respondent to rule that the first and the fifth applicants were not entitled to vote at the meeting.

DISCUSSION

- [4] The issue for determination is:

"Whether a power of attorney intended to be used at any meeting of members referred to in regulation 12(2) encompasses the special authorisation referred; to in regulation 12(1):"

- [5] Regulation 12 provides:

"(1) Members or contributories may vote: at a meeting either personally or by an agent specially authorised thereto or acting under a general power of attorney.

- (2) A power of attorney intended to be, used at any meeting of members, creditors or contributories shall be lodged with the presiding officer not later than 24 hours before the advertised time of the meeting and in default thereof it shall for the purpose of voting at the meeting be deemed to be invalid. "
- [6] The applicants contend that the first and fifth applicants were agents as defined in regulation 12(1) and that regulation 12(2) did not find: application.
- [7] Advocate Manca SC, Orcrest's counsel, submitted that the interpretation that the applicants sought to place on the regulation would differentiate inequitably and unjustly between members who were natural persons: and trusts. The natural person must timeously file a power of attorney or face sanction while a member who is a trust does not need to file the resolution whereby its representative is authorised to vote prior to the meeting.
- [8] Regulation 12(1) envisages 3 possibilities:
- (a) A member votes personally;
- (b) A member votes by an agent specially; authorised thereto; or

- (c) A member votes by an agent acting under a general power of attorney.
- [9] Regulation 12(2) requires only the member who uses (c) above to lodge 24 hours prior to the intended meeting.
- [10] The parties agreed that the purpose of the 24-hour lodgement was “.. to afford all parties an opportunity to consider such power prior to the commencement of a meeting. This opportunity is afforded to affected parties in order to allow them to verify and/or ascertain whether or not the person appointed in terms of a power of attorney (special or general) is properly authorised to attend the meeting in question and/or vote.”
- [11] The principles applicable in interpreting the regulation are summarised in paragraphs 16–19 of *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008(5) SA 1(SCA). When interpreting an instrument, legislative or otherwise, one must “give meaning to the words used ... by having regard to the context provided by reading the particular provision ... in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the apparent purpose to which it is directed and the material known to those responsible for its production...” (See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) at paragraph [18])
- [12] *Watermeyer J, in the matter of Hofmeyr and Another v The Magistrate, Paarl*, 1922 CPD 259, said in relation to sec 50 of Act 32 1916:
- “...I am not prepared to hold that the words “specially authorised . thereto” mean the agent must have a proper power of attorney to . vote, as was contended before the presiding officer. Special authority can be given in other ways, for example- in the constitution of the company or by resolution of directors by telegram or letter:, but there must be ‘special authority’.”*
- [13] *Shaw J, in the matter of EJtis Owners Association s Dharumpal* 1952
- (3) SA 442 (N) dealt with the provisions of Order V1 Rule 2, which provided:

“Should a power of attorney to sue be given by the agent of the plaintiff, the attorney shall file with the Registrar, together with such power granted to him, a duly certified, copy of the power of attorney granted to the agent” (page 444 paragraphs D-E)

He found at page 444 paragraphs H-445 C:

"This submission involves the contention that, in the Rule the words ‘power of attorney’ extend to and embrace a resolution passed by an association, company, corporation, or the like. A power of attorney is a written authority from a principal in favour of an agent whereby the principal delegates to the agent the right and power to perform certain acts or deeds. While the officers of an association or a company or corporation, acting pursuant to a resolution, are to be regarded as agents- ... they are necessarily interposed because a corporation cannot act in its own person or without the interposition of a human agency...

cannot find any justification for construing the Rule so as to include within the meaning of the words “power of attorney” a resolution of an association, company or corporation

[14] Wallis JA, in the Endumeni matter cautioned as follows at paragraph [18]:

“...Where more than one meaning is possible each possibility must. be weighed in the light of all these factors:. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike or undermines the

apparent purpose of the document. Judges must be alert to, and. guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation

[15] In my view, the legislature clearly imposed a duty on the member ; who authorises his agent through a power of attorney. This is neither “unbusinesslike” nor “unjust . and inequitable” because the administration of a trust is subject to considerable scrutiny from the Master of the High Court: (See *La rid and Agricultural Bank of SA v Parker and Others* 2005 (2) SA 77 (SCA) at paras 33-^34:

“[33] While outsiders have an interest in self-protection, the .primary responsibility for compliance with formalities and for ensuring that contracts lie within the authority conferred by the trust deed lies with the trustees. Where they are also the-beneficiaries, the debasement of trust function means all too often that this duty will be violated.

[34] The situation may in due course require legislative attention, but ; that does not mean that the Master and the courts are powerless to restrict or prevent abuses. The statutory system of trust supervision invests extensive powers in the Master. These include the power to: appoint trustees in the absence of provision in the trust instrument, and to appoint any person as co-trustee of a serving trustee where / he considers it ‘desirable notwithstanding the provisions of the trust instrument. In addition, trustees require written authorisation from the Master before they may act in that capacity ” (mv emphasis)

[16] In my view, the purpose of regulation 12(2) is accomplished in the case of a trust by the extensive oversight that the Master has over the administration of the affairs of trusts. It follows, in my view, that the applicants were not required to have lodged the resolution 24 hours prior to the date set for the first members’ meeting.

[17] Even if I am wrong, the magistrate should have allowed the. applicants the opportunity to vote because to have done, otherwise was to prefer form over substance.; It: was common cause that the resolution came to the notice of all the: relevant parties at the hearing of the first meeting.. That meeting was only held after 2 postponements. It follows that on the reconvened date, the purpose of the regulation was met Neither Orcrest .nor any other respondent attempted to show any prejudice suffered by the applicants’ failure to have lodged in terms of the regulations. Lopes J, in circumstances where on the facts of that case the applicant arguably had a more substantive argument than Orcrest said: (See. *Leisher v*

Mothala N.O 2012 JDR 0455 (KZD) at para 30:

“I regard it as somewhat artificial to suggest that the second meeting did not constitute a meeting of both creditors and members. The purpose of publication in the Gazette and in the newspapers with regard to both meetings of creditors and meetings of members was achieved in this instance because Bate attended the meeting....” (my emphasis)

COSTS

- [18] On 22 October 2012, in addition to the application for review and setting aside the first respondent's order, the applicants under case number 20157/12 launched an application for temporary interdictory relief. In that application, they sought to interdict the Master from “issuing a certificate of appointment in respect of the liquidators of Dynmar Twaalf (Pty) Ltd (in liquidation)..., pending the finalisation of the review application”. Orcrest opposed that application and in its answering papers annexed correspondence, dated 3 October 2012, from which it was apparent that the Master had indicated that he would not issue a certificate pending finalisation of the review application. Therefore the applicants withdrew that application. The costs stood over for determination at the review hearing.
- [19] I accept that the applicants were not aware of that correspondence when they launched the interdict application. Mr Manca SC submitted : that the applicants came to court with undue haste while the applicants submitted, that Orcrest should , have informed them of the Master's attitude, instead of opposing the application. There is enough blame to go around. Therefore, in my view, it would be just to make no order as to costs in the interdict application. I intend to order Orcrest to pay the costs: of the review .application.

CONCLUSION

[20] I, for the reasons stated above make the following order:

- (a) In respect of case 20158/12 (the review application):
- (i) The first respondent's decision, 12 September 2012 at the adjourned first meeting of creditors and members of Dynmar Twaalf (Pty) Ltd (in liquidation) (Master's reference C593/2012) is reviewed and set aside.
 - (ii) Prayers 2.1, 3, 4 and 5 of the Notice of Motion are granted.
 - (iii) Orcrest is directed to pay the costs of the application.
- (b) In respect of case number 20157/12
- (i) No order as to costs.

Baartman J

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Prepared on 12 October 2026 · Esheria