

SOUTH AFRICA / JUDGMENT

Mkhwanazi and Another v Manvin Resources (Pty) Ltd and Others (2024-086554) [2024] ZAGPPHC 820 (19 August 2024) [2024] ZAGPPHC 820

COURT

North Gauteng High Court, Pretoria

BEFORE

Strijdom

CASE / FILE NUMBER

2024-086554

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: 2024-086554

Heard

on: 14 August 2024

Judgment

delivered on: 19 August 2024

(1)

REPORTABLE: NO.

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE:

19-08-2024

SIGNATURE:

In

the matter between:	MANDLA JEROME MKHWANAZI (ID NUMBER: 7[...]) First Applicant THE TRUSTEES OF THE SHAMASE FAMILY TRUST FOR THE TIME (TRUST
NUMBER:	IT00104/2015(T)) Second Applicant and MANVIN RESOURCES (PTY) LTD (REG. NUMBER: 2012/024453/07) First Respondent SOURTED TRADING (PTY) LTD (REG.
NUMBER:	2017/089068/07) Second Respondent THE TRUSTEES OF THE XIMBHEMBHE FAMILY (TRUST
NUMBER:	IT2316/2020) Third Respondent MAINLAND MINERALS (PTY) LTD (REG.
NUMBER:	2023/857547/07) Fourth Respondent EDUAN PEPYER (ID
NUMBER:	6[...]) Fifth Respondent NURSE MMASEKWATI NGOBENI WAKA MATHONSI (ID

NUMBER: 8[...] Sixth Respondent THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Seventh Respondent This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 19 August 2024.

JUDGMENT

STRIJDOM J

[1] In this matter the applicants seek an urgent declaratory order in the following terms:

1.1 That the purported shareholders meeting of the first respondent held on 24 July 2024 was unlawful and invalid; and

1.2 That all decisions purportedly taken and/or resolutions purportedly adopted at the purported shareholders meeting are invalid and set aside; and

1.3 Directing the seventh respondent (CIPC) not to give effect to the decisions purportedly taken and/or resolutions purportedly adopted at the purported shareholders meeting alternatively, if the seventh respondent has already given effect thereto, directing the seventh respondent to restore its register, specifically as it pertains to the records of the first respondent, to reflect the factual position and/or particulars that existed prior to the purported shareholders meeting.

[2] At the commencement of the application the Court ordered that the matter is urgent as the applicants will not be afforded substantial redress at a hearing in due course.

[3] The application is opposed by the second respondent. The second respondent did not file an answering affidavit but instead filed a Rule 6(5)(d)(iii) notice.

[4] The third and sixth respondents filed a notice of intention to abide by the decisions of the Court.

[5] The applicants filed an application on the 9th of August 2024 to join Thabang Isaiah Maakamedi as the eighth respondent.

[6] In its Rule 6(5)(d)(iii) notice the second respondent raises the following points of law:-

“1. The applicants cite the Second Applicant as ‘The trustees of Shamase Family Trust for the time being’.

2. The First Applicant, Mr Mkhwanazi, contends that he is a trustee of the Shamase Family Trust (the ‘Trust’) and that he is duly authorised to bring the application and to depose to the affidavit on behalf of the Second Applicant.
3. It is, however, settled law that, unless a trust deed provide otherwise, trustees of a trust must act jointly.
4. Mr Mkhwanazi does not:-
 - 4.1 Attach a copy of the Trust’s letters of authority in order to evidence who the trustees of the Trust’s are;
 - 4.2 Attach a copy of the Trust’s deed from which it can be gleaned that he can be authorised by his other trustee(s) to bring the application on behalf of the trustees;
 - 4.3 Attach a confirmatory affidavit of his co-trustees confirming such authorisation.
5. There is, accordingly, nothing ex facie the notice of motion and founding affidavit to evidence that the application has been brought jointly by all trustees, or that the trust deed empowers Mr Mkhwanazi to bring the application in his own stead.
6. Accordingly, the founding papers fail to make the necessary averments to sustain a cause of action for the Trust.”
- [7] The second respondent without prior notice to the applicants raised a point in limine that the application was not properly served on the fourth and fifth respondents, as well as on Thabang Maakamedi.
- [8] In my view there is no merit in this point in limine. A proper service affidavit was filed by the applicants’ and the fourth and fifth respondent’s duly appointed attorney. It was confirmed that service of the founding papers were served on the fourth and fifth respondents, as well as Mr Thabang Maakamedi.
- [9] It was confirmed that on 1 August 2024, the attorney served the founding papers on all the respondents as is evident from the proof of service appearing on Caselines under section 08 at page 08-9. He further confirmed that the e-mail addresses used for purpose of service on the fourth and fifth respondents are indeed the correct e-mail addresses of the said respondents.
- [10] With regards to the service on Mr Maakamedi, he confirm that he obtained his e-mail address from the second respondent’s attorney of record, Mr Ndobe, and that the notice of the application for his joinder, as well as the founding papers, were electronically served on Mr Maakamedi on 9 August 2024, as is evident from the proof of service appearing on Caselines under section 27 at page 27-1.

[11] I conclude that the founding papers were duly served on all the respondents and Mr Maakamedi and that all the parties were aware of the application.

[12] The joinder application was not opposed by the second respondent. Mr. Maakamedi is joined to the application as the eighth respondent.

[13] The second respondent did not persist with the second and third point in limine.

[14] The main issues for consideration are the following:

14.1 Whether the purported shareholders meeting of the first respondent held on 24 July 2024 should be declared unlawful and invalid; and

14.2 Whether all decisions purportedly taken and/or resolutions purportedly adopted at the purported shareholders meeting should be declared invalid and set aside.

[15] It was submitted by the second respondent that Section 71 of the Companies Act (the Act) authorises the removal of a director by an ordinary resolution adopted at a shareholders meeting by persons entitled to exercise voting rights in an election of a director. The second and the third or sixth respondent has a majority to vote and adopt the resolution in question.

[16] It was further submitted that it is permissible for a single director to call for a meeting of shareholders. It cannot be denied that Nurse was a director of Manvin at the time she convened a meeting or delegated her powers to convene the meeting to Sourted and/or Ndabe Inc. It cannot be disputed that Sourted is a shareholder in Manvin.

[17] The notice to convene a shareholders meeting was communicated on 27 June 2024 by second respondent's attorney.[1] It:

17.1 purports to be a notice of a meeting of shareholders of Manvin in terms of section 65 and 71 of the Companies Act;

17.2 records the purpose of the meeting to remove the first applicant as a director of Manvin by ordinary resolution and, in addition, to adopt the following resolutions[2]:

“(2) The remaining Director, Nurse, Wa Ka Mathonsi Ngobeni (the sixth respondent) be and is hereby authorised to sign and execute all necessary documents (including to file any prescribed form/s with the office of the CiPC) for purpose of giving effect to this Resolution.”

[18] On 27 June 2024, when Sourted delivered the aforesaid notice, it was in a state of final deregistration.[3]

[19] On 2 July 2024, the applicants' attorney, in a letter to Sourted's attorney, recorded that Sourted is not a shareholder in Manvin, and urged Sourted, not to proceed with the envisaged meeting.[4]

- [20] On 4 July 2024, Sourted's attorney responded with a letter persisting with the assertion that Sourted is a shareholder in Manvin and that the envisaged meeting would proceed on 24 July 2024.[5]
- [21] On 12 July 2024, the applicants' attorney communicated a further letter pointing out Sourted's status of final deregistration, and urged Sourted not to proceed with the envisaged meeting. The letter records that, failing the cancellation of the meeting, the applicants will approach a court for urgent relief.
- [22] It appeared from a letter received from Sourted's attorney on 24 July 2024, that the envisaged meeting did in fact take place.[6]

"7.2 Your client's proposal [in the letter of 23 July 2024 – MM13'] and the request for the undertaking was however noted and recorded by all the shareholders during the Shareholders Meeting of 24th July 2024. The Minutes of Meeting will however confirm that your client's request for an undertaking has been rejected by the shareholders (as a collective). We confirm that the relevant copies of the adopted Resolutions (once signed) and the Minutes of the Shareholders Meeting (once prepared) will be circulated in due course ..."

- [23] On 31 July 2024, did Sourted's attorney provide the applicants' attorney with a copy of the decisions taken at the meeting.[7]
- [24] It was submitted by the second respondent that the first applicant has failed to attach any form of authorisation or resolution authorising him to bring the application on behalf of the Shamase Trust.
- [25] This point of law raised has no bearing on the locus standi of the first applicant, who is prosecuting the application in his personal capacity as director affected by the decision under scrutiny. It was also conceded by the second respondent.

Section 61 of the Companies Act

- [26] Section 61 of the Companies Act governs the procedure for shareholders meetings.
- [27] Henochsberg[8] comments as follows on section 61:

"General meetings are ordinarily convened by the directors, and a majority shareholder cannot usurp this power."

"This [a demand in terms of section 61(3)] is a request for the board to convene the meeting and if they fail to do so, the shareholders cannot themselves convene the meeting. If the board fails to convene the meeting the remedies lie in sub-s (12)."

- [28] The provisions of section 61 were considered in this Division by Ranchod J in *Heatherview Estates Ext 24, Home Owners Association (NPC) v Mahlatse Trading Enterprise CC and 101 Others*.[9]

[29] In the Heatherview case the respondents purported to convene a meeting outside the provisions of section 61 of the Companies Act where they adopted resolutions to remove the applicant's lawfully appointed directors and to substitute them with new directors.

[30] Ranchod J summarise the issue for determination as follows:

"[11] The crisp issue before me is whether the respondents held a lawfully constituted meeting with the required quorum and whether the resolutions passed have legal effect.

[12] Central to this issue is the meaning and effect of section 61 of the Act - in particular subsections (3) and (12)."

[31] Ranchod J concluded as follows:

"[22] It seems therefore that whilst shareholders or members may in terms of section 61(3) request the board to convene a meeting, it is the board that must in fact do so and where the shareholders or members convene the meeting themselves, it is unlawful. Their remedy, where the directors refuse or fail to convene a meeting an request in terms of s61(3) lies in subsection

(12) i.e. to approach a court.

[23] It seems to me therefore that the respondents' contention that since section 61(12) is not peremptory they may convene a meeting is misplaced. It follows therefore that the meeting was unlawfully constituted. In this regard it is to be remembered that the Act is a codification of the rights and powers of directors and members and the company itself."

[32] I agree with the judgment and reasoning of Ranchod J in the Heatherview judgment.

Conclusion

[33] I conclude that the meeting under scrutiny was convened in terms of section 61 of the Companies Act. It follows that the meeting was constituted unlawfully and that the decisions taken thereat constitute a nullity.

Costs

[34] The applicants request in prayer 5 of the notice of motion for a punitive costs order.

[35] The second respondent (Sourted) was repeatedly referred to the unlawfulness of the proposed meeting. The letter of 15 July 2024 to its attorney, dealt in detail with the provisions of section 61 and urged Sourted to act sensibly by not proceeding with the meeting. The request was ignored. Sourted was again on 23 July 2024 urged not to proceed with the meeting, as a result of non-compliance with section 61 of the Companies Act. When it appeared that the launching of an urgent application was unavoidable, the applicants made a reasonable proposal to Sourted, which would result in it not being necessary to proceed with the application on an urgent basis. The request was dismissed.

- [36] Having forced the applicants to proceed with an urgent application, Sourted resolved not to file an answer to the allegations in the founding affidavit, but rather to resort to a notice in terms of Rule 6(5)(d)(iii).
- [37] I am persuaded that the first applicant has made out a case for the relief sought in the notice of motion and that he is entitled to be granted a punitive costs order.
- [38] In the result, the draft order marked “X” is made an order of Court.

J.J. STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-086554 HEARD ON: 14 August 2024 FOR THE APPLICANTS: ADV. B.H. SWART SC assisted by ADV. E. WARD INSTRUCTED BY: Joshua Lazarus Attorneys FOR THE 2nd RESPONDENT: ADV. J.M. HOFFMAN INSTRUCTED BY: Ndobe Incorporated DATE OF JUDGMENT: 19 August 2024

- [1] Caselines: Founding affidavit: para 5.1, p02-15; “MM2”-“MM5”, pp02-41 to 02-57
- [2] Caselines: p02-47
- [3] Caselines: Founding Affidavit: para 5.3, p02-16 and p02-78 paragraphs 4 and 5
- [4] Caselines: Founding Affidavit: para 5.10, p02-19; “MM7”, pp02-64 to 02-66
- [5] Caselines: Founding Affidavit: p02-19 and pp02-68 to 02-71
- [6] Caselines: Founding Affidavit: para 5.19, p02-27; and pp02-90-02-92
- [7] Caselines: Founding affidavit: para 5.22, p02-28, “MM17”, pp02-106 to 02-107
- [8] Henochsberg on the Companies Act, 71 of 2008
- [9]
- [2019] JOL 44922 (GP)

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/mkhwanazi-and-another-v-manvin-unknown-topic-agpphc-2024>

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