

SOUTH AFRICA / JUDGMENT

Morobi and Others v Umyezo Leisure Investments (Pty) Ltd and Others

(2501/2015) [2016] ZAFSHC 43; [2016] 2 All SA 845 (FB) (28 January 2016)
[2016] ZAFSHC 43

COURT

Free State High Court, Bloemfontein

BEFORE

Rampai

CASE / FILE NUMBER

2501/2015

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IN THE HIGH COURT

OF SOUTH AFRICA

FREE STATE

DIVISION, BLOEMFONTEIN

Case

number: 2501/2015

In

the matter between:

LINKIE

VIVIAN

MOROB.....1st

Applicant

THISETSO

LORRAINNE

MORRISON.....2nd

Applicant

MOTLALEPULE

SARAH

CHAO.....3rd

Applicant

(In

her capacity as the executrix: deceased estate:

Kedimetse

Martha Chao)

N

B MAYEKISO

NO.....4th

Applicant
Vakele
Joseph Mayekiso)
UMYEZO
LEISURE INVESTMENTS (PTY)
LTD.....1st
Respondent
ETAPELE
INVESTMENTS (PTY)
LTD.....2nd
Respondent
JAMELA
JOSEPH
MHLAMBI.....3rd
Respondent
THAMSANQA
GODFREY
MAYEKISO.....4th
Respondent
PALAETSO
ALINA LIAU-
MOKHOETI.....5th
Respondent
LETELE
CEDRIC LIONEL
MAKHETA.....6th
Respondent

CORAM: RAMPAL, J
HEARD
ON: 26 NOVEMBER 2015

JUDGMENT

BY: RAMPAL, J

DELIVERED ON: 28 JANUARY 2016

- [1] The matter came to court by way of motion proceedings. The application was launched on 27 May 2015. The applicants apply for a prohibitory interim interdict. They contemplate initiating action proceedings against the respondents within 20 days after the grant of the interim order they seek. The application is opposed by four of the six respondents.
- [2] The corporate structure needs to be explained in order to understand the relational saga in this matter. There are a number of corporate enterprises involved. The flagship of them all is the well-known Sun International (South Africa) Limited. Then there is Mangaung Sun (Pty) Ltd on the local front. The latter is a local satellite of the former, a global corporate colossus. Now Sun International (South Africa) Limited, Thabo Community Trust, Sun International Employees Share Trust and Etapele Investment (Pty) Ltd, the second

respondent are the shareholders in Mangaung Sun (Pty) Ltd.

- [3] Mangaung Sun (Pty) Ltd is the holder of a gambling licence. It trades as the Windmill Casino in Bloemfontein. The second respondent holds 15.4% equity of the ordinary issued shares in Mangaung Sun (Pty) Ltd.
- [4] Etapele Investments (Pty) Ltd in turn has four shareholders, namely: Mathabo Business Investments (Pty) Ltd; Tsela Tshoeu Investments (Pty) Ltd; Belega Women's Investments (Pty) Ltd and Umyezo Leisure Investments (Pty) Ltd, the first respondent. Each of these shareholders holds an equity of 25% of the ordinary issued shares in Etapele Investments (Pty) Ltd.
- [5] Umyezo Leisure Investments (Pty) Ltd, originally had a number of individual equity stakeholders, namely: Ms Linkie Vivian Morobi; Ms Tiisetso Lorraine Morrison; Ms Kediemetse Martha Chao, now deceased and Mr Vakele Joseph Mayekiso, also deceased. Now Ms Motlalepule Sarah Chao, the executrix and Ms Beatrice Mayekiso, the executrix in the two deceased estates together with Ms Morobi and Ms Morrison are the applicants in these proceedings. This is one faction of the first respondent.

The other individual equity stakeholders are Mr Jamela Joseph Mhlambi, Mr Thamsanqa Godfrey Mayekiso, Ms Pelaetso Alina Liau-Mokhoethi and Mr Letebele Cedric Lionel Makhetha. They are the respondents in these proceedings.

- [6] Besides the sixth respondent, Mr Makhetha, the third, fourth and fifth respondents are the directors and the other faction of the first respondent. The sixth respondent appears to be repudiated by the directors as a spy who owes allegiance to the faction of disgruntled shareholders. He is not really before me. His separate notice of intention to defend was emailed to the applicants' attorneys but it was never filed. The second respondent, Etapele Investments (Pty) Ltd abides. Brevitas causa, I shall refer to the third, fourth and fifth respondents collectively as directors or the trio or the respondents. Wherever I use the last noun, it must be understood to exclude the first, second and the sixth respondents unless the context indicates otherwise. They and the first respondent, Umyezo, oppose the application.
- [7] From time to time Umyezo, as a shareholder, receives dividends from Etapele. Over the years Umyezo has seen its fair share of infighting. Various shades of leadership crises have resulted in what may sadly be described as an endless litany of senseless, but costly litigation. The current application is a classic example of a company at war with itself. The relational feud has an adverse impact on the potential growth of

the troubled company. Enormous sums of money which Umyezo earns as dividend from Etapele are wastefully used to defray the high costs of litigation to the great detriment of the intended beneficiaries. This hopelessly aimless internal feud appears to be fuelled by greed, mistrust and position mongering. The destructive force of the unending litigation saga lamentably impoverishes the very shareholders the company was floated and designed to benefit.

- [8] It would appear that on 12 March 2014 a notice in terms of section 61(9) Companies Act 71 of 2008 was given by the board of directors of Umyezo to the shareholders whose names were specified that a general meeting of the company would be held at the Windmill Casino in Bloemfontein on 12 April 2014 at 10:00. The purpose of the meeting and business to be transacted were disclosed.
- [9] On 12 April 2014 none of the applicants except for the fourth applicant attended the meeting. The respondents, save for the sixth respondent, attended the meeting. Item 3 on the agenda concerned the appointment of directors. The third, fourth and fifth respondents were appointed as directors. At that stage the company had no bank account. The third respondent was authorised to open a bank account. The third, fourth and fifth respondents were also appointed as the authorised signatories to the company bank account. The minutes of the meeting were attached to the founding affidavit – vide “anx c”.
- [10] On 30 August 2014 the account of Ms N B Mayekiso was credited with an amount of R39 843,75. The money came from Umyezo Leisure Investments (Pty) Ltd – vide “anx f”, replying affidavit.
- [11] On 18 September 2014 Naidoo J gave an order by consent of all the parties under case number 5093/13. The order was attached to the founding affidavit and marked “anx d”. Ms Laura Claire Grobler and Mr Lebohang T Shabe were cited as the first and the second applicant respectively. Mr Kwidi Christopher Makaba, Mr Molefi Simeon Litheko, Etapele Investments (Pty) Ltd, the second respondent herein, Umyezo Investments (Pty) Ltd, the first respondent herein, Mangaung Sun (Pty) Ltd, and Mr Letebele Cedric Lionel Makhetha, the sixth respondent herein – were among 14 others cited as the first, second, third, fourth, ninth and 13th respondents respectively. Naidoo J finally confirmed, by agreement between the parties, the provisional rule nisi and finally declared that J J Mhlambi, Mr TG Mayekiso and Ms P Liau also known as PA Liau-Mokhoethi to be directors of Umyezo Leisure Investments (Pty) Ltd – vide 2.5 “anx d”.
- [12] The first applicant, Ms Linkie Vivian Morobi, is and has always been a legitimate shareholder in the first respondent, Umyezo Leisure Investments (Pty) Ltd. So was the second applicant, Ms Tiisetso Lorraine Morrison. The third applicant’s deceased daughter, the late K M Chao and the fourth applicant’s deceased husband, the late V J Mayekiso, were regarded and treated as shareholders.
- [13] The first respondent was 1 of the 4 shareholders of the second respondent. In turn the second respondent was 1 of the 4 shareholders of the Mangaung Sun (Pty) Ltd. The third, fourth, fifth and sixth respondents were legitimate shareholders in the first respondent, Umyezo Leisure Investments (Pty) Ltd just like the first and the second applicants.
- [14] During 2013 a dispute arose between Umyezo and Etapele and among the shareholders of Umyezo. The dispute concerned the distribution of dividends by Etapele Investments (Pty) Ltd to its shareholders, namely Belega Women’s Investments (Pty) Ltd, Mathabo Business Investments (Pty) Ltd, Tsela Tshoeu Investments (Pty) Ltd, and Umyezo Leisure Investments

(Pty) Ltd, the first respondent herein. The equity stake of each of those four corporate enterprises in Etapele Investments (Pty) Ltd was 25% each. The first mentioned three shareholders were dissatisfied. They reckon that the last mentioned shareholder, in other words Umyezo Investments (Pty) Ltd, was receiving an unfair financial advantage over them. They complained that they were receiving a raw deal from Etapele Investments (Pty) Ltd.

- [15] The argument of the aforesaid disgruntled three shareholders went along the following lines, more or less. Umyezo had only eight individual shareholders but each of them, in other words the disgruntled fellow shareholders, had more than eight individual shareholders. On account of such numerical disparities, they complained that per capita the individual shareholders in Umyezo were financially better off than their counterparts in the other three corporate enterprises although all four of them held equal equity in Etapele, the dispenser of dividends. They demanded, therefore, that Etapele must calculate dividends to its 4 shareholders in such a way that all the individual shareholders of its four corporate shareholders ultimately receive precisely equal dividends. Umyezo naturally disagreed, I suppose.
- [16] The dispute precipitated the launch of an application under case number 5093/2013 by Ms L C Grobler and another. The outcome of that application was a consent order of 18 September 2014 by Naidoo J.
- [17] The second respondent furnished the applicants with a written proof of the various amounts it had paid to the first respondent as dividends. As on 31 May 2014 the total dividends paid was R2 241 511,38 – vide “anx e”. On three occasions the second respondents paid such dividends into the trust account of Mhlambi Attorneys held at Standard Bank (SA) Limited in Welkom. The total of those three payments was the sum of R1 370 625. The total was made up as follows: R900 000,00, R375 000,00 and R95 625,00. Subsequently the second respondent paid a further amount of R796 846,07 to the first respondent as dividend. The shareholders of the first respondent have a beneficial interest in the securities of the first respondent.
- [18] The dividends in favour of the first respondent by the second respondents were directly deposited into the trust account of Mhlambi Attorneys held at the Standard Bank Limited in Welkom. The relevant account number was 43387500. Mr J J Mhlambi was the proprietor or senior partner of that law enterprise. The second respondent paid out such dividends following the court order of 18 September 2014 by Naidoo J – vide 6.1 “anx d”. The required bank account was subsequently opened in the name of Umyezo Leisure Investments (Pty) Ltd with the Standard Bank Limited in Welkom. The relevant account number is 040194 353.
- [19] On 7 November 2014 the applicants attended a meeting in Bloemfontein. The meeting was convened by the sixth respondent. The attendees called themselves the majority shareholders of Umyezo Leisure Investments (Pty) Ltd. The agenda included an item about the directors of the first respondent, Umyezo. According to the resolutions adopted at that meeting the third, fourth and fifth respondents were removed from office as directors of the first respondent. They were replaced by Mr L C L Makhetha, the sixth respondent, Ms PA

Liau-Mokhoethi, the fifth respondent, Ms L V Morobi, the first respondent and a certain N E Matambuye. Ms LY Morobi, Ms N B Mayekiso, the fourth applicant and Mr LCL Makhetha were elected to represent the first respondent in the second respondent. The company attorneys, namely, Mhlambi Attorneys and Modise Modise Attorneys were removed and replaced with Moroka Attorneys. The concern was that the directors of the company had withheld the dividend funds due to the shareholders and that they had failed to respond to their enquiries – vide “anx c”, replying affidavit.

- [20] On 13 November 2014 and pursuant to the aforesaid meeting of 7 November 2014 a memorandum was written and signed by the third applicant, Ms M S Chao. A certain Mr Khetheng Patrick Chao was her co-author and co-signatory. They indicated that they wrote and signed the memorandum on behalf of the majority shareholders of the first respondent, Umyezo Leisure Investments (Pty) Ltd. The memorandum was addressed to Mr J J Mhlambi, Mr G M (sic) Mayekiso and Ms PA Liau-Mokhoethi – the third, fourth and fifth respondents. A great variety of complaints were levelled against them. A wide range of demands were then made. An indication of the next line of action was given in case the demands were not met by the directors.
- [21] Mangaung Sun (Pty) Ltd, Etapele Investments (Pty) Ltd, Nedbank Limited, Free State Gambling & Liquor Board, The Law Society: Free State Province and Companies and Intellectual Property Commission were copied. The memorandum containing multiple complaints and demands was distributed under a covering letter signed by Ms L V Morobi, Ms TL Morrison, Ms M S Chao and Mr LCL Makhetha, in other words the first applicant, second applicant, third applicant and sixth respondent. Although the fourth applicant did not append her signature to the letter, she unreservedly associated herself with the letter. The letter and memorandum were collectively marked “anx f” and attached to the founding affidavit deposed to by Ms N B Mayekiso, the fourth applicant. The letter was delivered per tradio brevi manu to Modise Modise Attorneys in Bloemfontein on 18 November 2014.
- [22] The respondents did not answer. The demands of the applicants as embodied in “anx f” were not met. On 27 May 2015 the applicants launched the current application under case number 250/2015. It was one of many cases in the series of the hostile saga involving the corporate enterprises that had financial ties with Mangaung Sun (Pty) Ltd. In these proceedings only six of such previous cases were referred to. They were case number 3794/2009, case 5093/2013, case 5819/2008, case 1063/2010, case 304/2012 – vide “anx 03”, “anx d”, “anx d to replying affidavit” “anx lmc”, “anx d” replying affidavit” and “anx f”. The last of these was in the Thaba Nchu District Court. The rest were in this provincial high court.
- [23] This completes the synopsis of the undisputed facts together with facts which, although denied, could not be seriously disputed.
- [24] The issue in the case was whether the applicants have made out a case to justify the grant of an interim interdict.

- [25] Mr Van der Merwe, counsel for the applicant, submitted that a proper case has been made out. Accordingly, he urged me to grant a interim relief in accordance with the notice of motion.
- [26] However, Mr Snellenburg, counsel for the respondents, differed. He submitted that no proper case had been made for the interim relief sought. Therefore, he urged me to deny the relief.
- [27] In *National Treasury & Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at para [41] the requisites for the grant of an interim interdict were restated:
- "[41] The High Court relied on the well known requirements for the grant of an interim interdict set out in Setlogelo and refined, 34 years later, in Webster. The test requires that an applicant that claims an interim interdict must establish (a) a prima facie right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) the balance of convenience must favour the grant of the interdict and (d) the applicant must have no other remedy." Moseneke DCJ.*
- [28] In the first place, since they seek an interim interdict, the test requires that the applicants must establish a prima facie right, even if it is open to some doubt, to the interim protection. This is the first element of the test.
- [29] The establishment of a prima facie right was elucidated as follows about six decades ago in *Webster v Mitchell* 1948
- (1) SA 1186 (WLD) at 1189 :
- "If the phrase used were 'prima facie case' what the court would have to consider would be whether the applicant had furnished proof which, if uncontradicted and believed at the trial, would establish his right. In the grant of a temporary interdict, apart from prejudice involved, the first question for the court, in my view is whether, if the interim protection is given, the applicant could ever obtain the right he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates, I think, that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required." Clayden, J.*
- [30] Still on the same page 1189 Clayden, J went on to say the following about the proper approach to ascertain whether or not a prima facie right has been established:
- "The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."*

See Webster *supra*.

[31] In *Gool v Minister of Justice and Another* 1955

(2) SA 682 (C) at 688E Ogilvie Thompson J approvingly said about the proper approach as laid down in *Webster v Mitchell*, *supra*:

“In my view the criterion on an applicant’s own averred or admitted facts is: should (not could) the applicant on those facts obtained final relief at the trial. Subject to that qualification, I respectfully agree that the approach outlined in Webster v Mitchell, supra, is the correct approach for ordinary interdict applications”.

[32] The version of the applicants was that a meeting was convened; that a few selected shareholders were notified about it; that all the applicants were not given notice; that the secret meeting was held; that a false proxy form was deliberately used to deceitfully make up the quorum; that the directors were then elected; and that those positions of power and control were allocated to the respondents by the respondents themselves behind the backs of the applicants. Therefore, it was their case that since the meeting was procedurally irregular and not quorate, the respondents could not competently have transacted the business of the company as they purported to do. Therefore, the puchline of their case was that all the resolutions taken at that meeting were unlawful.

[33] Among others, two of the resolutions unlawfully taken at the secret meeting, according to the applicants, determined that the respondents were the directors of the company (vide “anx c”, founding affidavit). Subsequent to that meeting another resolution was taken that the first respondent should declare no dividends until the company was in a healthy financial state – vide “anx 04”. As directors, the respondents subsequently resolved to stop distributing dividends the company received from the second respondent. The resolution to pay no dividends to the shareholders was a breach of fiduciary duty according to the applicants. They were suspicious as to why the dividends from the second respondent were deposited into the bank account of Mhlambi Attorneys instead of the bank account of the first respondent itself.

[34] The applicant’s version was then crowned with the following averments as regards their right, which, as they said, was threatened by the unlawful conduct of the respondents:

“43. In light of the fact that the applicants are 50% shareholders of the first respondent, we have been advised that we have a clear right, alternatively a prim facie right to payment of dividends by the first respondent, further and or alternatively, a clear right, alternatively a prima facie right that the directors of the first respondent act in accordance with their fiduciary duty and in the best interest of the shareholders of the first respondent.”

[35] I am called upon to consider whether each of the four applicants had furnished proof which, if uncontradicted and believed at the trial, would establish her alleged rights. The first question is whether, if interim protection is given now, each of the applicants could ever finally prove and obtain the right she temporarily seeks to protect now in these temporary

interdict proceedings. In my view each of one of them, as an individual and not as a group, has to show prima facie proof that final protection would be given by virtue of their common version as outlined above – Webster *supra*.

- [36] The proper approach I am required to adopt is to consider the facts as set out by the applicants, together with any facts set out by the respondents which the applicants cannot dispute and to consider whether, on those facts, the applicants should be given a final protective relief at the trial.
- [37] As regards the fourth applicant, Ms Mayekiso, she is the widow of the late V J Mayekiso who died on 14 November 2012. He was a shareholder in the first respondent but she never was. She is an executrix of the deceased estate: late V J Mayekiso. She could not, by virtue of her official and representative capacity as an executrix automatically step into the shoes of her deceased spouse to become a shareholder of the first respondent. No specific resolution or clause in the first respondent's articles of association or incorporation was referred to in terms of which she could lawfully have succeeded her deceased husband as a shareholder. I take it, therefore, that the first respondent's shares were not hereditary. Nonetheless the deceased estate remains a claimant of the equity the deceased V J Mayekiso had in the securities of the first respondent.
- [38] It follows, as a matter of logic, that when the deceased estate is finally liquidated and distributed, the executrix will have no further lawful claim against the first respondent. Such an event would terminate her relationship, as a claimant, with the first respondent.
- [39] Having considered the facts set up by the fourth applicant together with the facts set up by the respondents the which the applicants cannot dispute, I am persuaded that a serious doubt is cast on the fourth applicant's alleged right. On those facts she would not be able to establish that she has a prima facie protectable right. She cannot, therefore, succeeds to obtain temporary relief. On the facts, it cannot be found that the fourth applicant has established a prim facie right at all – not even one open to some doubt.
- [40] As regards the third applicant, Ms Chao, she is the surviving parent of the late MK Chao who died on 9 May 2003, almost 13 years ago. Her deceased daughter died long before the relevant corporate structure was put in place. It follows, as a matter of common-sense, therefore, that her daughter was never a shareholder of the first respondent. The fourth applicant could not posthumously have become a shareholder because the first respondent's shares were not shown to be transferrable. The name of one Martha Chao appears on the list of the first respondent's shareholders attached to the court order, "anx d", of 18 September 2014 by Naidoo J. If that Martha Chao was one and the same person as Martha Kediemetse Chao who died over 11 years before the court order, then she could not posthumously have been declared a shareholder. A deceased person cannot acquire rights and obligations. In my view, the case of the third applicant appeared to be far weaker than that of the fourth applicant. The remarks I made, the views I express and the conclusion I reached in connection with the fourth applicant apply to the third applicant as well but with greater

force.

[41] Let me pause here before I proceed to deal with the first applicant. As far as the fourth applicant and the third applicant were concerned the question was:

‘Ba tena ba tjha ba tsholang? (What was it that they were trying to salvage from the fire when they burned their fingers?) Mr Van der Merwe submitted that the essence of their case was to have the second respondent restrained from paying any further dividends to the respondents which dividends the second respondents is obliged to pay to the first respondent. Well I have just found that the fourth applicant and the third applicant had absolutely no rights whatsoever to seek any interim relief because they failed to establish a prima facie proof that they were the first respondent’s shareholders. The submission that it was irrelevant to consider whether the two ladies were in fact shareholders or not was misplaced. None of them had direct and substantial interest in the shareholding of the first respondent. As executors their interest, however substantial, was indirect and not direct. That materially disqualified them. They were not entitled to be given notice of the first respondent’s meetings. To that procedural right and the related participatory rights they were not entitled. They could ride on the back of any legitimate shareholder(s) as their counsel argued. It follows, therefore, that they had no legitimate business to be in the arena.

[42] As regards the first applicant, Ms Morobi, her credentials were not questionable. The trio did not deny that she was a legitimate shareholder of the first respondent. She had a right to payment of dividends by the first respondent. Therefore, she had the right to seek interim protection of her right provided there was a reasonable threat or reasonable apprehension of irreparable and imminent harm.

[43] The recurring theme of her case was that a secret meeting was convened, that she was deliberately marginalised; that a clandestine meeting was held; that an untrue proxy form unauthorised by the third applicant was dishonestly contrived, signed and presented to create the false impression that the meeting was quorate to transact the business of the first respondent whereas and in reality, there was not quorum to do so; and that the respondents took all those irregular steps in order to control the dividends distribution in a manner detriment to her rights.

[44] The first applicant was aggrieved. She alleged that she was not given notice of the general meeting in terms of section 6(1) Companies Act 71 of 2008. That meeting was held in Bloemfontein on 12 April 2014 at 10:00. Although she did not attend the meeting Ms N B Mayekiso, the fourth applicant did. The latter alleged that Ms LC Grobler co-incidentally told her about it on 7 April 2014. By then the notice in terms of section 6(1) had not yet been sent out by the first respondent. According to her version that notice was sent out five days later, on 12 April 2014.

[45] However, she did not complain at the meeting that she was not given notice thereof. Her failure to do so tended to give credence to the respondent’s version that she was given notice.

- [46] The respondent had earlier alleged that the fourth respondent had telephonically called all the applicants, informed them about the meeting and asked them to provide their addresses. Because they all refused to furnish him with their correct addresses, he could not send the hard copies of the notice. Once the belated explanation pertaining to Ms Grobler is discounted, nothing else remains to explain how the second respondent's deponent acquired knowledge of the meeting, a meeting that was supposed to be a guarded secret for that matter.
- [47] Now the pendulum swings to the other extreme end. Given all those peculiar circumstances it has to be accepted that the first applicant's deponent attended the meeting because the fourth respondent telephonically informed her about it; that the first applicant was similarly informed about it; that there was nothing secret about it; that the first applicant freely elected to absent herself from it; that the first applicant and her other two co-applicants and the sixth respondent deliberately stayed away from it in a bid to impair the quorum; that the sixth respondent also freely absented himself from it; that the first applicant actively colluded with her co-applicants as well as the sixth respondent to frustrate the meeting of the first respondent and that the first applicant demonstrated, through words and deeds, that she was a collusive collaborator who did not really have the interest of the first respondent at heart.
- [48] Moreover, the respondents alleged that Phatsoane Henny Attorneys also gave notice of the meeting to all the first respondent's shareholders. Attached to the founding affidavit as "anx b" was a copy of the second respondent's meeting which was held at the same day as all the meetings of its four shareholders. The applicants erroneously believed that it was a notice sent out by the first respondent. There was no explanation as to how the applicant's acquired possession of the notice of the second respondent's meeting.
- [49] The applicants cannot deny that four general meetings of all the corporate shareholders of the second respondents were held at the same venue, Windmill Casino on the same day and at the same time. The exclusive general meeting of the second respondent was also held at the same venue on the same day but hours later than those of its four corporate shareholders. All those various meetings were facilitated by the second respondent's lawyers, Phatsoane Henney Attorneys. The primary purpose of the lawyers was to put proper corporate governance structures of the second respondents in place to ensure that they comply with the law.
- [50] The agenda of the first respondent's general meeting (vide "anx uli2) was almost identical to the agenda of the second respondent's general meeting – vide "anx b", founding affidavit. It seems to me, therefore, that the primary purpose of the lawyers as regards the first respondent, was also to facilitate putting proper corporate governance structures of the first respondent in place and to help the individual shareholders of the first respondent's four corporate constituent companies understand corporate structures, their corporate

relationships and corporate functioning. Those matters were important for the cultivation of a healthy culture and promotion of a sound system of values vital for proper corporate governance – something which appears to be lacking among the first respondent's shareholders.

- [51] In the founding affidavit the first applicant's deponent alleged that the respondents were dishonest because they used an unauthorised document at the meeting. Indeed the third applicants later denied that she had authorised any of the respondents to act as her proxy. In the founding affidavit the fourth applicant stated that it would appear that the respondent or one of them produced a forged document. Firstly, it was clear that she did not know precisely who was purportedly authorised to act as the third applicant's proxy. Secondly, she did not see who produced the false document at the meeting.
- [52] In the answering affidavit the respondents denied the fourth applicant's allegation that any of them produced the alleged false document; that any of them signed the minutes, "anx c", under the false pretext that he or she was authorised by the third applicant or that they were involved in any irregular dealings as the applicant's suggested. They ventured to say that they suspected that the fourth applicant herself was the culprit.
- [53] In the replying affidavit the applicants denied the allegation that the fourth applicant, their deponent, was the culprit who purportedly signed the minutes on behalf of the third applicant. In response to paragraph 6 of the answering affidavit, the first applicant's deponent initially replied as follows:

"8.4 The only logical inference is then that the proxy was signed by the one of the other three individuals referred to in 8.1 supra. I will deal herewith more fully hereunder."

See p137, record.

Contrary to her initial reply and in response to paragraph 34 of the answering affidavit, the first applicant's deponent later replied as follows:

"20.1 At the meeting of 12 April 2014, the fourth respondent signed the proxy and the fifth respondent produced same."

See p144, record.

- [54] The fourth applicant second reply cannot be reconciled with her first response in the replying affidavit. It was in sharp contrast to her primary allegation in the founding affidavit. Mr Snellenburg urged me to strike it out on the grounds that it was, in substance, materially inconsistent with her primary allegation. The fourth respondent and the fifth respondent were belatedly accused. They were deprived of their procedural rights to deal with the serious accusations attributed to them for the very first time in the replying affidavit. Indeed they were unfairly ambushed. I have no hesitation to strike out the belated allegations of fraud levelled against.

- [55] The first applicant and others accused the respondents that they elected themselves as directors. The applicants could democratically have prevented that state of affairs had they not boycotted the meeting.
- [56] The first applicant and others accused the respondents that all they were after was the money. They alleged that the respondents were concealing the dividends from the other shareholders. They alleged that the respondents are unlawfully stashed the dividends away in the bank nest of Attorney J.J Mhlambi's instead of the bank account of Umyezo – see “anx f”. As on 12 April 2014 Umyezo did not have a bank account (vide item 7 “anx uli2”). The applicants were not alarmed by the item. They knew why. They and their allies had been spreading a

smear campaign which portrayed the directors of the first respondent in a bad light. They made it difficult for them to open a bank account in the name of the company.

- [57] On 23 April 2014 the trio, as directors, resolved to have all the money received by the first respondent from the second respondent deposited into the trust account of J J Mhlambi Incorporated, law enterprise – vide “anx 04”. The money was not stashed away in the personal and private account of the attorney J J Mhlambi as the applicants suggested. The applicants knew that the trust account number concerned. They also knew that the respondent had since opened a separate bank account for Umyezo in accordance with resolution “anx 04”. The respondent gave a reasonably innocent explanation as to why they, as directors, could not immediately open a bank account for the first respondent.

The accusation of the applicants was devoid of any grain of truth, in my view.

- [58] The applicants rounded off their grievances or accusations as follows:

“As a result of your conduct of dishonesty, detriment to your fellow shareholders, delinquency, fraud and filing of false sworn statements

in court proceedings, the company makes the following demands on you.”

See p48, record.

- [59] The aforesaid memorandum of accusations and demands was annexed to a covering letter signed by the first applicant together with the second, third and sixth respondents. That particular letter emanated from Litheko Advice Centre at Thaba Nchu. About Mr M.S Litheko, the respondents averred that the business relationship between him and Sun International (Pty) Ltd soured many years ago.

- [60] At paragraph 18 of the answering affidavit the respondents averred:

“In the abovementioned application, to which the Court is referred, the agreements between Sun International and Mr Litheko and Mr Makwaba in terms whereof they were bought out were appended. Both agreements (with the respective persons) contained a similar term that provides that Mr Litheko and Mr. Makwaba “will henceforth have no direct contact, communication or liaison with any of the directors, trustees or other decision making structures of our company (Sun International) or

any of the legal entities which own, form part of or are otherwise related or associated to us (Sun International) in regard to any aspect of the business or affairs of Mangaung Sun (Pty) Ltd.”

See page 70, record.

[61] At paragraph 19 of the answering affidavit the respondents elaborated:

“To this end and because Mr. Litheko and Mr. Makwba continued to breach the agreement and interfered with the business and affairs and inter alia the first and second respondents, Sun International sought and obtained (on 15 February 2010) a court order [case 3794/2009] of which, for sake of convenience, I append a copy hereto as Annexure “03”. The content thereof is self-explanatory but inter alia comprises of a final interdict restraining the said persons from:

19.1 holding meetings of shareholders and/or directors;

19.2 interfering with the affairs of the shareholders of the second respondent;

19.3 “the first and second respondents shall desists [sic ‘desist’] and are interdicted from, directly or indirectly, communicating and/or liaising with prospective directors

and shareholders of the fifth [Etapele (second respondent in casu)], sixth [Mathabo], seventh [Tsela Tshoeu], eight [Umyezo] and ninth [Belega] respondents concerning the affairs of those respondents and for any other reason or purpose that [sic ‘than’] to give effect to and comply with the relief provided for in sub-paragraph 1.5 below;”

19.4 directly or indirectly holding or obtaining shares in the Mangaung Sun (Pty) Ltd not obtained on a recognised stock exchange.”

See page 71, record.

[62] At paragraph 21 of the answering affidavit the respondents asserted:

“Mr. Litheko did not adhere to the agreement or the court order and actively engaged and cajoled with the applicants and sixth respondent

in this matter in order to apparently obtain or indirectly still exercise control over the first respondent. He, with the

assistance of for example the sixth respondent, attempted to derive economic benefits for himself from the first respondent, to the first respondent’s detriment.”

See p 72, record.

[63] In their response to the aforesaid averments the applicants replied as follows:

“5. Before dealing with the allegations set out in the first, third, fourth and fifth respondents’ opposing affidavit seriatim, I wish to state unequivocally that the applicants have not relation whatsoever to Mr. Molefi Simeon Litheko (hereinafter Litheko), do not wish to be associated with him and deny any averments to that effect and any averments to the effect that this application is in fact a “method employed by the applicants a part of a strategy to gain control of the company to serve the interests of Litheko.”

See p135, record.

[64] The applicants heavily relied on “anx f”, a dossier of very serious accusations levelled against the respondents. There was a widespread dissemination of that dossier. Then the respondents turned the other side of the coin. They hit back. The first applicant and others were hurt. They were stunned by what was revealed against their ally. They turned their back to him. They started singing a different tune. They suddenly wanted the world to believe that the never had anything to do with him. It is too late. They simply cannot distance themselves from “anx f”.

That annexure is telling. It shows that they had everything to do with him. Before they launched these motion proceedings they went to the aforesaid centre where they sought and obtained advice from Litheko Advice Centre. They cannot now disassociate

themselves from him when they had earlier shown that they were closely associated with him. They cannot be allowed to somersault. In my view they are inextricably bound by that unholy alliance and all the consequences of such a relationship.

[65] Mr Snellenburg argued that by sending copies of “anx f” to banking institutions, among others, the applicants subversively acting in collaboration with Mr Litheko and the sixth respondent, demonstrated that they did not have the best interest of the first respondent at heart. The annexure was synonymous to the name of Mr Litheko. By repudiating him as they did, the applicants implicitly admit that there was no real true substance in the accusations contained in the memorandum of accusations. Their disavowal of their association with him was untrue.

[66] On behalf of the respondents it was contended that even if it were shown, which allegation the respondents still deny, that their appointment as directors and all the resolutions taken at the Windmill Casino on 12 April 2014 were irregular – such irregular procedure, irregular appointment of directors and irregular resolutions were ratified by consent on 18 September 2014. The court order by Naidoo J encapsulated mutual settlement reached by all the parties. However, the first applicant and others tried to distance themselves from the settlement negotiations, the settlement and the related court order. They alleged that they were not legally represented during those proceedings before Naidoo J. They claimed that they did not mandate Moroka Attorneys or Adv. Thompson to act on their behalf. They alleged that Mr Litheko did all that without their knowledge and instructions.

[67] The version of the first applicant was far-fetched and clearly untenable. Hardly two months after the alleged unauthorised

actions of Mr Litheko, they were still in cahoots with him. Among the resolutions they took on 7 November 2014 was one which

reads:

“5. The attorneys of the company are Moroka Attorneys. J J Mhlambo and Modise Modise are removed with immediate effect.”

See p174, record.

Six days later, aided and abetted by Mr Litheko, they wrote and signed “anx f”. Seemingly they took no steps to have the wrong court order set aside or Mr Litheko reprimanded or to have the alleged irregular resolutions of the 12 April 2014 reviewed and set aside. They knew all too well that Moroka Attorneys were appointed as their attorneys with their blessings. They knew that they were privy to the settlement of the 18 September 2014. They also knew that there was nothing wrong with the resolutions taking at a general meeting of the 12 April 2014. In my view the allegation of the first applicant that she was not bound by the mutual settlement was untrue.

[68] In their reply the first applicant and others said that they were not asking for the distribution of dividends but rather that their interests in the first respondents be protected from the dishonest trio. However, they said nothing in their founding affidavit or replying affidavit about the interest of their company or its creditors. Those two aspects were material considerations. Notwithstanding the resolution of the trio to temporarily suspend declaring dividends of the first respondent, the fourth applicant was paid an amount of R39 843,75 from the coffers of the first respondents on 23 May 2014. The applicants turned around and insinuated that the payment constituted breach of the resolution of 23 April 2014 – “anx 04”. The allegation or insinuation that such a payment, made to one of their kind, their own

chosen deponent, indicated that the trio was secretly making similar payments to themselves to the detriment of the applicant was

ridiculous and baseless. Mr Snellenburg, argued that the trio, as company directors, made such a payment on compassionate grounds at the request of the fourth applicant who was apparently in financial distress. I am persuaded that the payment, was not, by any stretch of imagination, an indication that the trio was embezzling the dividends fund. The fourth applicant was ungrateful to allege that such a gesture of kindness amounted to breach of the relevant resolution. Once again I pause to point out that an allegation so serious should have been made in the founding and not in the replying affidavit. Since it was not, it fell to be struck down.

[69] The theme of the respondents, which the applicants could not deny, was that over the years the first respondent had been involved in many court cases; that as a result of such litigation, the first respondents incurred enormous legal costs which has an adverse impact on the first respondent’s liquidity; that, as the directors of the first respondent, they

considered it advisable and in the interest of the company , its creditors and all concerned and resolved to stop paying dividends to the first respondent's shareholders for a while; that they took such a resolution in order to pay the creditors of the first respondent first; that attorneys and advocates rank among the main creditors of the first respondent; that the resolution has agitated the applicants because previously the second respondents used to pay dividends directly to the first respondent's shareholders and that such a practice was discontinued because the second respondent could not overlook its own shareholders and lawfully pay dividends, to persons who were not its shareholders.

- [70] I hold the view, and it is a very firm view, that the version of the respondents throws serious doubt on the case of the applicants. It cannot be brushed aside as an unconvincing explanation. The crucial question is whether, if interim protection is given now, the first applicant could ever establish that final protection should be given for the right she seeks to protect. It is my considered view that, at the trial, the first applicant would not be able to establish that she deserves final protection of her right. Since she would not, in my view, interim protection should not be given – Webster supra. Accordingly she too failed to satisfy the first elementary requisite for the grant of interim interdict.
- [71] It has since become unnecessary to deal with the second applicant, Ms Morrision. It will soon become apparent why. In brief I deem it sufficient to say her fate is pretty much the same as that of the first applicant. I say no more about her in connection with the substantive merits of this application.
- [72] It follows from the critical analysis and views that the applicants cannot invoke section 163 Companies Act 71 of 2008. They have not shown that the conduct of the respondents as directors is unfairly prejudicial to their interest as the section requires. On the contrary, the conduct of the accused directors was reasonably innocent, procedurally regular, substantively meritorious and legally sound. They acted pursuant to a properly taken resolution. The resolution was taken in the interest of the company that they directed. In order to successfully rely on the section, the applicants, as shareholders, had to address the qualifying requirements of section 163.
- [73] The section requires that:
- “(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;*
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.”

- [74] To this end the applicants have dismally failed. I could detect no prima facie proof of incriminating symptoms, apparent or latent, to evidence that the interest of the applicants in the dividends of the company were unfairly disregarded or unfairly prejudiced or unfairly oppressed by the conduct of the directors of the company. In the absence of oppressive or prejudicial or detrimental conduct, a shareholder may not straightaway apply to court. In this matter it occurred to me that the conduct of the directors was perfectly justified by the conduct of the shareholders.
- [75] The directors have a fiduciary duty to the company first and foremost and not to the shareholders. They are obliged to pay dividends to the shareholder in accordance with law and not the unrealistic demands of shareholders. They have to protect, first and foremost, the interest of the company and then those of the creditors and lastly those of shareholders. The interest of the shareholders are subordinate, firstly to those of the company and secondly to those of the creditors. That hierarchy of interests is central to a good value system in a culture of corporate governance. It is that corporate culture which the shareholders have to learn to understand and to embrace. It has not been shown that the directors acted contrary to the provisions of the statute.
- [76] It is evident that the company is frequently forced to incur substantially huge legal costs as a result of selfish internal feuds for its control and leadership or directorship. It would be a serious breach of their fiduciary duty if the directors were to disregard the expenses or financial obligations of the company and blindly pay dividends to the shareholders as if the company had no financial obligations towards any creditors. The law does not countenance such illegal disregard of the interests of the company and those of its creditors.
- [77] In the circumstance, I have come to the conclusion that the first elementary requisite for the grant of interim interdict has not been satisfied. The version of the applicants is disturbingly unsatisfactory and doubtful. The allegations on which it was based and on which they relied for the grant of interim relief were devoid of merits.
- [78] In the second place, since they seek interim interdict, the test requires that the applicants must establish a reasonable apprehension of irreparable and imminent harm if an interdict is not granted – *Setlogelo v Setlogelo* 1914 AD 221.
- [79] The first respondent is a corporate persona. It is a company with its own legal personality. As a juristic person it has its own autonomous existence separate from its members, in other words, shareholders and directors. In the replying affidavit the applicants made a sweeping allegation that the company, the first respondent, was an empty shell. That was not their case in the founding affidavit. They failed to substantiate the allegation, anyway. The company was and still is no empty shell. The applicants cannot deny that the company has been dragged to court on a number of occasions; that it has had to incur enormous expenses as a result of litigious disputes and that auditing transactions of its former director has created additional financial obligations. The company was purposefully established. It is subject to its own articles of association. However, it also remains subject to legislative

provisions.

- [80] The applicant's version in this connection corroborated the respondent's version that part of the problem is that the applicant misconceive the legal nature of the first respondent. It is inconceivable that there can be no expenses the first respondent has to pay. Given the number of legal proceedings the first respondent frequently has to defend or oppose. If all the funds were diverted to the attorney for the applicants for the entire duration of a trial, which has not even instituted as yet, how on earth would the company meet its obligations towards its creditors and how would it exercise its right to defend itself in the contemplated action?
- [81] Even if it were accepted that the first respondent has no expenses or creditors to pay, how would it defend itself if the interdict is granted. The point is this: If the applicants honestly have real concern let alone a reasonably genuine apprehension of irreparable and imminent harm to their right to the dividends, how come they are so amazingly slow to initiate action proceedings as envisaged in prayer 2, notice of motion. If there was an imminent harm threatening their rights they would probably long have instituted the contemplated action against the respondents. Why are they still holding back?
- [82] The alleged offensive resolution (vide "anx 04") which induced their alleged apprehension was passed 13 long months before the application was launched. Almost 20 months since their alleged cause of action arose, they are still considering to initiate an action. Their conduct of the applicants was not consistent with that of a person reasonably apprehensive about irreparable and imminent harm. They have, right from the onset, been dragging their feet. The hallmark of an interim interdict is speed. It is a speedy remedy. In this instance their case has long lost momentum. It seems to me that they are going at a snail's pace because there is no threat of irreparable and imminent harm to their rights or alleged right to dividends.
- [83] In temporary interdict proceedings, whether or not temporary relief should be granted, the real test is the apparent harm that will be done. The harm that will be done to the applicant's right if temporary protection is not granted versus the harm that will be done to the respondent's right if temporary protection is given. In the instant matter, the latter is more apparent than the former, in my view.
- [84] It follows that their indecisive conduct militates against their contention that there was reasonable apprehension of irreparable and imminent harm if the respondents are not immediately interdicted. In my view the applicants have failed to establish the second elementary requirements of the interdict.
- [85] The conduct of the applicants caused a great deal of confusion and suspicion in the commercial world concerning the integrity of the trio. Among those that became confused and suspicious were the banks and the Companies and Intellectual Property Commission. That was the sole reason why the first respondent's directors resolved to have the first respondent's money paid into the trust account of an attorney. The trust accounts of

attorneys are subject to regular annual trust audits. The apprehension of the applicants that there was imminent risk that the first respondent's money would not be properly accounting for was, in my view, not reasonable. The attorneys are subject to strict accounting rules regarding funds held in trust. They have to keep accurate accounting records. The Attorneys Fidelity Fund, moreover, secures funds held in trust by attorneys.

- [86] The resolution passed by the directors to temporarily suspend paying out dividends to the first respondent's shareholders could not, in my view, be regarded as an irreparable and imminent harm that unfairly prejudiced or unfairly oppressed the applicants by unfairly disregarding their interest in the securities of the first respondent. The court order by Naidoo J was no authority or justification for the argument that the directors have to declare and pay out dividend to the shareholders irrespective of the liquidity of the company, and its contractual obligation towards its creditors.
- [87] In the third place, since they seek interim interdict, the test requires that the applicants must show that the balance of convenience favours the grant of the interdict. By the phrase balance of convenience is meant a measure of prejudice to the applicant if interdict is refused weighed up against a measure of prejudice to the respondent if it is granted – *Setlogelo v Setlogelo supra*.
- [88] This aspect of enquiry ties in with the applicant's overall failure to make out a proper case. They woefully failed to deal with the balance of convenience. I have already alluded, elsewhere in this judgment, that they did not at all indicate how the expenses of the company would be paid if the interdict were to be granted. This application alone, apart from the contemplated action, will have financial implications for the company. The applicants take their time to get things done as I have already demonstrated. Judging by that alone, it will probably take a considerable period of years before the contemplated action is disposed of. Certainly the company will not survive. That will not be in the interest of anyone.
- [89] It follows that the applicants have not seriously addressed the balance of convenience. In my view, the prejudice to the company if the interdict is granted substantially eclipses the prejudice to the applicants if the interdict is not granted. There was no iota of evidence to substantiate the allegation and the argument of the applicants that they feared that the respondents would dissipate the dividends fund of the company unless they were immediately restrained. The funds are now in the bank account of the company. A bank account of a company is also subject to tight accounting regulations in terms of the statute applicable to companies. The integrity and conduct of the directors was not tarnished by any proven mala fides. The same cannot be said about the applicants and their leader and ally, the sixth respondent. Their version was bedevilled with false allegations. In my view they failed to satisfy the third elementary requisite for the grant of an interim interdict.

- [90] In the fourth place, since they seek interim interdict, the test requires that the applicant must show that no other available remedy is available to him or her to protect their endangered rights – *Setlogelo v Setlogelo supra*.
- [91] In their memorandum of accusations and demands, the applicants threatened that unless the respondents complied with their listed demands they would initiate arbitration proceedings – vide 13 “anx f”. They considered arbitration an adequate and alternative remedy by then, 13 November 2014. However, they did not do so. In the end (27 May 2015) they chose to come this way instead of going that way. But they failed to explain in the founding affidavit why they reckoned that they could no longer obtain appropriate redress by following that alternative route. Now I am still in the dark as to why their initial chosen remedy is no longer adequate or no longer available.
- [92] Apart from the aforesaid alternative remedy, the applicants have statutory remedial rights in terms of subsection 1(1), subsection (2) and subsection (3) of section 26 Companies Act 71 of 2008. As regards the exercise of those right subsection (4) provides:
- “(4) A person may exercise the rights set out in subsection (1) or (2), or contemplated in subsection (3)-*
- (a) for a reasonable period during business hours;
 - (b) by direct request made to a company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; or
 - (c) in accordance with the Promotion of Access to Information Act, 2000 (Act 2 of 2000).”
- [93] Again the applicants gave no explanation as to why they considered those alternative remedies inadequate, ineffective or unavailable. They should not be allowed to circumvent the remedial procedures of the statute or to subvert the exercise of lawful functions by the directors by simply choosing the adjudicative alternative.
- [94] It follows, therefore, that an adjudicative court process should be used as the absolutely last resort. The applicant had alternative remedies. They did not say why those alternatives remedies were not adequate, suitable or unavailable. In my view they did not satisfy the last elementary requirements for the grant of an interim interdict.
- [95] Having considered all the requirements of an interdict I am persuaded and satisfied that the applicants have not made out a case for the grant of an interim interdict. It was incumbent upon them to establish all the requisites of an interim interdict in order to succeed. It is trite that failure to prove just one of the four requisites is fatal to the applicant’s case. In this matter none of the requisite was established by any of the applicants.
- [96] There remains one more issue – the costs. On 22 October 2015 the matter came up for hearing, Mocumie J was seized with the matter. The respondent handed up a special supplementary affidavit and applied for leave to file it. Attached thereto and marked “anx a” was a sworn statement by the second applicant, Ms T L Morrison. The sworn statement was attested in Johannesburg on 20 October 2015. She thereby announced her decision to

withdraw from these proceedings. I guess Mocumie J noted her withdrawal. Pursuant to her withdrawal the respondents called upon Blair Attorneys to file proof of their mandate in terms of rule 7 to act on behalf of the remaining applicants. Consequently the hearing could not proceed. Mocumie J directed Blair Attorneys to comply with the request in terms of rule 7; postponed the application and reserved the costs.

- [97] On 3 November 2015, Attorney B Blair filed a formal notice whereby he announced that he no longer acted as the second applicant's attorneys of record. The next day he filed an affidavit on behalf of the first, third and fourth applicants in response to the supplementary affidavit filed by the respondents in connection with the second applicant's withdrawal.
- [98] On 5 November 2015 the matter was allocated to Naidoo J. It was on the roll for hearing. Meanwhile Blair Attorneys had complied, or so it appeared to me, with the respondent's request. The respondents then moved an application to strike out certain allegations made in the replying affidavit. Naidoo J refused the application to strike out, postponed the application and reserved costs.
- [99] On Thursday 26 November 2015 the matter once again came up for hearing. I was seized with the matter. Mr R. van der Merwe appeared for first, third and fourth applicants and Mr N. Snellenburg for the first, third, fourth and fifth respondents. Then there was a surprise appearance by Ms M Qofa for the second applicant. She was not before me on the merits. She informed me that her brief was restricted to the aspect of costs only.
- [100] As regards 22 October 2015 Mr Van der Merwe urged me to direct that the wasted costs occasioned by the postponement be borne and paid by the second applicant. He argued firstly that the second applicant filed no formal notice of withdrawal or presented an oral application to withdraw. He urged me to give Ms Qofa no audience on the grounds that the second applicant was not properly before me. He concluded his argument with the submission that the postponement of that particular day was occasioned by the second applicant's decision to withdraw on false grounds.
- [101] Ms Qofa disagreed. She urged me to hear the second applicant out. I agreed to give her an audience notwithstanding the fact that Ms T L Morrison's new attorney was not formally on record. She confirmed that the second applicant made and signed an affidavit at Mondeor on 20 October 2015. I deem it necessary to quote paragraph 1 thereof:

"At the meeting of shareholders held in Welkom on the 15th August 2015, the shoulders (sic) of Umyezo Leisure Investments resolved to work together and resolved to cease with all legal action

against the company and its director (sic) in all current legal proceedings including case no 2051/2015 at the Free State High Court."

- [102] The second applicant's affidavit was served and filed on 22 October 2015. I am persuaded by Ms Qofa's argument that nothing really significant turned on the undisputed facts that the second applicant filed no formal notice of withdrawal. In my view she announced her decision in a much more formal manner by way of an affidavit than by way of a bare notice.

She even went a step further to explain the reasons for her decision. Whether her reasons were sound, true or not was not the point. No reasons need be given in the formal notice of withdrawal. No application, written or oral, is required for a party wishing to withdraw his or her case. In the circumstances, I accept she properly withdrew from these proceedings on 22 October 2014.

- [103] Ms Qofa persuasively argued the postponement was not the necessary consequence of the second applicant's decision to withdraw. I am satisfied that the second applicant's decision to withdraw had nothing to do with the postponement of the matter on that day. At the time the matter was postponed the second applicant was no longer before the court. She did not participate in the subsequent debate which led to the eventual postponement. It appears from the court order by Mocumie J that a request in terms of rule 7 necessitated a postponement. At the time that request was made, the second applicant was no longer a party before the court. It was incumbent upon the attorney for the applicants to have filed the required special power of attorney right from the beginning of these proceedings. He did not. He did so at the peril of his clients. It was the earlier omission by the attorney and not the second applicant's decision which was the effective cause of the postponement, in my view. Therefore, I decline to hold the second applicant to be solely responsible for such costs. I would, therefore, award the costs reserved on 22 October 2015 in favour of the respondents against the first, third and fourth applicants together with the second applicant but only up to the stage of her withdrawal.
- [104] As to the reserved costs of 5 November 2015 I am inclined to award those costs in favour of the respondents. They were prompted to bring an application to strike out by the manner in which the applicants presented their case. Although they did not succeed before Naidoo J they succeeded before me to have the offending allegations struck out. When the application was argued, the second applicant was no longer before the court. The application no longer concerned her. Had she been the only applicant in the matter these proceedings would effectively have terminated on 22 October 2015. It follows, therefore, that on 5 November 2015 the first, third and fourth applicants only were confronted with the interlocutory application to strike out. Therefore, only the remaining applicants, namely the first, third and fourth applicants, are liable to pay the costs of that day jointly and severally, the one paying the others to be absolved.
- [105] As regards the costs of 26 November 2015 I need to make a few comments. The second applicant rushed back to court although she had already withdrawn. Asked why the new attorney did not file the customary notice to place himself on record, Ms Qofa explained that the second applicant did not rush back on her own free accord; that she still abided by her decision that she no longer wanted to participate any further in the current proceedings against the respondents; that she was prompted to rush back because she received a telephone call from the office of the attorneys for the applicants that the applicants were going to ask for a punitive costs order against her for the wasted costs of 22 October 2015; and that the second applicant received such a serious warning at an

extremely short notice. Although those comments were made from the bar, they were not challenged from the bar. Accordingly there was no reason to doubt their veracity.

[106] Then Ms Qofa informed me that in those circumstances she advised her instructing attorney who, like her and the second applicant, also lived in Johannesburg, that given the particular circumstances of the second applicant's invidious position he should not file the usual notice to avoid unnecessary costs. She then submitted that the second applicant was ambushed which was why she rushed back to court in haste on 26 November 2015. Counsel stressed that had it not been for the warning by the applicants, the second applicant would not have returned and appeared in court again on the 26 November 2015. I was persuaded by counsel's submission. The second applicant deserves to be reimbursed for the wasteful costs she incurred in connection with her forced return to court. Such costs were occasioned by the threat made by her erstwhile co-applicants. Her unnecessary return to the battlefield was a direct consequence of their threat. In the light of all these considerations, I am inclined to direct that the unnecessary costs incurred by the second applicant on 26 November 2015 must be borne and paid by the remaining

three applicants.

[107] The respondents are entitled to the fruits of their success. The second applicant and the rest of the applicants are jointly liable for the costs incurred by the respondents until 22 October

2015. The costs incurred by the respondents from 23 October 2015 must be borne and paid by the first, third and fourth applicants

[108] Before I make the order, I have to make some general comments about the annexures, especially the way they are often marked or labelled by attorneys. The instant matter is a good example of how annexures should never be labelled.

* To the founding affidavit 13 documents were attached of which only 10 were identified and irregularly labelled as annexures: A, B, C, D, E, F, LMC, ULI.2, G and H.

* To the answering affidavit 7 documents were attached and all 7 of them were identified and regularly labelled as annexures: 01, 02, 03, 04, 05, 06 and 07.

* To the replying affidavit 9 documents were attached of which only 6 were identified and regularly labelled as annexures: A, B, C, D, E, and F.

* To the so-called the applicants' supplementary affidavit 8 documents were attached of which only 6 were identified and regularly labelled as annexures: A, B, C, D, E, and F.

* To the so-called respondents' supplementary affidavit 1 document was attached, identified and regularly labelled as annexure: A.

[109] It will be readily noted that there were 5 documents marked Annexure A, 4 marked Annexure B, 4 marked Annexure C, 4 marked Annexure D, 4 marked Annexure E, and 4 marked Annexure F. This sort of alphabetic repetition in the labelling of annexures must be

avoided at all costs. It has to be totally discouraged. During the course of legal argument by counsels and during the course of judgment writing by a judge, it is very cumbersome to refer to, say 'Annexure A' to the applicant's founding affidavit instead of simply saying 'Annexure A'. There is a growing tendency by attorneys to identify and label annexures by means of a deponent's initials. Using initials is equally cumbersome. At times initials can be very long and clumsy. For instance, imagine a document marked 'Annexure PZXQ 17'. It is easier to refer to Annexure FA.17 instead of 'Annexure PZXQ 17'. Using strange labels such as 'Annexure LMC or ULI.2 which hardly match the initials of a deponent is very bad and senseless. Mixing such meaningless and strange labels with alphabetical labels is awful. Attaching unlabelled documents to affidavits is appalling. I make a special appeal to all practitioners to eradicate all these practices. Such labels are not user friendly at all.

[110] As regards a founding affidavit, I propose that annexures be uniformly identified and labelled as follows: FA1, FA2, FA3 and so on, where the prefix FA stands for founding affidavit. As regards answering affidavit, I propose that annexures be uniformly identified and labelled as follows: AA1, AA2, AA3 and so on, where the prefix AA stands for answering affidavit. As regards a replying affidavit, I propose that annexures be uniformly identified and labelled as follows: RA1, RA2, RA3 and so on, where the prefix RA stands for replying affidavit. These are mere suggestions.

[111] Accordingly, I make the following order:

111.1 The application is dismissed;

111.2 The second applicant is directed to pay the costs of the respondents from the commencement of these proceedings on 27 May 2015 until her withdrawal on 22 October 2015 together with the first, third and fourth applicants, jointly and severally, the one paying the others to be absolved.

111.3 The first, third and fourth applicants are further directed to pay the costs of the respondents from 23 October 2015 and further, including the wasted costs occasioned by the postponement of 5 November 2015, jointly and severally, the one paying the others to be absolved.

111.4 The first, third and fourth applicants are also directed to pay the costs incurred by the second applicant in connection with the final proceedings of 26 November 2015, jointly and severally, the one paying the others to be absolved and such cost must be paid on the special scale as between attorney and client.

M.H. RAMPAL, J

On behalf of first, third and

fourth applicants: Adv. R. van der Merwe

Instructed by: Blair Attorneys

BLOEMFONTEIN

On behalf of the second

applicant: Adv. M. Qofa

Instructed by:

Nyapotse Inc.

JOHANNESBURG

On behalf of the first,

third, fourth and fifth

respondents: Adv. N. Snellenburg SC

Rossouws Attorneys

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