

SOUTH AFRICA / JUDGMENT

Sanbonani Holiday Spa Share Block Ltd and Others v Off Beat Holiday Club and Others (32171/21) [2023] ZAGPPHC 627 (25 July 2023) [2023] ZAGPPHC 627

COURT

North Gauteng High Court, Pretoria

BEFORE

L Badenhorst

CASE / FILE NUMBER

32171/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 32171/21

1.

REPORTABLE: YES / NO

2.

OF INTEREST TO OTHER JUDGES: YES / NO

3.

REVISED: NO

DATE:

25/07/2023

In

the matter between:

SANBONANI
HOLIDAY SPA SHARE BLOCK LTD
First Applicant
SANBONANI
DEVELOPMENT (PTY) LTD
Second Applicant
HANS
MICHAEL
HARRI
Third Applicant
HANS
MICHAEL HARRI
N.O.
Fourth Applicant
VINCENT
CHRISTOPHER CALACA N.O.
Fifth Applicant
HELEEN
DUPORETHA HARRI N.O.
Sixth Applicant
SANBONANI
HOTEL MANAGEMENT (PTY) LTD
Seventh Applicant
and
OFF
BEAT HOLIDAY CLUB
First Respondent
FLEXI
HOLIDAY CLUB
Second Respondent
THE
COMMISSIONER OF COMPANIES AND
Third Respondent
INTELLECTUAL
PROPERTY COMMISSION
In

re:

OFF
BEAT HOLIDAY CLUB
First Plaintiff
FLEXI
HOLIDAY CLUB
Second Plaintiff
SANBONANI
HOLIDAY SPA SHARE BLOCK LTD
First Defendant
SANBONANI
DEVELOPMENT (PTY) LTD
Second Defendant
HANS
MICHAEL

HARRI
Third Defendant
HANS
MICHAEL HARRI
N.O.
Fourth Defendant
VINCENT
CHRISTOPHER CALACA N.O.
Fifth Defendant
HELEEN
DUPORETHA HARRI N.O.
Sixth Defendant
SANBONANI
HOTEL MANAGEMENT (PTY) LTD
Seventh Defendant
THE
COMMISSIONER OF COMPANIES AND
Eight Defendant

JUDGMENT

This matter has been heard via teams and is otherwise disposed of in terms of the Directives of the Judge President of this Division. This Judgment is made an Order of the Court by the Judge whose name is reflected herein and duly stamped by the Registrar of the Court. The judgment and order are accordingly published and distributed electronically. The date for hand-down is deemed to be 25 July 2023.

BADENHORST AJ

Introduction

- [1] The parties to this application have been embroiled in litigation since 2008. The dispute relates to the timeshare and share blocks scheme comprising of chalets and a hotel called “the Sanbonani Resort”.
- [2] This application was preceded by a judgment of this Court dated 12 September 2012, a judgment by the Supreme Court of Appeal and a judgment by the Constitutional Court.[1]
- [3] The Constitutional Court referred the matter back to the High Court Pretoria under case number 49588/09 and Fourie AJ delivered her judgment on 11 February 2019.
- [4] Yet another appeal followed to the Supreme Court of Appeal under case number 655/2019 and a Consent Order was issued on 2 September 2020 after the SCA granted certain relief in favour of the Plaintiffs.
- [5] The relevant part of the SCA Order provides as follows, that:

“2. The claim by the appellants to declare invalid any shares held by any of the respondents in respect of share blocks 57-60 and SBCF and 61-63 SBCP may be included in the action already instituted by the appellants under section 266 of the Companies Act, 61 of 1973 (“the section 266 action”).

“3. The appellants, should they wish to do so, shall be entitled to amend the particulars of claim in the section 266 action:

3.1. To include a claim in respect of the shares referred to in paragraph 2 above; and

3.2. To include the allegations regarding the invalidity of an allocation of shares in respect of sites 27-34, as depicted at annexure B (page 79 of the present SCA record).

[6] The SCA Consent Order was in certain respects inchoate, therefore the parties reached an agreement on how to proceed with the matter. The agreement is contained in correspondence, dated 10 February 2021 and 15 March 2021 respectively.

[7] In terms of the agreement the claims referred to in paragraphs 2 and 3 of the SCA Consent Order will be resolved at trial, commenced by the issuing of a fresh summons in respect of such claims.

[8] The Plaintiffs (also referred to as ‘the Clubs’) instituted action under above case number.

[9] The First, Second, Third, Fourth, Fifth, Sixth and Seventh Defendants (also referred to as ‘Sanbonani’) served their notice of intention to defend on 13 August 2021.

[10] The dispute is in essence, whether under the provisions of the Shareholders’ Oppression Remedy, provided for in section 252 of the Companies Act, 61 of 1973, the Plaintiffs have established that they are entitled to the amendment of the First Defendant’s (amended) articles of association and whether they are entitled to reverse certain share allocations made in accordance with the First Defendant’s articles of association.

[11] The Defendants delivered four special pleas including a plea-over dated 20 September 2021.

[12] The Plaintiffs delivered its notice amendment in terms of Rule 28(1) dated 11 April 2022 and its notice of amendment in terms of Rule 28(1) dated 29 April 2022.

[13] The Defendants did not oppose or except to these amendments and having received no objection to the amendment, the Plaintiffs duly effected the amendment.

[14] The Defendants served a Notice to Strike Out paragraphs 40 and 41 of the amended particulars of claim dated 30 May 2022.

[15] The Plaintiffs held that the cause of complaint was not a ‘valid complaint’.

[16] The Defendants’ Application to Strike Out was served on 5 July 2022 and the Plaintiffs filed its notice of intention to oppose dated 12 July 2022.

Application to strike out

- [17] This is an opposed interlocutory application to strike out paragraphs 40 and 41 of the Plaintiffs' (Respondents in this application) amended particulars of claim.
- [18] The Applicants in this application to strike out are the Defendants in the main action.
- [19] The Respondents are timeshare clubs engaged in the timesharing business and holds shares in the First Applicant (Sanbonani).
- [20] The First to Seventh Applicants launched the application to strike out paragraphs 40 and 41 of the amended particulars of claim on the grounds of irrelevance.
- [21] Paragraphs 40 and 41 of the amended particulars of claim indicate that the allocation of share blocks 57 SBCF to 60 SBCF as well as 61 SBCP to 63 SBCP is contrary to Section 10(b) of the Share Blocks Control Act, 59 of 1980, as read against the definition of common facilities and common property.

- [22] Paragraph 40 of the amended particulars of claim reads as follows:

"The allocation of share blocks to 57 SBCF to 60 SBCF as well as 61 SBCP to 63 SBCP is contrary to section 10(b) of the Share Blocks Control Act as read against the definition of common facilities and common property."

- [23] Paragraph 41 of the amended particulars of claim reads as follows:

"41. The allocation of share blocks to 57 SBCF to 60 SBCF as well as 61 SBCP to SBCP is further contrary to section 7(2) of the Share Blocks Control Act, in that:

41.1. when read in the context of the Share Blocks Control Act it demonstrates that the notions of exclusive use and common property are implicit within the Share Blocks Control Act:

41.2 The allocation of share blocks to common property in such circumstances is inimical to the scheme of the Share Blocks Control Act and conflicts with the underlying assumptions of the Share Blocks Control Act."

- [24] Paragraph 42 of the amended particulars of claim reads as follows:

"42. The wrongful allocation ("the allocation") to Development of the shares referred to in paragraph 40 and 41 above ("the impugned shares"), by relying on Article 3.5 is unfairly prejudicial, unjust or inequitable to the plaintiffs, alternatively to allocation has allowed the affairs of Sanbonani to be conducted in a manner unfairly prejudicial, unjust or inequitable to the plaintiffs in that"

The dispute

- [25] It is the Applicants' submission that the allegation of contravention of the Share Blocks Control Act are irrelevant in the disputed issues in the oppression claim because the Respondents do not allege any connection between the alleged contravention of the Share Blocks Control Act and the relief claimed under the statutory oppression remedy.

- [26] The Applicants argued that the illegality pleaded at paragraphs 40 and 41 of the amended particulars of claim pertain to an alleged contravention of the Share Blocks Control Act, and even if proven, does not amount to conduct that is alleged to have been oppressive of the minority shareholders of the First Defendant.
- [27] It was argued by Mr. Rome for the Applicants that the amended paragraphs are irrelevant and prejudicial.
- [28] The basis of this argument was that the agreement between the parties was that a fresh summons be issued in respect of the Respondents' claims pertaining to the shares referred to in paragraphs 2 and 3.2 of the SCA Consent Order read with the proposal letter.
- [29] It is the Applicants' view that section 252 of the Companies Act, the SCA Consent Order and the Applicants' proposal letter should be the basis from which this application to strike out must be determined.
- [30] Section 252 of the Companies Act of 1973 deals with a remedy that a member has when complaints that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company.
- [31] Mr. Epstein on behalf of the Respondents disputed that these amended paragraphs are irrelevant to the action.
- [32] The Respondents' argument is that the nexus between the wrongful allocation of the shares and the oppression remedy relied upon is apparent from paragraph 42 of the amended particulars of claim as there is a pleaded nexus between the wrongful allocation and the oppression remedy relied upon and the infringements.
- [33] The Respondents' case is in essence that the unfair, prejudicial and oppressive conduct by the Applicants is factually linked to the grounds listed in paragraph 42 of its amended particulars of claim.

Submissions

- [34] Turning to the merits of the application. In argument on behalf of the Applicants, Mr. Rome held that the Respondents must bring their claim in respect of the cancellation of the shares under theegis of section 252 given the background of the SCA Consent Order and the Respondents' proposal letter. The oppression remedy is meant to temper the majority rule and you do not need to raise the issue of legality under the oppression remedy.
- [35] According to the Applicants' this matter is a question of mixed fact and law, however, the Respondents' view is that this is a question of law and therefore inappropriate to be determined in a Rule 23 application.

- [36] It was argued that paragraphs 40 and 41 of the amended particulars of claim, dealing with illegality, have no link or nexus with paragraph 42, which is dealing with the oppression remedy.
- [37] The court was referred to *Rail Commuters Action Group v Transnet Limited*
- [2] for a useful summation on applications to strike out. It was held that all that concerns the Court in an application to strike out, is whether or not the passages sought to be struck out are relevant in order to raise an issue on the pleadings.
- [38] The court was also referred to *Living Hands (Pty) Ltd v Ditz*
- [3] where the court held although a decision whether or not to strike out is in the discretion of the court, which should be exercised judiciously, prejudice is a key consideration.
- [39] Uniform Rule 23(2) stipulates that an application to strike out shall not be granted unless the applicant is prejudiced.
- [40] It was argued for the Applicants that any allegations pleaded, which do not apply to the matter at hand and do not contribute one way or another to the decision of such matter, should be struck out. It was further submitted that if evidence cannot be led to allegations pleaded, because it is irrelevant, it can be struck as irrelevant.
- [41] It was argued on behalf of the Applicants that the type of allegations one would usually make under the oppression remedy are to be seen at paragraph 42.1 of the particulars of claim. These allegations need to be proved at trial and have nothing to do with the contravention of a statute.
- [42] The Applicants referred the court to *Aspek Pipe Co (Pty) Ltd v Mauerberger*[4] stresses that the oppression remedy is an exception to the usual principle of majority rule. This remedy tempers the power in circumstances where it might be used unfairly to the prejudice of the minority shareholder. Therefore, according to the Applicants, it is unnecessary to go into the legality of obtaining shares.
- [43] The court was referred to *Meintjes v Wallachs Ltd*
- [5] where it was held that the question of relevancy is the most important of the grounds. It is a question mixed law and fact in respect of which the judge must determine whether the facts alleged are or are not relevant to the issue and whether the allegations will take the matter further or whether any evidence led on them would be relevant at the trial.
- [44] It is the Applicants' case in short that there is no nexus between the alleged contravention of the Share Blocks Control Act and the relief claimed under the statutory oppression remedy.
- [45] Mr. Epstein, on behalf of the Respondents, held that after the summons was issued, the Respondents amended its particulars of claim after receipt of the Applicants' special pleas.

- [46] It was reiterated that the Applicants raised no objections to the proposed amendments and after the amended pages were effected the Applicants did not take exception.
- [47] After the amended pages were delivered the Applicants launched this application to strike out paragraphs 40 and 41 on basis that the Respondents are confined to a claim based only on article 3.5. Mr. Epstein argued the Applicants say that: “Because you relied on 3.5 initially you are now confined to any claim you bring even if these articles are registered in contravention of other sections of the statute, like section 72 and section 10(b) of the Share Blocks Control Act.”
- [48] The Respondents rejected the Applicants’ view that the Respondents are confined to a claim only under the oppression remedy and article 3.5 and any other claim is inadmissible. The Applicants have already pleaded to paragraph 40 and 41 prior to the amendment. The Respondent alleged in these paragraphs that the allocation of certain shares was contrary to sections 10(b) and 7(2) of the Share Blocks Control Act. The Applicants, in its plea, denied these allegations.
- [49] It was argued on behalf of the Respondents that for the Applicants to succeed in this application they will have to show that the Respondents are not allowed to rely on sections 10(b) and 72 and that their claim is confined to Article 3.5.
- [50] Mr. Epstein argued that this means that the Applicants expect of this court to make a finding on what the terms of the agreement between the parties were and whether it is only confined to the article 3.5 taking into account the following:
- [50.1] In paragraph 37 of the particulars of claim reference is also made to section 10(b) of the Share Blocks Control Act 59 of 1980.
- [50.2] In paragraph 38 of the particulars of claim reference is made to section 7(2) of the Share Blocks Control Act.
- [50.3] There is no application to strike out paragraphs 37 and 38 of the amended particulars of claim as being irrelevant although these paragraphs also refer to the relevant sections of the Share Blocks Control Act.
- [51] Mr. Epstein raised the questions of whether it means that reference to the oppression remedy in the Consent Order confines the action to Article 3.5 and does the Consent Order stipulate that the Respondents can only bring its new action, based on Article 3.5.
- [52] Mr. Epstein informed the court that the SCA Consent Order was drafted by the parties after the SCA indicated that they were going to grant some of the relief to the Respondents. In terms of the Order certain shares were declared invalid, not because of Art 3.5 but because those blocks did not exist.

- [53] Mr. Epstein explained that the issue pertaining to “maintenance week” was that the Applicants took these shares, which they were not entitled to. It cannot be disputed that the issue surrounding maintenance week is not part of Article 3.5, but it stands alone. Therefore, the Respondents’ claim cannot be confined to Article 3.5 only.
- [54] The Respondents submitted that it is unreasonable of the Applicants to expect of this court, without having the full background and not being privy to the circumstances surrounding the Consent Order, to make a finding whether certain paragraphs are irrelevant in the action.
- [55] It was argued that it cannot be expected of this court to find that the paragraphs are irrelevant if the original founding papers are not before this court and this court will therefore not know that sections 10(b) and 7(2) of the Share Blocks Control Act were pertinently referred to in those papers.
- [56] The Clubs’ view is that paragraph 42 of their amended particular of claim sets out why the conduct of the Applicants were oppressive. A litigant must tell a court what has been done by the majority of shareholders. It was argued that it is not for this court to make a decision pertaining to the conduct of the majority of shareholders. The trial court will decide whether the conduct as set out in paragraph 42 is oppressive or not.
- [57] It was argued that the Clubs must make out a case in the main action as to why the conduct of Sanbonani is unfair and unjust. The content of paragraphs 40, 41 and 42 must be tested by the trial court because a court cannot close its eyes to alleged unlawful conduct.
- [58] The Respondents further argued that this matter should have gone by exception and not by way of an application to strike out. There are core allegations that need to be made in addition to Article 3.5 and the trial court should determine whether the Clubs proved its case.

The Law

- [59] Rule 6(15) of the Uniform Rules of Court provides that:

“The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious, or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court may not grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted.”

- [60] Rule 23(2) of the Uniform Rules of Court provides that:

“Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the aforesaid matter...., and

- (a),

(b) the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in the conduct of any claim or defence if the application is not granted.”

[61] An application to strike out is an interlocutory application procedure aimed to remove scandalous, vexatious or irrelevant matter

from pleadings.

[62] Irrelevant allegations have been held that if it is irrelevant to the issues raised on the pleadings, i.e., allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.

[63] The onus of showing that the allegations must be struck out rests on the Applicant.

[64] In *Swissborough Diamond Mines (Ptd) Ltd and Others vs Government of the Republic of South Africa and Others*

[6] the court referred to various decisions and re-emphasised that for the striking out of any matter in an affidavit which is scandalous, vexatious or irrelevant, the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted. The court has a discretion which of course should be exercised judiciously but the key consideration is ‘prejudice’. [7]

[65] In *Beinash v Wixley*

[8] the court confirmed that the applicant must show that the matter sought to be struck out is indeed scandalous, vexatious or irrelevant and it must satisfy the court that he or she will be prejudiced should the matter not be struck out.

[66] In *Vaatz v Law Society of Namibia* [9] the court stated that irrelevant matter is ‘allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter’. The court further held that in relation to prejudice “does not mean that, if the offending allegations remain, the innocent party’s chances of success will be reduced. It is substantially

less than that”.

[67] The court in *Vaatz* stated further that no matter may be struck out unless applicant would be prejudiced in its case if such matter were allowed to remain. Irrelevant matter can be defined as allegations which does not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.

[68] In *Rail Commuters’ Action Group and Others v Transnet Ltd and Others*

[10] it was stated that ‘irrelevant’ for the purpose of the Rule means irrelevant to an issue or issues in the action.

[69] The definition of relevance was confirmed in *Meintjes v Wallachs Ltd*.

- [11] The correct test to apply is whether the matter objected to is irrelevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the plea of which it forms a part. That plea may eventually be held to be bad, but, until it is excepted to and set aside, it embodies an issue by reference to which the relevancy of the matter which it contains must be judged.”
- [70] It was further stated that: “the court will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action. All that concerned the Court is whether or not the passage or passage sought to be struck out is or are relevant in order to raise an issue on the pleadings.”
- [71] The Applicants referred to *Stephens v De Wet* [12] held that a decision whether or not to strike out is discretionary in nature.
- [72] *Bosman v Van Vuuren*
- [13] held that question of striking out depends solely on the construction of the Rule 35. “To say that it is irrelevant or superfluous because it raises a question which will have to be decided adversely at the trial would be to elevate Rule 35 from a mere rule of pleadings to a rule providing for the determination of preliminary points of law.” Bristowe J confirmed that the test to be applied is whether the matter objected to is or is not relevant to an issue in the action.
- [73] Full Bench in *Weeber v Vermaak en ‘n Ander*
- [14] the court concluded that the words “the court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted” are strictly and narrowly interpreted. “The phrase ‘prejudice to the applicant’s case’ clearly does not mean that, if the offending allegations remain, the innocent party’s chances of success will be reduced.”
- [74] In *Richter v Town Council of Bloemfontein*, [15] De Villiers JP said at 173: “it is further asked in the application that paras 4 and 5 of the declaration be struck out on the ground that they are irrelevant and superfluous. Now, I must admit that it is not clear to me that these paragraphs are relevant, but, at the same time, I feel that it is not impossible that they may become relevant in some way not yet appears. If there is that possibility, it would be proper to follow the practice of the English courts, which is that an application to strike out irrelevant matter in a pleading will not be granted if a doubt exists whether the matter is relevant or not. Even apart from that, it is possible to regard both paras 4 and 5 as mere recitals of the history of the case, and I therefore seem to me that the paragraphs should be allowed to stand.”

[75] The court shall not grant the application unless satisfied that the applicants will be prejudiced in the conduct of his claim or defence if the application to strike out is not granted. This is not a matter of discretion as stated in *Rail Commuters Action Group v Transnet Limited*

[16] .

[76] Thring J further stated that: “The Court will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action.” It was also held that if there is a possibility that the allegations raised in the pleadings may become relevant, it may not be struck.

[77] *Golding v Torch Printing and Publishing Co (Pty) Limited and Others*:

[17] “a decisive test is whether evidence should at the trial be led on the allegations now challenged in the plea. If evidence on certain

facts

would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded:”

[78] *Deeley-Barnard v Thambi*

[18] the court stated that Rule 23 is not intended for the determination of preliminary point of law. The Respondents argued that the issue is a point of law and the Applicants conceded this to state it is a matter of mixed fact and law.

[79] The claim is brought in terms of section 252 of the Companies Act. The minority shareholder bears an onus of proof and must show

that the impugned conduct is prejudicial or disregards its interest and that the prejudice has occurred unfairly.

[80] *Grancy Property Limited v Mnala*

[19] the court held that a court has a wide discretion to grant just and equitable relief from oppressive and unfairly prejudicial conduct. The court as a wide discretion in determining if such conduct complained of is oppressive, unfairly prejudicial, or unfairly disregarded the interests of an Applicant.

[81] *In Eriger (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council*

[20] the court held that:

“The legal validity is not an issue to be considered in an application to strike out”.

[82] *Bosman v Van Vuuren and Another*

- [21] held that the court is rather concerned with the question of are the passages sought to be expunged relevant to the issue which can fairly be said to be raised on the pleadings. The court rejected the argument that if a defence is bad in law, it must of necessity be irrelevant and superfluous. At 832 it was stated that the question of striking out depends solely on the construction of Rule
35. To say a matter is irrelevant because it raises a question which will have to be decided at trial, would be to elevate Rule 35 from a mere rule of pleading to a rule providing for the determination of preliminary points of law.
- [83] *Geyser and Another v Geyser*
- [22] stated courts of law will discourage and set their face against applications under Rule 35, unless the party applying is clearly embarrassed in his pleading and in preparation of his case, by the form of his opponent's pleadings.
- [84] *Gold Fields Ltd and Others v Motley Rice LLC*
- [23] at paragraph 119 "that the last sentence in rule 6(15) is of importance as it places substance over form. The rationale behind the striking-out jurisdiction of the court is sound. It promotes orderly ventilation of the issues, promotes focus on the real issues, prevents proliferation of issues, unnecessary prolix and irrelevancies that unduly burden records in application proceedings."
- [85] An action which is unsustainable is vexatious, but this must appear as a certainty, for it is only in very exceptional circumstances that the doors of the court will be closed upon anyone who desires to prosecute an action.[24]
- [86] Bristowe J, dealing with the former Transvaal rule 35, remarked in *Bosman v Van Vuuren*:
- [25] "the rule is merely a rule of pleadings, and I think it was only intended to apply to matter which is argumentative, irrelevant or superfluous from the point of pleading, that is having regard to the issues intended to be raised. If the matter complained of is relevant to an issue in the action, I cannot see how it can be said to be either irrelevant or superfluous. To say that it is irrelevant or superfluous because it raises a question which will have to be decided adversely at the trial would be to elevate rule 35 from a mere rule of pleading to a rule providing for the determination of preliminary points of law."
- [87] A similar view was expressed in *Meintjes v Wallachs Ltd*: [26] "it appears to me that whether matter is or is not relevant is a question of mixed fact and law. The Judge has to determine whether the facts alleged are or are not relevant to the issue, if they are relevant to the issue then they should stand, even though the plaintiff may not succeed in proving them at the trial. But if the facts are irrelevant, if they have nothing to do with the issue which has to be tried by the Court, or if evidence cannot be led upon them because they are too vague, then the Court will strike out the passages complained of because they are irrelevant to the issue."

- [88] If evidence at the trial as to certain allegations will be relevant, the allegations cannot be struck out under the rules. [27]
- [89] In Rail Commuters Action Group v Transnet-matter if there is a possibility that the allegations raised in the pleadings may become relevant, it may not be struck.
- [90] Being “irrelevant” for the purpose of the Rule, means irrelevant to an issue or issues in the actions.[28]
- [91] Innes CJ said in Stephens v De Wet:[29]

“The correct test to apply is whether the matter objected to is relevant to an issue in the action. And no particular section can be irrelevant within the meaning of the Rule if it is relevant to the issue raised by the Plea of which it forms part.”

- [92] Rail Commuters’ Action Group and Others v Transnet Ltd and Others
- [30] It was confirmed that the court will not concern itself with the validity or otherwise of the claim, or whether it raises a cause of action. All that concerns the court is whether the passage sought to be struck out is irrelevant in order to raise an issue on the pleadings.\
- [93] In Golding v Torch Printing and Publishing Co (Pty) Ltd and Others
- [31] it was held at 1090:

“A decisive test is whether evidence should at the trial be led on the allegations now challenged in the plea. If evidence on certain

facts

would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded.”

Applying the principles on the facts

- [94] These principles as laid down by our courts must be applied to the present case.
- [95] It is to be noted that Uniform Rule 23(2) stipulates that the court shall not grant an application to strike out unless it is satisfied that the Applicant will be prejudiced in the conduct of his claim or defence if it be not granted.
- [96] The Rule is peremptory and therefore the Applicants must show prejudice in the conduct of their defence, should the matter not be

struck out.

- [97] What the Applicants is asking the court is to find the paragraphs to be irrelevant on the basis that the averments pleaded, falls outside the egis of the section 252 claim, the SCA Consent Order and the agreement.

- [98] In essence the Applicants ask this court to make a factual finding that the claim may only be confined to Art 3.5 and the court must further make a finding on what the agreement was and therefore strike out par 40 and 41 of the amended particulars of claim.
- [99] The Applicants application to strike out is on the basis that the content of paragraph 41 and 41 is irrelevant and do not contribute to a decision of the action.
- [100] Rule 23(2) is clear in that the court shall not grant an application to strike out unless the court is satisfied that the Applicant is prejudiced. Even if the court finds that the averments are irrelevant, the court shall not strike out the paragraphs unless there is prejudice.
- [101] The Applicants has the onus to prove the content is irrelevant and that they will be prejudiced in their case, should the matter not be struck out.
- [102] I am inclined to follow De Villiers JP's view in *Richter v Town Council of Bloemfontein* cited above. It might be possible that the content pleading in paragraphs 40 and 41 might be relevant or become relevant and that the content of these paragraphs can be seen as the 'background' to the Respondents' oppression claim.
- [103] The court must consider the particulars of claim as a whole and then rule whether the paragraphs complained of, are or are not relevant to the issue. If they are relevant to the issue, then they should stand even though the Respondents may not succeed in proving it at trial.
- [104] It is evident that the pleaded sections in terms of the Share Blocks Control Act are not new to this matter. The Respondents' complaint pertaining to illegality of the registration of the Articles features as far back as 2012 when the matter was heard in this division.
- [105] Paragraph 3.1 of the judgment handed down by the Constitutional Court dated 23 May 2017 also made mentions the illegality of the registered shares and whether the allocation of these shares is illegal and liable to be declared invalid.
- [106] The Applicants are of the view that the content of paragraphs 40 and 41 is irrelevant for trial and sidetrack the crisp issues. It is a procedural issue which manifests prejudice. It is irrelevant to bring a statutory contravention in terms of the Share Blocks Act if the claim should be based on oppressive conduct.
- [107] The contents of paragraph 40 and 41 of the particulars of claim are prejudicial to the Applicants because they contain allegations that the Applicants or some of them, acted unlawfully in amending the articles. The offending paragraphs 40 and 41 of the particulars stray beyond such confines and are therefore irrelevant to the issues in dispute.

- [108] The Respondents argued that the Applicants have already pleaded to the paragraphs they sought to strike out and there can be no prejudice after thirteen years of litigation where the Respondents complain illegality was from the outset present. The matter is finally set for trial and this court cannot be asked to make an order that the Respondents are precluded from making the allegations as they did. The Applicants should have objected to the amendment.
- [109] The view of the Applicants, that they will be prejudice because the case will now last longer, does not comply with the test for prejudice as envisaged in Rule 35. Given the history of the matter I am not persuaded that the Applicants will suffer any prejudice should these paragraphs be allowed to stand.
- [110] To say that it is irrelevant or superfluous because it raises a question which will have to be decided adversely at the trial would
- be to elevate Rule 35 from a mere rule of pleading to a rule providing for the determination of preliminary points of law.
- [111] Paragraph 37 and paragraph 38 of the amended particulars of claim refers to sections 10(b) and 7(2) of the Share Blocks Control Act, 59 of 1980.
- [112] Paragraph 40 deals with the allocated share blocks which are contrary to section 10(b) of the Share Blocks Control Act. The unfair, prejudicial and oppressive conduct is factually linked to the grounds listed in paragraph 42 of the particulars of claim and this matter must be dealt with in evidence.
- [113] For this court to make a finding that a paragraph should be struck out because it does not indicate “a visible departure from the standards of fair dealing and a violation of the conditions of fair play” to warrant oppressive conduct, is a factual enquiry and I am of the view that such a finding cannot be made by this court and the trial court will be in a position to decide after the leading of evidence.
- [114] All that concerns the court is whether the passage sought to be struck out is irrelevant in order to raise an issue on the pleadings.
- [115] In Vaatz supra it was stated that irrelevant matter can be defined as allegations which does not apply to the matter in hand and do not contribute one way or the other to a decision of such matter.
- [116] Applying the law and test as set out in the case law cited supra , In the matter at hand, it is not for the Defendants to assume that the Plaintiffs have failed to meet this test at the outset of the pleadings and it is a matter for the trial court to after evidence is led.

- [117] Considering the protracted litigation in this matter I am of the view that the Respondents should be given the opportunity to properly ventilate their claim. Should the allegations complained about be struck out, the prejudice suffered by the Respondents will most likely outweigh any prejudice suffered by the Applicants, should the matter stand.
- [118] This is a complex matter as can clearly be seen from its litigation history. It seems to me that the Respondents wish to plead and prove a course of conduct on the part of the Applicants which forms the basis of the Respondents' complaints and the court should be cautious to close the doors on the Respondents' case.
- [119] The Applicants did not object to the amendments and they have pleaded to the paragraphs in question.
- [120] The Applicants do not contend that they are unable to plead adequately to the relevant allegations. As held in *Geyser supra*, the courts should be reluctant to grant application under Rule 35 unless the party applying is clearly embarrassed in his pleading and in preparation of his case, by the form of his opponent's pleadings.
- [121] I do not see how the Applicants can be prejudiced in the conduct of its defence if the allegations are allowed to stand. To say matter is irrelevant because it raises a question which will have to be decided at trial, would be to elevate Rule 35 from a mere rule of pleading to a rule providing for the determination of preliminary points of law.
- [122] If the court is in doubt as to whether a passage sought to be struck out as irrelevant is in fact irrelevant, it will not strike out the passage. If evidence on certain facts would be admissible at the trial those facts cannot be regarded as irrelevant when pleaded. [32]
- [123] The court in *Rail Commuters' Action Group v Transnet Ltd*
- [33] stated that the Court will not concern itself with the validity of a claim or whether it raises a cause of action. The Court is only concerned whether the passages complained about, are relevant in order to raise an issue on the pleadings.
- [124] By plain reading of the amended particulars of claim the content of paragraph 40 and 41 is valid and raise an issue on the pleadings as an 'introduction' to and basis of the oppression claim in terms of the Companies Act.
- [125] The Applicants cannot allege that they are unable to plea to these averments because they are embarrassed in their pleading and in preparation of their case. In fact, the Applicants have already pleaded to paragraphs 40 and 41 of the amended particulars of claim and denied the allegations that the allocations of certain share blocks are contrary to Section 10(b) and 7(2) of the Share Blocks Control Act.

[126] The Applicants furthermore pleaded to paragraph 37 and paragraph 38 of the amended particulars of claim where reference was made to section 10(b) and 7(2) of the Share Blocks Control Act. The Applicants admitted the contents of these paragraphs. The Applicants did not bring an application to strike out these paragraphs as not being relevant to the oppression claim.

[127] In *Golding v Torch Printing* supra it was stated that if evidence on certain facts would be admissible at the trial, those facts cannot be regarded as irrelevant when pleaded. The Respondents will have to lead evidence on the allegations in paragraph 40 and 41 and prove same. Likewise, the

Applicants will be able to lead evidence in rebuttal.

[128] Whether the allegations are relevant to the issue, is a question which can only be determined at trial when the allegations are before the Court and the Respondents makes good or fails to make out their case in regard to it.

[129] The Respondents' complaint of unlawful conduct by some of the Applicants has been present in the pleadings as far back as 2012 when the matter was heard by Bertelsmann J in this division. It is evident that the content of paragraphs 40 and 41 has been the Respondents' complaint since the outset of the litigation:

[137.1] It was argued by the Respondents that this court is not privy to the founding papers in the 2012 matter, before Bertelsmann J, which would show that the content of the paragraphs complained about have been part of the pleadings from the outset of litigation between the parties.

[137.2] The 2016 SCA judgment stated as follows: "The clubs mainly attack the substance of Shareblock's articles, which they contend were unlawfully registered and oppressive to the Shareblock's minority shareholders."

[137.3] The CC Court Order of 2017 referred to allegations of Mr Harri's unlawful conduct which was unfairly, prejudicially unjustly and inequitably.

[130] There is a golden thread running through the previous pleadings of allegations of unlawful conduct by some of the Applicants in obtaining common property and common facilities.

[131] The Applicants argued that one cannot lead evidence on the illegality pleaded and that the evidence will be irrelevant. As confirmed in the *Boost Sports v SA Breweries*,^[34] this court need not embark upon a detailed investigation of the merits of in this application. The question of whether evidence on the impugned paragraphs will be admissible or not or relevant or not, is for the trial court to decide.

- [132] The Applicants argued that the prejudice is that the claim should have been certain and contained in terms of section 252. The objection is that the offending paragraphs of alleged contravention of the Share Blocks Act was not intended to be referred to trial under the terms of the SCA Consent Order and the proposal.
- [133] That is insufficient reason to justify the paragraphs to be struck out. I can find no reason why the impugned paragraphs should be struck out given the history of the matter and given that the Applicants have already pleaded to these paragraphs. I am also not able to apprehend any real prejudice to the Applicants if the allegedly objectionable matter is not struck out.
- [134] By following what was stated in Meintjes *supra* and by reading the pleadings as a whole, it cannot be said that the paragraphs are irrelevant to the issue when the pleadings. This court cannot arbitrarily cut out a portion of the pleadings and say it is not relevant to the issue. Whether or not paragraphs 40 and 41 is relevant is a question which can only be determined at the trial. The primary question in terms of the Rules is whether the Applicants will be prejudiced should the matter stand.
- [135] The argument of the Applicants that they will suffer prejudice because they are now compelled to challenge the allegations of illegality and those allegations would result in 'what is not an issue in the matter will become an issue' does not accord with the meet the strict application of Rule 35 nor the rules laid down by the case law cited above.
- [136] The prejudice seems to be that the Applicants were under the impression that the agreement was that the current action would only be dealing with the oppressive conduct which stand on the premise that registration of article 3.5 has allowed the majority to engaged in oppressive conduct. This argument does not meet the requirements of Rule 35. The Applicants have the onus to prove prejudice should the allegations stand, irrespective of whether these allegations are irrelevant.
- [137] There is nothing before this court to suggest that the paragraphs sought to be struck out is inadmissible at the trial.
- [138] The court has a discretion which should be exercised judiciously. The key consideration as can be seen from the Rule and case law cited, is that of prejudice.
- [139] It was argued that the illegal conduct as set out in paragraphs 40 and 41 is irrelevant to the question of whether the conduct of the Applicants was oppressive of the minority shareholders in the First Applicant.
- [140] The wording of section 252(3) of the Companies Act indicates that it was intended that the Court should have a wide and unfettered

discretion as to what order it should make pertaining to matters complained off. I am of the view that if the Respondents prove their allegations of illegality, it is for the trial court after hearing evidence, to decide if such conduct amounts to oppressive conduct to minority shareholders of the First Applicant.

[141] Considering *Eriger supra*, an application to strike out is not appropriate when seeking to challenge the legal validity or soundness of paragraphs in a pleading. Rule 35 is a rule of pleading intended to apply to matters which are argumentative, irrelevant or superfluous from the point of pleading. Whether or not the averments of illegality in paragraphs 40 and 41 has a nexus to paragraph 42 is a question for the trial court after evidence is heard.

[142] To sum up, even if I was convinced that the contents of paragraphs 40 and 41 are irrelevant to the oppressive claim pleaded at paragraph 42, I cannot grant the application unless satisfied that the Applicants will be prejudiced in their defence, should the application not be granted. The Applicants have failed to advance any basis on which they are prejudiced should the allegations complained about, not be struck

out.

[143] I fail to see how the Respondents can be precluded from making allegations of illegal conduct to pave the way for their claim under section 252 if these allegations have always been the Respondents case from the outset of the litigation a decade ago.

[144] It cannot be expected of this court to interpret the Consent Order and the subsequent correspondence between the parties to establish the context within which the Respondents were allowed to launch their action. For the Court to venture there is way beyond what is envisaged in Rule 23.

[145] The court was referred to *Sammel v President Brand Gold Mining Co Ltd*

[35] where it was held that by becoming a shareholder a person undertakes to be bound by the decisions of the majority of shareholders.

[146] What is also stated in this judgment is that a shareholder undertakes to be bound by the majority if: “those decisions on the affairs of the company are arrived at in accordance with the law.” I do not think any court can close its eyes to allegations of illegal conduct if such conduct is the reason the minority shareholders approached the court for relief. The trial court will be in a better position to adjudicate whether evidence on legality should be allowed.

[147] I am therefore not persuaded that the impugned allegations are irrelevant. In my view, they have been forming part of the Clubs complaint from the outset of the litigation.

- [148] All that concerns this court is whether the passages sought to be struck out are relevant to raise an issue on the pleadings. Given the complicated nature of the main action, I am of the view that paragraphs 40 and 41 should stand as this has been the Respondents' case throughout this matter. There can be no prejudice if the trial court decides whether evidence of illegality will be admissible or not.
- [149] I do not agree that the alleged irrelevant paragraphs are prejudicial should it stand. To prove whether the conduct of the Applicants was oppressive or not, is for the trial court to decide. I am also not convinced that the Applicants will be prejudiced in the conduct of their defence should the application not be granted.
- [150] The principle of fair dealing was affirmed in *Grancy Property Limited v Manala*
- [36] when the court commented on the wide ambit of section 163 of the new Companies Act. The court has wide discretion in determining if conduct complained of is oppressive of a shareholder.
- [151] I am of the view that this court cannot close the door on the Respondents' case and assume at this early stage that the Respondents have failed to meet the test at the outset of pleadings. It will be in the interest of justice to allow this matter to be properly ventilated and for the trial court to determine whether the Respondents have made out a case for the relief sought, after evidence is led.
- [152] I have difficulty in appreciating why the content of the paragraphs complained about should characterised as irrelevant just because it is the view of the Applicants that the content is not in line with the agreement and SCA Consent Order. It might be difficult or even impossible to lead evidence to what was pleaded in paragraphs 40 and 41, as argued by the Applicants, but that argument does not fall within the narrow application as envisaged in the Rule.
- [153] I am not persuaded that the matter under attack is irrelevant to the issue in this case. The onus of showing that the allegations must be struck out rest on the Applicants.
- [154] In exercising my discretion the application to strike out fall to be dismissed and all that remains is the issue of costs.
- [155] Ordinarily, costs should follow the event and there is no reason to deviate from this. Both Counsel submitted that costs should include costs of two counsel as both parties were represented by senior and junior counsel.

ORDER

- [1] In the result, the application to strike out is dismissed with costs and costs to include costs of two counsel.

L. BADENHORST, AJ

Acting Judge of the High Court

Gauteng Division, Pretoria

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Attorneys

Date of Hearing: 22 May 2023

Judgment

delivered: 25 July 2023

- [1] Reported as *Off-Beat Holiday Club & Another v Sanbonani Holiday Spa Shareblock Limited & Others*, 2016 (6) SA 181 (SCA); Reported as *Off-Beat Holiday Club & Another v Sanbonani Holiday Spa Shareblock Limited & Others*, 2017 (5) SA 9 (CC)
- [2] 2006
- (6) SA (C)
- [3] 2013
- (2) SA 368 (GSJ) para 76
- [4] 1968
- (1) SA 517 (C)
- [5] 1913 TPD 278
- [6] 1999 (2) SA 279 (T) at 336
- [7] See also *Tittys Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 368 F-G and *Bredenkamp and Others v Standard Bank of South Africa Ltd and Another* 2009 (S) SA 304 (GSJ) at paragraph 77.
- [8] 1997 (3) SA 721 (SCA)
- [9] 1991 (3) SA 563 (NM)
- [10] 2006 (6) SA 68 (C)
- [11] 1913 TPD 278
- [12] 1920 AD 279 at 282
- [13] 1911 TPD 825
- [14] 1974
- (3) SA 207 (O)

[15] 1920 OPD 161

[16] 2006

(6) SA 68 (C)

[17] 1948 (3) SA 1067 (C) held 1090

[18] 1922 (4) SA 404 (D)

[19] 2015 (3) SA 313 (SCA)

[20]

(1997) JOL 1327 (W) at page 16

[21] 1911 TPD 825 at 831

[22] 1926 TPD 590

[23] 2015 (4) SA 299 (GJ)

[24] See: Bisses v Boland Bank Ltd 1991 (4) SA 603 (D) at 608

[25] 1911 TPD 825 at 832

[26] 1913 TPD 278 at 285

[27] See: Golding v Torch Printing & Publishing Co (Pty) Ltd 1948 (3) SA 1067 (C)

[28] See Meintjes v Wallachs Ltd 1913 TPD 278 at 285

[29] 1920 AD 279

[30] 2006 (6) SA 68 (C)

[31] 1948 (3) SA 1067 (C)

[32] See Golding v Torch Printing & Publishing Co (Pty) Ltd 1948 (3) SA 1067 (C) at 1090

[33] 2006 (6) SA 68 (C) at 83

[34] 2015 (5) SA 38 (SCA) at paragraph 19 page 52

[35] 1969 (3) SA 629 (A) at 678

[36] 2015

(3) SA 313 (SCA) at paragraph 27

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