

SOUTH AFRICA / JUDGMENT

Von Siebel and Others v Accentuate Limited and Others (47008/13)

[2015] ZAGPJHC 99 (13 March 2015)

[2015] ZAGPJHC 99**COURT**

South Gauteng High Court, Johannesburg

BEFORE

RE Monama

CASE / FILE NUMBER

47008/13

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Source record**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****LOCAL DIVISION, JOHANNESBURG****Case****No: 47008/13****DATE:**

13 MARCH 2015

In

the matter between:

CRON

ROBERT VON

SIEBEL.....1ST

APPLICANT

LALIBELA

LIMITED.....2ND

APPLICANT

WILLOW

SECURITIES

CC.....3RD

APPLICANT

THE

TRUSTEES OF THE ELM

TRUST.....4TH

APPLICANT

And

ACCENTUATE

LIMITED.....1ST
RESPONDENT
COMPUTERSHARE
INVESTOR SERVICES (PTY) LIMITED.....2ND
RESPONDENT
STANDARD BANK
NOMINEES (TRANSVAAL) (PTY) LIMITED.....3RD
RESPONDENT
BNS NOMINEES
(PTY)
LIMITED.....4TH
RESPONDENT

JUDGMENT

Coram: RE Monama, J

Introduction

[1] On 13 December 2013 the Applicants launched an urgent interdict application. The application was set down for 19 December 2013. On the later date the parties, without prejudice agreed to a draft which was made an order of court.

[2] The order provides that:

“-1. The application is postponed sine die to be heard in the ordinary course, the costs to be reserved for determination in the

application. The Respondents reserve the right to argue urgency in respect of the costs;

2. The Respondents will deliver their answering affidavit by no later than the 27th January 2014;

3. Pending the hearing of the application and the handing down of judgment and without prejudice to any of the parties’ contentions, the Respondents undertake not to further implement or act upon;

3.1 Ordinary Resolution Number 10 and Special Resolution numbers 1 to 4 passed at the annual meeting of the shareholders of the First Respondent held on 29 November 2013 and adjourned until 6 December 2013;

3.2 Articles 5c, 5e, 5f, 27c and 27d of the memorandum of incorporation adopted by the First Respondent pursuant to Special Resolution number 5 passed at the annual general meeting of the of the shareholders of the First Respondent held on 29 November 2013 and adjourned until 6 December 2013.[1]

The order is a sequel to the events of 29 November 2013 and 6 December 2013 at the annual general meeting of the first respondent.

The factual matrix

[3] The applicants are the beneficial holders of shares in the first respondent. The first applicant's shares are held by the fourth respondent. The second applicant's shares are held by the third respondent. The third applicant's shares are registered in the name of the fourth respondent. Lastly, the fourth applicant's shares are registered in the name of third respondent. Their total beneficial shareholding is approximately 23% of the entire issued share capital in the first respondent.

[4] During 29 November 2013 and 6 December 2013 the first respondent held its general annual meeting. The applicants and/or

their representative were invited and attended. On 29 November 2013, they participated in the proceedings and voted in respect of certain transactions and resolutions. At the end of the meeting a certain Mr Sack raised certain issues of proxies and letters of representation. The meeting was adjourned until 6 December 2013. When the meeting resumed the applicants' votes were excluded. The votes were alleged to have contravened the law. The relevant Sections 56 and 58 of the Companies Act, Act 71 of 2008 ("the Act")[2].

[5] The exclusion was based on two grounds. The first ground relates to the proxies and letters of representation. The second ground of exclusion is based on the second applicant's failure to disclose the details of its beneficial shareholding.

[6] The exclusion of the applicants' votes enabled the passage and adoption of certain crucial resolutions. These resolutions are incorporated in the draft order which was finally made an order of court on 19 December 2013.

[7] The applicants contend that that their votes were unlawfully and unfairly excluded. A fortiori they contend that the adoption of the resolutions were unlawful. In the alternative they relied on Section 163 of the Companies Act, No 71 of 2008 ("the Act [3]"). They argued that the conduct of the exclusion of their votes was prejudicial and oppressive.

The Issue

[8] The first issue is the interim relief. This followed by the exclusion of the votes. Lastly, the final issue is the alleged oppressive or prejudicial conduct.

The legal framework

[9] The respective parties rely on the provisions of two different acts. The applicants rely on the provisions of the Financial Markets Act[4] ("the Markets Act"), and the directives[5] issued by South African Central Depository ("Strate Limited"). On the other hand the respondents rely on the provisions of Sections 56 and 58 of the Act.

The Financial Markets Act and its scope

[10] The preamble to the above Act is instructive. It set the tone for its application and its ambit regulate exchanges, central securities depositories, clearing houses and trade repositories; to regulate and control securities trading, clearing and settlement, and the custody and administration of securities; to prohibit insider trading, and other market abuses, to provide for the approval of nominees; to provide for codes of conduct; to replace the Securities Services Act, 2004, as amended by the Financial Services Law General Amendment Act, 2008, so as to align this Act with international standards; and to provide for to license and matters connected therewith.” “-the regulation of the financial markets;

The relevant Sections of the Companies Act

“(1) Except to the extent a company’s Memorandum of Incorporation provides otherwise, the company’s issued securities may be held by and registered in the name of one person for the beneficial interest of another person.

- (2) A person is regarded to have a beneficial interest in a security of a public company if the security is held nominee officii by another person on that first person’s behalf, or if that first person:-
 - (a) if married in community of property to a person who has a beneficial interest in that security.
 - (b) is the parent of a minor child who has a beneficial interest in that security;
 - (c) acts in terms of an agreement with another person who has a beneficial interest in that security, and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in that security;
 - (d) is the holding company of a company that has a beneficial interest in that security;
 - (e) is entitled to exercise or control the exercise of the majority of the voting rights at general meeting of a juristic person that has a beneficial interest in that security; and
 - (f) gives directions or instructions to a juristic person that has a beneficial interest in that security, and its directors or the trustees are accustomed to act in accordance with that person’s directions or instructions.
- (3) If a security of a public company is registered in the name of a person who is not the holder of the beneficial interest in all of the securities so held, the number and class of securities held for each person with a beneficial interest, and the extent of each such beneficial interest.
- (4) The information required in terms of subsection (3) must_

- (a) be disclosed in writing to the company within five business days after the end of every month during which a change has occurred in the information contemplated in subsection (3), or more promptly or frequently to the extent so provided by the requirements of a central securities depository; and formalities, except to the extent that the Memorandum of Incorporation provides otherwise,

provided that-

- (i) every such person was present at the board meeting when the matter was referred to them in their capacity as shareholders;
 - (ii) sufficient persons are present in their capacity as shareholders to satisfy the quorum requirements set out in section 64; and
 - (iii) a resolution adopted by those persons in their capacity as shareholders has at least the support that would have been required for it to be adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholder's meeting; and
- (b) when acting in their capacity as shareholders, those persons are not subject to the provisions of Sections 73 to 78 relating to the duties, obligations, liability and indemnification of directors."

Participation at the annual general meetings in terms of the Act

- [12] The Act confers certain powers on the members in the general meetings. The powers are contained in Section 58 of the Act. The section governs the right to participate at the meeting of the company. It provides that:

“(i) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to-

- (a) participate in, and speak and vote at , a shareholders meeting on behalf of the shareholder; or
- (b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section

60. [Subs.

- (2) A proxy appointment-

- (a) must be in writing, dated and signed by the shareholder; and
 - (b) remain valid for-
- (i) one year after the date on which it was signed; or

(ii) any longer or shorter period expressly set out in the appointment, unless it is revoked in a manner contemplated in subsection 4(2), or expires earlier as contemplated in subsection (8) (d).

Oppressive or prejudicial conduct in terms of the Act

[13] The Act has provisions which provide a relief from oppressive or prejudicial conduct or from the abuse by shareholders or directors of companies. The Act provides a mechanism to deal with oppressive or prejudicial allegations. It provides that:

“A shareholder or a director of a company may apply to court for relief if

- (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 interest 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 interest 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 interest of, the applicant.”[6]

The court considering an application in terms of the above provisions, may make any interim or final order which it deems fit.[7]

The formulation of the issues in this application

[14] In terms of the order of 19 November 2013 the respondents undertook not to further implement or act upon:

“ Ordinary Resolution 10 and Special Resolution number 1 to 4 passed at the annual meeting of the shareholders of the first

respondent.....;

and

Articles 5c, 5e 27c and 27d of the memorandum of incorporation adoptedpursuant to Special Resolution number 5.....”

The restriction above was subject to or pending the hearing of this application and handing down of the judgement . The proviso was an important element which should be taken account in the drawing of the affidavits because the function of the affidavits in motion proceedings is trite.[8]

[15] In this matter the applicants maintain that they seek an interim relief at this stage. Accordingly, they argued that the only need to prove a prima facie right to set aside the resolutions. They argued that I do not need to decide the difficult question of law. The difficult question should be left for the subsequent final relief.

[16] The above arguments and submissions are straightforward stand to be dismissed forthwith. They lack merit. The point is misconceived. The applicants have already obtain the interim relief. The order of 19 December 2013 stand as an interim order. There is no such a relief as the interim relief on interim relief.

[17] The applicants contention that is still entitled to a further interim relief is based on the wrong interpretation of the authorities relied upon.[9]

The concept of the so-called difficult question of law has received judicial attention in a series of cases. In the Beechem Group Limited v B-M Group (Pty) Ltd [10] the court opined that the grounds of objections

“-raised difficult question of law.”

This statement was made during the hearing of an urgent temporary interdict application. In Johannesburg Municipal Pension Fund v City of Johannesburg[11] the court held that:

“-Impressive and erudite arguments were addressed to me on all these grounds. I cannot do justice to all the consideration referred to. All the issues referred to involve ‘difficult questions of law and none of them can be described as ‘ordinary’, nor is it desirable to rule at this interim stage that there is no prospects of success on any of these bases of review. The issues are simply too involved (a serious question to be tried’) and such gravity that they cannot be, and should not be disposed in this interim proceeding”.

Finally in Geyser v Nedbank Ltd and Others: In re Nedbank Ltd v Geyser, the court stated that

“-Where ‘difficult question of law’ were raised they had to be dealt with at trial and not the interlocutory stage of the proceedings”.[12]

In my view, all these decisions dealt with urgent applications. The decisions reiterated the principle that in interim relief applications the test of prima facie right is less stringent and should be granted. The difficult question to be dealt with at late stage. Therefore the so-called difficult question means that and nothing more. The emphasize is preservation.

[18] As stated above, the application for that interim relief must be dismissed.

[19] I now turn to the interpretation of the acts to determine the applicable act to the facts.

The principal acts are the Companies Act and the Financial

Markets Act. The latter act provides for the following, namely to:

.

“-

(a) ensure that the South African financial markets are fair efficient and transparent;

(b) increase confidence in the South African financial markets by-

(

- i) requiring that the securities services can be provided in a fair, efficient and transparent manner; and
- (ii) contributing to the maintenance of stable financial environment;
- (c) promote the protection of regulated person, clients and investors;
- (d) reduce systematic risk
- (e) promote the international and domestic competitiveness of the South African financial markets and securities in the Republic'

There is no provisions for the meetings of the companies and, beneficiaries interests in this legislation. These issues are provided for in the Act.

[20] The term financial markets is not defined . However, the phrase must be given the same meaning as the defined phrase of market infrastructure. The market infrastructure is defined to mean each of the following; namely a licensed central securities on depository, a licensed clearing house, a licensed exchange; and a licensed trade repository.

[21] The Markets Act has a provision that provides that:

"Despite any other law, other than the Financial Intelligence Centre Act, if there is an inconsistency between any provision of this act and any other national legislation, this Act prevails"[13]

This provision must be seen on context. It relates to issues of financial markets inconsistency. The submissions based on the Markets Act must fail. The applicants conflate the scope of the two legislations which cater for different scenarios.

[

Annual general Meeting

[22] I turn to the provisions of the Act which confers constitutional powers to the members to conduct the affairs of the company in the general meetings. The meeting has extensive powers. It can alter the memorandum of incorporation by special resolution and can remove directors by ordinary resolution. The meeting has the power to amend to amend the memorandum of incorporation regarding the authorisation and classification of shares and the preferences, rights , limitations and other

terms associated with each class f shares. This power need special resolution.

[23] The applicants must make out the case sought in the final relief. They alleged the exclusion of their votes was unlawful. The

respondents contends that the exclusion was justifiable because the applicants did not comply with the provisions of the Act . The respondents submitted the applicants violated Sections 56 and 58 of the Act. These sections deal with the issues of beneficial interest in the securities and representation respectively by proxy[14].

[24] The applicants do not dispute the allegation that they are all the holders of beneficial interest in the listed securities of the first respondent. The essence of their case is that Section 58(2) of the Act does not apply to their case. The subsection provides that:

“A proxy appointment –

- (a) must be in writing, dated and signed by the shareholder; and
- (b) Remains valid for –
 - (i) One year after the date it was signed; or
 - (ii) Any longer or shorter period expressly set out in the appointment; unless it is revoked in a manner contemplated in subsection (4)(c), or expires earlier as contemplated in subsection (8) (d).

The subsection is preceded by the provision which allows the participation of the proxy. The applicants persist that the Act finds

no application in their case. They submitted the voting should be held to be in terms of the Markets Act and not in terms of the Act. As stated earlier that argument is fallacious.

[25] The fallacy emanates from thier interpretation of Section 56(9) to 56(11) of the Act. This section provides that :

-Any person who holds a beneficial interest in Any securities may vote in a manner at a meeting of shareholders, only to the extent that-

- (a) The beneficial interest includes the right to vote on the matter; and
- (b) The person’s name is on the company’s register of disclosures as the holder of a beneficial interest, or the person holds a proxy appointment in respect of that matter from the registered holder of those securities.

([10] The registered holder of any securities in which any person has beneficial interest must deliver to each such person-

- (a) a notice of any meeting of a company at which those securities may be voted on within two business days after receiving such a notice from the company; and
- (b) a proxy appointment to the extent of that person’s beneficial interest, if the person so demand in terms of sub-section (11).

- (11) A person who has a beneficial interest in any securities that are entitled to be voted on at a meeting of a company's

shareholders, may demand a proxy appointment from the registered holder of those securities, to the extent of that person's

beneficial interest, by delivering such a demand to the registered holder, in writing, or as required by the applicable requirements of a central securities depository.

The applicants failed to distinguish that scopes of the two legislation. The Companies Act is the foundation legislation governing the establishment, management of companies in the Republic of South Africa. It provides that if there is inconsistency between any of its provisions and provisions of any other national legislation then its provisions prevail. It has identified the Financial Markets Act as one such national legislation .[15] The failure led them to rely on the following provision, namely

“ Despite any other law, other than the Financial Intelligence Centre Act, if there is an inconsistency between any provision of this Act and a provision of any other national legislation, this Act prevails.” [16]

The object so this Act are clear. They are the following; namely to:

“ _

- (a) ensure that the South African markets are fair,efficient and transparent;
- (b) increase confidence in the South African markets by-
 - (i) requiring that the securities services be provided in a fair, and transparent manner ;and
 - (ii) contributing to the maintenance of a stable financial market environment;
- (c) Promote the protection of regulated persons, clients and investors;(d)reduce systemic risk; and (e) promote

the international and domestic competitiveness of the South African financial markets and of securities Services in the Republic.”

The primary purpose of the above Act is the markets and the securities.

[26] The provisions of Section 5(4) in the Companies Act apply in the matters its scope. Similarly, the provisions of Section 3(3) of the Markets Act apply to its scope of jurisdiction. The submission that the directives of Strate must prevail over the prescript of the national legislation is untenable.

Prejudice and Oppressive conduct in terms of Section 163 of the Act

[27] The Companies Act has a provision dealing with the necessary relief in the cases of oppressive, prejudicial conduct or abuse of separate juristic personality of company. Section 163(1) provides that a shareholder may apply to court for relief if :

“(a) any act or omission of the company, or related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interest of, the applicant;

(b) the business of the company, or 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...

Notwithstanding the short life of the Section, it has already enjoyed the scrutiny of our courts[17]. The applicant must make out a case. In order to succeed. The section empowers the court with wide discretion to restore fairness and equity. The discretion gives the court the power to stop and indeed to reign in the tyranny of the majority. In the exercise of this wide discretion the court also balances the other important factor. The other party's right to exercise power. The boardroom fight's always leave other parties unhappy. This is always the outcome of democracy. It has been held that:

“- By becoming a shareholder in a company a person undertakes by his contract to be bound by the decisions

of the prescribed majority shareholders, if those decisions of the company are arrived at in accordance with the

law, even where they adversely affect his rights as a shareholder. That principle of the supremacy of the

majority is essential for the proper functioning of companies.”[18]

[28] The applicants contend that the exclusion of their votes together with the first respondent's failure to inform them of the legal consequences of non-compliance with the requirements of proxies and letters of representation constitute a conduct which is prejudicial in terms of the Act. There is no statutory obligations on the first respondent to have given them the legal opinion.

[29] The respondent acted properly in excluding the votes. The empowering legislation is peremptory. The applicants did not comply therewith. They also relied on the wrong legislation. Again their reliance on the State directives was misconceived. The directives do not apply and in any event they cannot oust the application of the national legislation.

Costs

[30] The matter is complex. The issues raised are res nova . They have never been raised in terms of the new companies legislation. Therefore, the participation and involvement of two counsel was necessary. In the circumstances they are entitled to the costs.

Order

[31] In the circumstances I make the following order:

The application is dismissed with costs which costs include the costs of two counsel.

RE MONAMA

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Appearances

Counsel for the applicant: Adv. B. Gilbert

Adv. N. Muvangua

Instructed by:

Counsel for the respondent: Adv. Subel SC

Adv. J Meiring

Date of hearing: 5 November 2014

Date of judgment: 13 March 2015

[1] See the Court Order of 19 December 2013.

[2] The Act.

[3] The Companies Act, No 71 of 2008.

[4] Act 19 of 2012

[5] Government Gazette No. 33517 of 20 July 2012.

[6] Section 163(1) of the Act.

[7] Section 163(2) of the Act.

[8] See *Transnet Ltd v Rubenstein* 2006 (1) SA 591 SCA at 600 and *The Civil Practice of the High Courts of South Africa* 5th edition page 439.

[9] *Beecham Group Limited v BM Group (Pty) Limited* 1977 (1) SA 50 (T), *Ward v Cape Peninsula Ice Skating Club* 1998(2) SA 487 (C), *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005(6) SA 273(W) and *Geyser v Nedbank Limited and Others: in re Nedbank Limited v Geyser* 2006(5) 355(W).

[10] 1977(1) SA 50 (T).

[11] 2005(6) SA 273(W).

[12] 2006(5) SA 355 (W) at 359 H - J

[13] Section 3(3) of Act 19 of 2012.

[14] See Paragraphs 10 to 11 above.

[15] See Section 5(4) (ff) of Act 71 of 2008

[16] See Section 3(3) of the Financial Markets Act, 19 of 2012.

[17] Grancy Property Ltd v Manala and Others [2013] 3All SA 111 SCA; Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd

[2012] 4All SA 203 GSJ;

[18] Sammel and Others v President Brand Gold Mining Company Limited 1969

(3) SA 629 AD at page 678 H

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