

SOUTH AFRICA / JUDGMENT

Wessels N.O and Others v Estate Late Esias Johannes Janse Van Rensburg N.O and Others (48555/2011) [2023] ZAGPPHC 2040 (29 December 2023) [2023] ZAGPPHC 2040

COURT

North Gauteng High Court, Pretoria

BEFORE

L.A. Retief

CASE / FILE NUMBER

48555/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

No. 48555/2011

(1)

REPORTABLE: YES / NO

(2)

OF INTEREST TO OTHER JUDGES: YES / NO

(3)

REVISED

DATE:

29/12/2023

SIGNATURE

In

the matter between:

JOHANNES
STEPHANUS WESSELS N.O
First
Applicant
VERA
MARIA WESSELS N.O
Second
Applicant
JOHANNES
STEPHANUS WESSELS
Third
Applicant
and
ESTATE
LATE ESIAS JOHANNES JANSE VAN RENSBURG N.O
First
Respondent
FAROUK
SHARIEF N.O
Second
Respondent
THE
MASTER OF THE HIGH COURT
Third
Respondent
ABSA
BANK LIMITED
Fourth
Respondent
RAND
MERCHANT BANK
Fifth
Respondent
MANDLA
PROFESSOR MADLALA N.O
Sixth
Respondent
THE
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION
Seventh
Respondent
MABALINGWE
SHAREBLOCK
Eighth
Respondent
This
judgment is prepared and authored by the Judge whose name is
reflected as such, and is handed down electronically by
circulation to the parties / their legal representatives by email
and by uploading it to the electronic file of this matter
on

CaseLines. The date for handing down is deemed to be 29 December 2023.

JUDGMENT

RETIEF J

INTRODUCTION

- [1] The First, Second and Third Applicant [the Applicants] seek the setting aside of a Court order which placed Boschpoort Ondernemings (Pty) Ltd (in liquidation) [Boschpoort] under final winding-up. The Applicants seek such relief in terms of section 354 of the Companies Act, 61 of 1973 [old Companies Act] contending that Boschpoort is now solvent [section 354 relief].
- [2] In the alternative, the Applicants sought Boschpoort to be placed under supervision as envisaged in terms of section 131 of the Companies Act, 71 of 2008 [new Companies Act]. The Applicants' Counsel however, in argument, confirmed that the Applicants no longer seek the relief in the alternative.
- [3] The application is opposed by the Second Applicant, Farouk Sharief N.O the duly appointed co-liquidator of Boschpoort up until his removal by the third Respondent, the Master of the High Court [Sharief], and the Eighth Respondent, Mabalingwe Shareblock [Mabalingwe], as an alleged creditor.
- [4] Sharief and Mabalingwe [collectively the Respondents] seek condonation for the late filing of their answering affidavits which were both filed 6 (six) court days out of time. The Applicants refused to condone the delay, as a result thereof, the Respondents brought a formal condonation application. Notwithstanding the refusal, the condonation application was not opposed and the Applicants proceeded to file their replies thereto.
- [5] On the date of the hearing, and after having regard to the arguments and, the papers filed, condonation was granted with costs in the cause.
- [6] In consequence, the only matter for adjudication is the section 354 relief which the Respondents, inter alias, challenged by raising a point in limine. Such point in limine, the non-joinder of all the members and shareholders of Boschpoort.
- [7] The outcome of the in limine point will be decisive of the necessity of this Court to deal with the section 354 relief and in consequence it is deal with first.

POINT IN LIMINE (NON-JOINDER OF MEMBERS)

- [8] The nub of the Respondents' complaint of non-joinder is that not all the shareholders and members of the Boschpoort are to be joined in these proceedings in that such members and shareholders have a material and legal interest in the subject matter of the section 354 relief. On this basis they contend, it is obligatory to have joined them. The Respondents seek that the application be struck with costs as direct result of such non-joinder.
- [9] The Applicants however argue that no such necessity exists to join the remaining members and shareholders as complained of and, that in any event one of the shareholders, the Hannes Wessels Family Trust is mandated by the remaining shareholders to bring these proceedings. In short, all the shareholders possess knowledge and have consented to the launching of the application thereby negating the necessity to join them in the proceedings. Furthermore, as I understand the expanded argument, no complaint of non-joinder had ever been raised in previously proceedings before. Such proceedings meaning those which dealt with the same subject matter, the Boschpoort's liquidation. In this regard reliance and deference was made to the mandamus application brought against the Third Respondent, the Master of the High Court, which served before Wanless AJ, as he was then was.
- [10] To unpack the respective arguments and resolve the complaint, necessitates establishing who the shareholders and members of Boschpoort are and to consider whether the legal interest of all those shareholders may be affected by the outcome of the section 354 relief.

Who are the members and shareholders of Boschpoort?

- [11] It is common cause that Boschpoort has 3 (three) shareholders, the Mabalingwe Trust (IT 5583/94), the Hannes Wessels Family Trust (IT 7618/98) and the Willem Wessels Trust.
- [12] It is an undisputed fact the Applicants failed to cite both the Mabalingwe Trust and the Willem Wessels Trust. In support of the Respondents' argument, the Court was invited to have regard to the provisions of section 354 of the old Companies Act, the very basis for the Applicants' relief.
- [13] By virtue of item 9 of schedule 5 of the new Companies Act, section 354 of the repealed old Companies Act remains in force until a date to be determined.

- [14] Section 354 provides:

"354. Court may stay or set aside winding-up

- (1) The Court may at any time after the commencement of a winding-up, on the application of any liquidator, creditor or member, and on proof to the satisfaction of the Court that all proceedings in relation to the winding-up ought to be stayed or set aside, make an order staying or setting aside the proceedings or for the continuance of any voluntary winding-up on such terms and conditions as the Court may deem fit.
- (2) The Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or members as proved to it by any sufficient evidence." (own emphasis)

- [15] As I understand the Respondents argument on the papers, particular reliance is made to the provisions of section 354(2) in which a Court, exercising its section 354 discretion, is entitled to consider the wishes of the “creditors or members as proved to it by any sufficient evidence” when coming to its decision.
- [16] It is clear from the wording of sub-section (2), unlike on subsection (1), that the plural of the words “creditor” and “member” is used and as such, more than just one member or creditor, as the case maybe is envisaged. A common sense approach to the interpretation of the words is warranted in that the wishes of all those affected can be considered and measured before the Court exercises its discretion.
- [17] Applying section 354(2), failure to cite all the members results in the inability of a Court to consider and/or satisfy itself that it has considered all wishes of the members. In this case, the remaining members of Boschpoort, the Mabalingwe and Willem Wessels Trust. The failure is in direct contrast with the provisions of section 354(2). The mere provision of section 354(2) statutorily illustrates that all the members of Boschpoort have a direct and substantial interest into the subject matter of the section 354 relief.
- [18] Furthermore, the Respondents’ argument on the papers was expanded in argument and in the heads of argument, when their Counsel contended that notwithstanding the Applicants’ denial of the necessity to join the remaining shareholders, they themselves in their replying affidavit deemed it necessary to justify. The necessity to justify affirms the reason for the call to join. In support of this argument the Court was invited to have regard to the Applicants reply when dealing with the in limine point. In particular paragraph 35 thereof. The particular extract from the Applicants’ replying affidavit states the following:

“35.

In the third instance, the Hannes Wessels Trust is mandated by the shareholders to bring this application to the benefit of all shareholders. See in this regard a resolution from the relevant shareholders confirming same as annexure “CA2.1”.

- [19] “CA2.1” contains and refers to 3 (three) separate resolutions. Two of these resolutions were taken by the trustees of the Mabalingwe Trust (IT5583/94) and the remaining resolution by the Hannes Wessels Family Trust (IT7618/98). The absence of a resolution by the remaining shareholder, the Willem Wessels Trust is evident and in consequence the reliance by the Applicants of the allegations in paragraph 35 is not unclear.
- [20] Of further concern, and as pointed out by the Respondents’ Counsel, is that the content of all the resolutions relied on and, which make up annexure “CA2.1”, do not deal with the mandate to bring the application in the interest of all the shareholder, as relied on. The content of each resolution indicates that they were taken for entirely different purposes.

- [21] To illustrate the point, the resolution of 23 October 2015 taken by the Mabalingwe Trust, only deals with providing the Third Applicant with consent to investigate the liquidation of Boschpoort, at his own cost. Moreover, the second resolution by the Mabalingwe Trust and too, the resolution by the Hannes Wessels Family Trust dated in March 2021, merely provided the Third Applicant, and not the Hannes Wessels Family trust, with the necessary authority to enter into settlement negotiations. Such authorised negotiations extended to creditors, the Master of the High Court, and the liquidators. In contrast, the relief sought by the Applicants, including the section 354 relief, has nothing to do with settlement negotiations. In contrast, the provisions of section 354 deal with an application to Court to stay or set aside winding-up.
- [22] No resolution/s on the papers, as relied on by the Applicants in paragraph 35 of their reply: exist specifically mandating the Hannes Wessels Family Trust to launch the section 354 relief on behalf of the remaining shareholders; and exist for the Willem Wessels Trust at all.
- [23] The only resolution by the Hannes Wessels Trust authorising the Third Applicant to launch this application, and only on its behalf, is annexure “JS1”. An annexure annexed to the founding papers.
- “JS1” is headed “MINUTES OF THE MEETING OF THE TRUSTEES FOR THE TIME BEING OF THE HANNES WESSELS FAMILIE TRUST”.*
- [24] The authority in “JS1” provided to the Third Applicant to launch these proceedings is confined to the Hannes Wessels Family Trust. No other shareholders are mentioned in support of the Applicants contention at paragraph 35 of its reply.
- [25] Confusingly though, the Third Applicant, as the deponent in the founding papers alleges that he possessed authority to depose to the affidavit on behalf of the Wessels Family Trust and not the Hannes Wessels Family Trust. The confusion created more questions than answers, simply: who was the section 354(1) Applicant and did the Third Applicant had authority to act on behalf of the Wessels Trust? This confusion was raised by the Respondents in answer, but unfortunately the confusion persists as the Applicants failed to deal with the point adequately in reply.
- [26] Nonetheless, the consequence of the confusion, as a point on contention, was not taken further in argument and the Respondents’ Counsel in his heads of argument accepted that the Hannes Wessels Family Trust was duly represented by the Second and Third Applicant as provided for in section 354(1). On that basis, this Court does not expand on the confusion.
- [27] In consequence, having regard to all the facts, the necessity of the Applicants to justify the non-joinder in paragraph 35 is understood, but the veracity of the allegation falls short of sufficient proof of the alleged facts relied on.

[28] In short, section 354(2) clearly indicates that the wishes of all the members be considered. This stands to reason, not only to assist the Court in the exercise of its discretion afforded by section 354, but because the members and shareholders will be duly affected by the exercise of such discretion. It must flow that all shareholders must be joined and if not, that the Court must be provided with the assurance that all of Boschpoort's shareholders possess knowledge and have expressed their wishes for the success of the relief to be entertained. This is not evident on the papers.

[29] Lastly, the fact that the point of non-joinder had not been raised before as an arguable defence to the complaint, is of no moment having regard to the effects of the section 354 relief vis a vis in respect of the affected parties and having regard to the statutory provisions of section 354(2). Furthermore this point was not raised in the matter before Wanless AJ nor did the Court raise it.

[30] In consequence, the Respondents in limine point of non-joinder must succeed and the necessity to, at this stage deal with the merits of the section 354 relief is not apparent.

[31] The following order is made:

1. The Second and Eighth Respondents are granted condonation for the late filing of their answering affidavits;
2. The application is struck from the roll with costs, such costs to include the costs associated with the Second and Eighth Respondents' application for condonation.

L.A. RETIEF

Judge of the High Court

Gauteng Division

Appearances:

For the first to third applicant: Adv F.G. Janse Van Rensburg Instructed by attorneys: Haasbroek & Boezaart Inc. For the first to eighth respondent: Adv B.H. Swart SC Instructed by attorneys: Jaco Roos Attorneys Date of hearing: 18 October 2023 Date judgment delivered: 29 December 2023

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