IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE ~~YES~~ / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES ~~YES~~ / NO
(3) REVISED. O/K.

17/9/15
DATE

SIGNATURE

CASE NO: 19269/2011

17/9/2015

In the matter between:

D.J. SMYTH	1st Applicant
and 6 others	2nd-7th Applicant
and	
INVESTEC BANK LTD	1st Respondent
RANDGOLD & EXPLORATION CO LTD	2nd Respondent

CASE NO: 19269/2011

In the intervention applications of:

STANDARD BANK NOMINEES (TVL) PTY LTD

SHAP-ARON NOMINEES (PTY)LTD

BNS NOMINEES (PTY)LTD

CASE NO: 19269/2011

In the intervention applications of:

W.J.S. BAILEY

and 39 others

JUDGMENT

1. In the main application Mr DJ Smyth and six other applicants ("the main applicants") applied for, *inter alia*, the following relief against the first and second respondents:

> "1. Declaring that the conclusion of:
>
> 1.1 the agreement styled the "Revised Settlement Agreement" and concluded by the second respondent with JCI Ltd ("JCI") on 20 January 2010 and which was ratified by a simple majority of the second respondent's holders on 20 May 2010; and
>
> 1.2 the agreement styled the "Litigation Settlement Agreement" and concluded by the second respondent with *inter alia* the first respondent on 22 January 2010, the conclusion and ratification of which was a condition precedent to the Revised Settlement Agreement;
>
> constitutes or involves an act or omission which is unfairly prejudicial unjust or inequitable as contemplated in Section 252 (1) as read with Section 252 (3) of the Companies Act 61 of 1973 ("the Companies Act").
>
> 2. In the light of paragraph 1 above, ordering the first respondent to purchase the applicants' shares in the second respondent in the sum of R288,56 per share (or any other sum which the above Honourable Court made in its discretion determine) plus the ruling Randgold price at the time of such purchase."

2. The respondents objected to the *locus standi* of each of the main applicants in the main application on the ground that they are not registered members of Randgold and therefore do not have *locus standi* to seek relief under section

252 of the Companies Act, Act 61 of 1973 ("the Act)". The main applicants contested the objection and maintained that they indeed enjoyed *locus standi.*

3. Subsequently, during December 2012 and March 2013, Standard Bank Nominees (Transvaal) Pty Ltd ("SBN"), Shap-Aron Nominees Pty Ltd ("Shap-Aron") and BNS Nominees Pty Ltd ("BNS") instituted applications to intervene in the main application. I shall refer to these applications as "the nominee intervention applications". The nominee intervention applications were opposed by the first respondent ("Investec") but not by the second respondent ("Randgold").

4. During the period March 2013 to June 2013, 40 applications ("the 40 intervention applications") were instituted on behalf of persons wishing to intervene and join as applicants in the main application. I shall refer to these persons as "the 40 intervening parties". Investec, but not Randgold, opposed the 40 intervention applications, *inter alia*, on the basis that none of the 40 intervening parties is a registered member with *locus standi* to pursue a claim under section 252 of the Act.

5. During August 2012 the main applicants filed an application predicated on Rule 33 (4) of the Uniform Rules ("the separation application") to the effect that the issue of *locus standi* of the applicants be determined independently of, and prior to, the determination of the remaining issues in the main application.

6. Counter applications to the separation application were filed by Investec and Randgold but were subsequently amended so that the remaining material dispute between the parties at that stage was whether it will suffice if the first

to fourth main applicants have *locus standi* or whether the court needs to determine the *locus standi* of each and every one of the applicants before the matter can progress on the merits.

7. During November 2013 the nominee intervening parties claimed to be entitled to enrol their three nominee applications. Investec disputed this claim and, supported by Randgold, in turn, instituted proceedings for a consolidated hearing of the separation application; the issue of the *locus standi* of the applicants; the three nominee intervention applications; and the 40 intervention applications.

8. The parties eventually resolved the procedural difficulties and some of the disputes between them and came to an agreement styled "Agreement in Respect of Separation of Issues". The relevant terms thereof were the following:

"1. The applications in regard to the security for costs, separation and consolidation applications will not be proceeded with and will be deemed to have been settled on the basis that each party will pay its own costs in respect thereof.

2. The following applications and issues will be separated as aforesaid:

2.1 the *locus standi* of each of the main applicants as determined by:

2.1.1 the meaning to be ascribed to the word "member" in section 252 of the (1973) Companies Act;

2.1.2 whether or not the reference in section 252 to "any member of a company" excludes from its ambit a beneficial owner of shares in a company who has chosen to register such shares in the name of a nominee company,

and, in the circumstances, whether the application of each of the main applicants should be dismissed or permitted to proceed.

2.2 the forty intervention applications on the basis that:

2.2.1 the *locus standi* of these intervening parties will be determined on a test case basis, (in relation to an agreed number of applications, the result of which will be applied to all such applications) as determined by:

2.2.1.1 the meaning to be ascribed to the word "member" in section 252 of the (1973) Companies Act;

2.2.1.2 whether or not the reference in section 252 to "any member of a company" excludes from its ambit a beneficial owner of shares in a company who has chosen to register such shares in the name of a nominee company,

2.2.2 any objections other than to the *locus standi* on the part of these intervening parties will also be determined. In this regard, within 10 (court) days of the conclusion of this agreement, Investec's attorneys shall notify the attorneys of these intervening parties as to the identities of the specific intervening parties whose intervention applications are being opposed on grounds other than their alleged lack of *locus standi*.

2.3 the intervening nominee applications of SBN, Shap-Aron and BNS;

2.4

2.4.1 whether, as contended for by the main applicants and the forty intervening parties, in the event that the nominee intervention applications are granted, this has the consequence that;

2.4.1.1 all of the forty intervention application should also, and without more, be granted and that all of the main applicants should also and without more be permitted to proceed with the main application; and

2.4.1.2 whether this has the further consequence that no further attack on the *locus standi* of any of the main applicants and any of the forty intervening parties may be made by either the respondents at any stage of the main application.

2.4.2 whether, as contended for by Investec, it is entitled, regardless of the outcome of the nominee intervention applications, to have the forty intervention applications determined at this stage on the basis set out in 2.2 above; and

2.4.3 whether as contended for by Investec and the Randgold, they are entitled, regardless of the outcome of the nominee intervention applications, to have the *locus standi* of each of the main applicants determined at this stage and whether the application of each of the main applicants should be dismissed or permitted to proceed."

9. The matter came before me in respect of the aforesaid separated issues. Adv Loxton SC, Adv Vorster SC, Adv Farlam and Adv Davis represented all the applicants. Adv Rubens SC, Adv Blou SC and Adv Stein represented Investec. Adv Farber SC and Adv Konstantinides represented Randgold. The sets of legal representatives each filed a number of sets of heads of argument which, in total, ran into many hundreds of pages. Apart from South African legislation and case law I was referred to foreign legislation and case law and, over a period of nine days, addressed fully on every conceivable point relating to the aforesaid issues, and more. I mention these facts, firstly, in order to show my appreciation for the assistance of counsel on whose research and heads of argument I relied heavily for purposes of this judgement. Secondly, however, I have to mention that although I have considered all the submissions and counter submissions made, it is simply not feasible to refer

to them all. I shall attempt to refer to some of the salient features of the arguments which led me to my final conclusions.

10. As noted above the main application is a typical section 252 application where minority shareholders complain of unfairly prejudicial conduct on behalf of either the majority or those who have some control over the majority and the company. The relief sought is the purchase of shares by Investec from the applicants at a particular price. This is a common form of relief sought in this kind of application.

11. However, the difference in this application lies therein that the seven main applicants, who initially instituted the application, are not registered shareholders but beneficial shareholders whose shares in Randgold are registered in the names of nominees. The first and main issue in dispute is therefore whether a beneficial holder of shares in a company which has chosen to have those shares held through a nominee, is entitled to bring an application under section 252 for equitable relief.

12. The same issue relates to the 40 intervention applications which followed the main application. It may be mentioned at this stage that as time went by six of these applicants apparently withdrew their applications and another seven obtained registration in their own names ("the own name applicants"). Consequently there are at present, apart from the seven main applicants, 27 intervention applications left in respect of which the issue of *locus standi* is relevant.

13. Regarding the intervention applications by the three nominees, including the seven own name applicants, the respondents eventually did not deny their *locus standi* to intervene in the main application.

14. In order to answer the aforesaid main issue in dispute it is necessary to decide whether or not the words "member of a company" in section 252 (1) of the Act means only the person in whose name the shares are registered or whether it is also capable of meaning the person who has rights in the shares, in other words, the person who is the beneficial owner of the shares. According to the applicants "member" includes the beneficial owner of the shares whilst the respondents submitted that it only refers to the registered shareholders.

15. Section 252 of the Act provides as follows:

"Member's remedy in case of oppressive or unfairly prejudicial conduct

252(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or 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, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.

(2)-(4) ... "

16. What does "member" refer to? The term "member" is not defined in section 1, the definition section, of the Act. However, section 103, affords, in my view, the answer. Section 103 is part of Chapter V of the Act which, according to its main heading, deals with

"Share Capital, Aquisition by Companies of Own Shares, Shares, Allotment and Issue of Shares, Members and Register of Members, Debentures, Transfer and Restrictions on Offering Shares for sale".

17. Sections 103 to 115 have their own heading "Members and Register of Members (ss 103-115)". Section 103 also has its own sub-heading which is "Who are members of a company". Subsection (1) and (2) of section 103 are relevant and provide as follows:

"103 Who are members of a company

(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company."

18. Registration is thus, according to section 103, a *sine qua non* for membership. As the Act also recognises uncertificated securities, section 91A allows for such securities to be recorded on a sub-register. What is important is that section 91A(4)(b) provides that:

"A transferee shall, upon the entry of his, her or its name in a subregister, become a member of and be recognised as a member by the company in respect of the uncertificated securities registered in his, her or its name."

19. The Act thus requires registration in the company register as a prerequisite for membership.

20. The applicants submitted, however, that section 103 is not a definition and that it is clear from the fact that where the legislature intended to define a

word, it did so in express terms and called it a "definition". It was submitted that section 103 tells one who a member is but does not say that a person whose name does not appear on the register is not a member for any purpose under the Act.

21. The question is thus whether the Act contains an exhaustive definition of the term "member" for all purposes under the Act. Turning to English legislation Section 112 of the English Companies Act, 2006, which is almost identical to the South African Section 103, provides as follows:

> "112 The members of a company
>
> (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.
>
> (2) Every other person who agrees to become a member of the company, and whose name is entered in its register of members, is a member of the company."

22. Section 22 of the English Companies Act, 1985, was in identical terms. It was headed "A company's membership" and the margin contained the words "Definition of 'member'". Section 112 of the 2006 English Act is not in terms a definition but is simply headed "The members of a company". Despite not being noted as a definition, it is common cause that section 112 of the 2006 English Act retained its status as a definition. The English Supreme Court in Farstad Supply A/S v Enviroco Ltd [2011] UKSC 16, [2011] 1 WLR 921 remarked in paragraph [37] as follows:

> "[37] The starting point is that the definition of 'member' in what is now section 112 of the 2006 Act (section 22 of the 1985 Act ...) reflects a fundamental principle of United Kingdom

company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified: ..."

23. Definitions in statutes are sometimes found in the beginning of an Act, or at the end, or partway through, depending on how the particular statute came to be drafted. In the present instance section 103 is reasonably lengthy and incorporates substantive enactments and it is therefore no surprise that the legislature had decided that it is more appropriate for the definition to be set out as a separate provision. I agree with the submission of the respondents that the actual words used will be more significant than the location of the definition.

24. Section 103 of the Act falls within the chapter dealing with shares and share registers. Moreover, this section is headed "Who are the members of a company" and then proceeds to identify all of the categories of members. It is clear that this provision is exhaustive and thus constitutes a definition of the term "member".

25. The reference to "member" in section 103 has always been afforded the status of a definition by our courts. See for example Lourenco and Others v Ferela (Pty) Ltd and Others (No 1) 1998 (3) SA 281 (T). As already stated the English courts have done the same and I see no reason why there should be a departure therefrom. The legislature was aware of the fact that both English and South African courts have regarded section 103, or its equivalent, as defining what a "member" is. Having regard to the important status accorded to a "member" or "membership" in the Act one would have expected the

legislature to have included a different definition section if it was of the view that section 103 does not contain a correct and comprehensive definition.

26. The applicants also submitted that even if section 103 functions as a definition, the court is entitled to depart from such a definition if applying it would lead to absurdities or even substantial difficulties. The applicants attempted to show such absurdities and difficulties, especially with reference to the provisions of section 252. I am satisfied that no such absurdities or substantial difficulties arise and that there is no merit in the submissions on behalf of the applicant.

27. The main thrust of the applicants' argument is that a beneficial holder is included in the term "member" in section 252 of the Act. In support of this contention it was submitted that the terms "member", "shareholder" and "registered shareholder" are used indiscriminately by the legislature in the Act and that if the legislature intended to define "member" in section 103 and furthermore intended that it should mean "registered shareholder" consistently throughout the Act, it would hardly have employed the word "shareholder" when it meant "member" and *vice versa*.

28. I do not agree. The terms "member", "shareholder" and "registered shareholder" are interchangeable and mean "member" as defined in section 103 wherever they appear in the Act. It is clear that the company recognises only its registered shareholders and that it is the policy of the law that the company should concern itself only with the registered owner of the shares. See Oakland Nominees Pty Ltd v Gelria Mining & Inv Co Pty Ltd 1976 (1) SA

441 (A) at 453 B per Holmes J and Standard Bank of SA (Ltd) per Corbett JA (as he then was).

29. English Courts have also affirmed that the term "member" must be restricted to a registered shareholder. See Farstad (*supra*) from paragraph [37]; Eckerle v Wickeder Westfalenstahl GmbH [2013] EWHC 68, [2014] Ch 196 at paragraph [17] to [19] and [22]. Where errors occur in a company's register of members, possibly as a result of the action or inaction of the majority shareholders who are oppressing a minority, the English courts will not bend the requirements for standing under section 994. Instead, it will usually be necessary, before presenting a petition, to bring an action for specific performance of a subscription agreement or an action for rectification of the register of members. See Clearsprings (Management) Ltd v [2003] EWHC 2516 (Ch). A similar approach was adopted in South Africa in Juan Barnard v Carl Greaves Brokers Pty Ltd 2008 (3) SA 660 (C). See also Lourenco and Others v Ferela (Pty) Ltd and Others (No 1) (*supra*) at p 294.

30. On behalf of the applicants a number of sections of the Act were referred to in support of the contention that the terms "member", "shareholder" and "registered shareholder" do not retain the same meaning throughout the Act and can thus mean different things. As stated before, I do not agree with this submission. Where the legislature has used the terms "registered shareholder" and "shareholder" in certain sections of the Act and not merely the word "member" as defined by section 103, I regard that as attributable to the context of the particular section and not as an indication that the legislature did not intend to use the word "member" in the same sense throughout the Act. This applies to section 252 as well. What is more, I can

find no section in the Act in which the terms "member" or "shareholder" or "registered shareholder" either do or have been held to include a beneficial holder. If I interpret the word "member" in the manner contended for by the applicant, *i.e.*, so as to include a beneficial owner of shares registered in the name of a nominee, it would, in my view, amount to judicial legislation, and not interpretation, and would undermine the very architecture of the Act.

31. I shall now turn my attention more specifically to the provisions of section 252 of the Act and compare same with the relevant English legislative provisions and the English decisions which have pronounced definitively on section 459 of the 1985 English Companies Act and section 994 of the 2006 English Companies Act. Before doing so it is necessary to emphasise that there are a number of South African decisions which have consistently held that decisions of the English courts are highly persuasive in the South African company law context. In D-Jay Corporation and another v Investor Management Services Pty Ltd 2000 (2) is a 755 (W) at 762 C-E the court noted the following:

"It is true that recognition must be given to differences in the common law. But our early common law did not deal with companies which are creatures of statute and there is no such difference between the two legal systems as to warrant our ignoring the decisions of the higher English courts".

In Sentraal-Suid Koöperasie Bpk v Bessemer Steel Construction Pty Ltd 2004(3) SA 552 (W) at 556 G-H the following was held:

"It is trite that differences in the respective legal systems must always be borne in mind. However, in my view the correct position has been set out by Wunsh J. In interpreting the provisions of the Companies Act, decisions of the higher English Courts on substantially similar provisions will be treated with the utmost respect and are of great persuasive force: but

our legal principles must always remain paramount. In the circumstances, and in the absence of relevant differences between English law and our law, in my respectful view, the interpretation which had been given to the corresponding English provisions by the court in that country and had been consistently accepted since 1926 should determine the meaning to be given to s 13".

32. It is thus with some comfort that I turn to the equivalent English legislation and court decisions. The first section that needs be referred to is section 9 of the English Companies Act of 1947 which provided as follows:

"9 Alternative remedy to winding up in cases of oppression

(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself), may make an application to the court by petition for an order under this section.

(2) If on any such petition the court is of opinion -

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(3) - (5) ..."

33. The remedy created under section 9 was confined to members of the company concerned, *i.e.*, the subscribers of the company's memorandum on

registration of their names in the company's register of members and every other person who had agreed to become a member of the company and whose name had been entered in the register. See Hecquet et al. v McCarthy et al. [2006] EWHC 832 (Ch) at paragraphs [3] and [4] which dealt with the similarly worded section 459 of the English Companies Act of 1985.

34. As a result of the recommendations of the Committee of Lord Cohen on Company Law Amendments, section 9 was replaced by section 210 of the English Companies Act of 1948. Section 210(1) contained the only difference and reads as follows.

> "210(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself), or in the case of falling within subsection (3) of section one hundred and sixty-nine of this Act, or the Board of Trade, may make an application to the court by petition for an order under this section."

35. Aside from conferring *locus standi* on the Board of Trade in limited circumstances, section 210 in substance retained the statutory framework which had been in existence immediately prior thereto. The position remained the same until section 210 was superseded by section 75 of the English Companies Act of 1980. The relevant portion of section 75 of the 1980 English Companies Act provided as follows:

> "75 (1) Any member of a company may apply to the court by petition for an order under this section on the ground that the affairs of the company are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) - (8) ...

(9) This section shall apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as it applies to a member of the company, and references to a member or members shall be construed accordingly."

36. Firstly, section 75 (1) no longer referred to oppressive conduct but in its stead referred to conduct which is unfairly prejudicial to the interests of some part of the members, including at least the petitioner himself. Secondly, section 75 (9) introduced an innovation by conferring *locus standi* on two additional categories of persons, namely persons to whom shares had been transferred or transmitted by operation of law. This provision was retained as subsection 459(2) by the superseding English Companies Act of 1985. Section 459(1) and (2) of the 1985 English Companies Act provided as follows:

"459 Order on application of company member

(1) A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law, as those provisions apply to a member of the company; and references to a member or members are to be construed accordingly."

37. In Hecquet (*supra*) in paragraph [5] the court referred to the effect of section 459 (2) as follows:

"5. Those who are not members within this definition can petition under section 459 only if they come within subsection (2). This subsection embraces two categories namely (i) persons to whom shares have been transferred and (ii) persons to whom shares have been transmitted by operation of law. Category (ii) is not relevant to this case. It includes persons such as trustees in bankruptcy or personal representatives who have become entitled to shares in that capacity but have not had their names entered in the company's register of members. Category (i) is self explanatory. It consists of persons in whose favour a transfer of shares has been executed. By definition they must not yet have had their names entered in the register of members. Subsection (2) only applies to 'a person who is not a member of a company', that is to a person who does not have standing to petition by virtue of subsection (1)."

38. The Report of the Law Commission of 1995, in paragraph 11.14 at page 109, records that section 459(2), which is similar to section 75(9) of the 1980 English Companies Act, was, *inter alia*, introduced to resolve the uncertainty whether, under section 210 of the English Companies Act of 1948, the personal representatives of a bankrupt or deceased member had *locus standi*. The Law commission, in dealing with this aspect of the matter, stated the following in footnote 47 at p 109:

"Note, however, that s 459 (2) does not cover beneficial owners whose shares are held by nominees; see Re Quickdome Ltd [1988] BCLC 370 ..."

39. A court can take note of the findings of Reports such as that of the Law Commission in certain circumstances. See Westinghouse Brake & Equipment v Bilger Engineering 1986 (2) SA 555 (A.D.) at 562H-563A. I am satisfied that this is such a case.

40. On behalf of the applicants it was, *inter alia*, submitted that by adding the new subsection (2), the English legislature applied subsection (1) to non-members.

The South African legislature, however, did not see it fit to amend section 252 of the Act accordingly. Consequently, so it was submitted, material differences exist between the South African legislation and the English legislation in respect of the oppression of minority shareholders, with the result that English decisions dealing with section 459 should be viewed with circumspection by our courts when interpreting section 252

41. I do not agree with these submissions. Section 459 (2), and prior thereto section 75 (9), do not have the general application contended for by the applicants. Section 495 (2) is a specific provision which expressly brought into the fold specific types of persons who are not members. In Enviroco (*supra*) at paragraphs [37] to [39] one of the architectural features of English company law was formulated in the following terms:

> "[37] The starting point is that the definition of member in what is now the 2006 Act ... reflects a fundamental principle of United Kingdom company law, namely that, except where explicit provision is made to the contrary, the person on the register of members is the member to the exclusion of any other person.
>
> [38] Ever since the Company's Clauses Consolidation Act 1862 ... membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable were that not so.
>
> [39] For those and other purposes, the legislation makes it clear that the member is the person on the register, and where it is necessary to apply the legislation to persons not on the register, special provision is made ..."

See also Eckerle (*supra*) in paragraph 22.

42. The introduction of section 459 (2) consequently did not affect the interpretation of section 459 (1) at all. It is merely a special provision which had the

effect of applying section 459 to certain specific persons who are not on the register. Section 459 (1) is for all practical purposes *in pari materia* with section 252 (1) of the Act and English decisions regarding section 459 (1) should consequently be seriously considered in the interpretation of section 252 (1) of the Act.

43. Lastly, the reference to English legislation should include a reference to the English Companies Act of 2006. Section 994 (1) and (2) of this Act provides as follows:

"994(1) A member of a company may apply to the court by petition for an order under this Part on the ground -

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

(2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company."

44. The only real difference between the 2006 and 1986 Acts is the reference in the 2006 Act to the interests of "members generally" which was added to make it clear that the provisions of this section is available not only where part of the members have been affected but also where all the members have been affected. This amendment is not relevant for present purposes.

45. Next I should refer to the word "interests" in both the English Companies Act of 1980, 1985 and 2006. In 1962 the Jenkins Committee concluded that it should be made clear in the section that "oppressive" conduct, consistently with the judgement of the English Supreme Court in Elder v Elder Ltd 1952 S.C. 49, was to be interpreted broadly. To that end the Committee recommended that the section be amended to include reference to the "interests" of members. The English courts have found that the "interests" which the sections such as section 459 are able to protect, include matters going beyond the economic interest of the legal owner in his shares registered in his name and that the use of the word "unfairly" enables the court to have regard to wider equitable considerations. See Atlasview Ltd and others v Brightview Ltd and others [2004] EWHC 1056 (Ch) at paragraph [37] and Re a Company [1986] BCLC 391 at 396 a-e. In section 252 of the Act the description is similar, and possibly more comprehensive, where it refers to "unfairly prejudicial, unjust or inequitable" acts or omissions.

46. The courts in South Africa have, consistently with the approach in England and relying upon English authorities, approached applications for section 252 relief on the basis that where possible the section must be read in a way which promotes and extends its remedial purpose. In Hickman v Oban Infrastructure Pty Ltd 2010 JDR 0244 (GSJ) the court referred to the provisions of section 252 of the Act and to section 994 (1) of the English Companies Act of 2006 and then stated the following in paragraph 15:

"15. There is a common thread running through both our and the English enactments. It is the inclusion of the term "unfairly prejudicial", a term which has a far more elastic content than simply oppressive conduct against a minority shareholder.

16. In Donaldson Investments Pty Ltd v Anglo-Transvaal Collieries Ltd 1980 (4) SA 204 (T) at 209, the Court considered that the phrase "unfairly prejudicial, unjust or inequitable" is intended to be interpreted purposively so as to advance the remedy provided for under this section. It also used to be contrasted with the term "oppressive" that was explicitly removed from the body of that section."

47. In Visser Sitrus Pty Ltd v Goede Hoop Sitrus Pty Ltd 2014 JDR 1321 (WCC) at paragraph [54] the court stated the following:

"The old section 252 remedy, in keeping with equivalent provisions in Commonwealth jurisdictions, was not confined to the enforcement of "rights" but covered "interests" as well.

48. I agree with the submission on behalf of the respondents that in adopting a purposive approach, the court engages in the process of interpretation relating to the remedy, and does not assume a legislative role by expanding the term "member" to include persons who are not referred to in the definition of "member" in section 103 and for whom the legislature did not see fit to create a statutory exception.

49. I furthermore agree with the submission on behalf of the respondents that this approach informs the basis upon which the words "to him" in section 252 of the Act (and the word "himself" in the respective English Companies Acts) should be interpreted. That is, not in the narrow sense of affecting the member directly or personally as contended for by the applicants, but in a broader or wider equitable sense so as to expand rather than limit the ambit of the remedy. The English courts have at no time considered that the words "to himself" are somehow restrictive, warranting the importation into the section of persons who do not fall under the definition of "member" contained in those Acts. There is also no South African case which has held that the words "to

him" impose any limitation on a purposive approach to interpretation aimed at expanding the ambit of the remedy. By interpreting the section in this manner there is no need to extend the meaning of the word "member" to include therein a beneficial owner of shares by virtue of his beneficial ownership. In the result I respectfully disagree with the submission on behalf of the applicants that it is only the beneficial holder and not the nominee who has an interest and who can sustain prejudice to those interests, and that the nominee is therefore not the type of "member" to which section 252 relates.

50. It is perhaps necessary to refer to a few English decisions in more detail in order to support the aforesaid conclusion. The first case that may be referred to is that of Re a Company (*supra*). In this matter, F and his wife, G, originally petitioned the court under section 459 of the English Companies Act 1985, or alternatively for the winding up of the company. F, with three others, had set up a company with the intention that all four would play an equal role in the company's affairs. F's wife, G, was appointed director and made a shareholders instead of F himself in order to avoid the contravention by F of a covenant in the restraint of trade. Relationships between F and his co-venturers deteriorated and he was dismissed from his employment with the company and G was removed from her position as director. In the proceedings before the court the applicants sought to have F's name removed from the petition on the grounds that he had no *locus standi* to petition either under section 459 or section 519(1). The court, per Hoffmann J, referred to section 459 of the Companies Act 1985 and found that since F was not a member as defined in section 22 of that Act, and neither a person who is not a member but to whom shares "have been transferred or transmitted by

operation of law", F does not have *locus standi* to present a petition under section 459. F's name was thus struck out as a petitioner.

51. In Atlasview (*supra*) Mr Barton and his wife and a company JGR petitioned the court under section 459 of the English Companies Act 1985 alleging, *inter alia*, unfairly prejudicial conduct. The respondents contended, *inter alia*, firstly, that Mr Barton and his wife had no *locus standi* and should accordingly be struck out as petitioners since they were not members of the company and held no shares by operation of law within the meaning of section 459 (2). Secondly, that although JGR was registered as a member of the company, it could not complain of any prejudice to its "interests" under section 459 because it was a bare nominee and as such had no economic interest in the value of the company's shares registered in its name.

52. Mr Jonathan Crow, sitting as Deputy Judge of the High Court said the following in paragraph 29 to 34 regarding Mr and Mrs Barton who were not members:

"[29] The first complaint was that Mr and Mrs Barton have no *locus standi*, and that they should accordingly be struck out as petitioners. The Reedbest parties point to the fact that s 459 confers a right of petition only on 'a member of a company' and on those to whom shares have been transferred by operation of law. Reference was made in this regard to Re a Company ... at 393 and Re Quickdome Ltd [1988] BCLC 370 at 374-375. It is common ground that neither Mr nor Mrs Barton is registered as a shareholder in Brightview, and that no shares have been transferred to either of them by operation of law. It is also common ground that Mr Barton is not even beneficially interested in any shares in the company.

[30] In response, Mr and Mrs Barton acknowledge that they are not 'members' of Brightview, within the meaning of s 22 of the Companies Act 1985, nor persons to whom shares have been transferred by operation of law, within s 459 (2). Nevertheless, they pointed

to the fact that Mrs Barton is beneficially interested in the shares held by JGR, and that both she and Mr Barton are parties to the investment agreement. On that basis, they submit that it is 'desirable' for them to remain as parties, within the meaning of CPR 19.2 (2) (a), so as to be bound by the outcome and potentially exposed to an adverse order in costs. They also point out that the application to remove them as parties may have been prompted by tactical considerations, as part of the respondents' attempt to obtain an order for security for costs against JGR.

[31] In my judgement, there is no proper basis on which Mr or Mrs Barton could be joined as petitioners. There is some latitude in the range of respondents who can properly be joined, as will be seen from the discussion that follows: but there is no such latitude in the joinder of petitioners. The right to petition the court under s 459 is conferred only on members and those to whom shares have been transferred by operation of law, and neither Mr nor Mrs Barton fall within those categories. No rights are conferred on them by s 459, and although there may be room for nominal defendants in certain types of proceedings, there is in my view no room for nominal petitioners in this context. Furthermore, a procedural provision such as CPR 19.2 (2) (a) cannot expand the class of claimants on whom a cause of action is conferred by primary legislation. Indeed, the very wording of the rule shows that that was not its intended purpose. The court's power to add parties under CPR 19.2 (2) (a) is confined to cases where it is desirable 'so that the court can resolve all the matters in dispute in the proceedings'. Since it is impossible for a 'dispute' under s 459 to arise at the suit of a person who is not a member, the rule cannot be invoked to support the joinder of a non-member as a party.

[32] The parties' respective arguments in this regard are neither worse nor better because they may have been prompted by tactical considerations. The fact that the Reedbest parties may be motivated in taking this point by a desire to improve their application for security for costs against JGR is no more relevant than that the Barton parties may have been motivated in joining Mr and Mrs Barton in the first place by a desire to resist any such application for security.

[33] Finally, it is worth noting that, although para 11 of the petition states that Mr Conway (like Mrs Barton) is the beneficial owner of some of the B shares held by JGR, he (unlike Mrs

Barton) has been joined as a respondent, rather than as a petitioner. This rather suggests that the naming of Mrs Barton as a petitioner is more an expression of her sympathies in the proceedings than of her legal right to bring them. If the Barton parties' only interest in joining Mr and Mrs Barton to the petition is to ensure that they will be bound by the result and potentially exposed to an adverse order in costs, then consideration could be given to joining them, like Mr Conway, as respondents.

[34] At all events, Mr and Mrs Barton must be removed as petitioners."

53. In paragraphs [35] to [39] Mr Jonathan Crow dealt with the standing of the beneficial shareholder. These paragraphs should be fully referred to as it would not be unfair to say that the principle submission on behalf of the applicants was that, as a matter of logic and common sense, only the beneficial owners (whether registered or not) have *locus standi* to institute proceedings for redress in terms of section 252 of the Act. If I understood the development of the applicants' argument correctly, it was later submitted that both the unregistered beneficial holder and the registered shareholder should both be entitled to redress in terms of section 252. But, to continue with the initial submission on behalf of the applicants: it was contended that the applicants were the persons who beneficially owned the shares in Randgold at the appropriate time and who in fact sustained loss in consequence of the prejudicial conduct complained of. It was further contended that it would be quite iniquitous to permit a nominee which, for all intents and purposes was not a party to the oppression and prejudice complained of, to seek redress.

54. In paragraphs [35] to [39] Mr Jonathan Crow in Atlasview dealt with the position of JGR, who was a registered shareholder who held their shares as nominee, as follows:

"(2) JGR as a petitioner

[35] The next point taken by the applicants was that, although JGR is registered as a member, it cannot complain of any prejudice to its 'interests' under s 459 because it is a bare nominee and as such it has no economic interest in the value of the shares in Brightview registered in its name. In support of this line of argument, the Reedbest parties relied on a string of factors which they say show that s 459 cannot be available to JGR in this case. They said that the petition is based on an alleged breach of the investment agreement, to which JGR is not a party. They pointed out that the dispute is essentially one between Mr Barton and Mr Shalson, and that JGR is not a nominee for Mr Barton. They said that Brightview is not a quasi-partnership company, and that JGR cannot 'carry' or otherwise rely upon the other Barton parties' complaints.

[36] Even accepting the truth of all these various factors, the legal submission which they are said to support is in my judgement plainly wrong. The 'interests' which s 459 is able to protect include matters going beyond the economic interest of the legal owner in the shares registered in his name. This is clear from one of the Reedbest parties' own authorities, O'Neill v Phillips [1999] 2 BCLC 1 at 10-11, [1999] 1WLR 1092 at 1110-1101. The phrase 'legitimate expectations' has long been used in this context. For example, they may embrace matters such as an understanding as to the governance of the company, including an undertaking that someone other than the registered shareholder should be involved in management: Hoffmann J said as much in Re a company (No 003160 of 1986) [1986] BCLC 391 at 396, and the fact that his remark was obiter does not detract from its force as a matter of logic. To suggest otherwise, as the applicants do, would involve imposing an arbitrary restriction on the scope of the word 'interests' in s 459. As a matter of statutory interpretation, there is no justification for doing so. Indeed, it would in my judgement be a thoroughly retrograde step to do so: it would mean that, in a case like this, no matter how disgracefully Mr Shalson might have behaved, Mrs Barton would have an interest but no locus, and JGR would have locus but no interest, so neither could complain. There is no reason at all to infer that the parliamentary draughtsman intended such an arbitrary result.

[37] It is striking that this specific point, relating to a nominee shareholder as petitioner, seems never to have been argued or decided before. However, it is also striking that numerous cases have been argued and decided on the assumed basis that a nominee shareholder is fully entitled to complain under s 459 about any diminution in value of the shares registered in its name, and that its 'interests' are for these purposes co-extensive with the interests of the beneficial owner: see Estill v Cowling Swift & Kitchin [2000] Lloyds Rep PN 378 at [101], Arrow Nominees Inc v Blackledge [2000] 1 BCLC 709 at 711, Lloyd v Casey [2002] 1 BCLC 454 at [48]-[49], and Rock Nominees Ltd v RCO (Holdings) plc [2003] EWHC 936 (Ch) at [2]-[3], [2003] 2 BCLC 493 at [2]-[3]. It is, I suppose, entirely possible that all the learned counsel and judges involved in those cases (including, in Lloyd v Casey, junior counsel for the Reedbest parties in this case) completely failed to miss a knock-out point, but it seems highly unlikely. More probably, the point was never taken in any of those earlier cases because it is simply wrong.

[38] For the purpose of this strike-out application, all I have to decide is whether it is properly arguable that the 'interests' of a nominee shareholder under s 459 are capable of including the economic and contractual interests of the beneficial owners of the shares. In my judgement, based on both the language of s 459 and the authorities mentioned above, I consider it to be well arguable: indeed, if I had to decide the point, I would find that it was correct.

[39] For these reasons, the claim by JGR cannot be struck out simply on the basis that it is a nominee shareholder."

55. The aforesaid decisions are some of the English decisions which rejected the very arguments upon which the applicants relied in this application.

56. Further in support of the submission that the beneficial owner of shares in a company is not regarded as a member of the company by virtue of his beneficial ownership, the respondents referred me to a decision of the Supreme Court of South Australia and the decision of the Royal Court of the

Island of Guernsey. I must add that although the legislation upon which these decisions were based were not scrutinised, they do appear to be remarkably similar and at the very least show how this issue had been dealt with in other parts of the Commonwealth. I have not been referred to, and could not myself find, any decision which, in respect of standing, extended relief against oppression or unfair and prejudicial conduct to non-members unless explicit provision was made to extend relief to such non-members, nor a decision which excluded a registered nominee shareholder from relief for the reason that it could show no prejudice or at all.

57. In Niord Pty Ltd v Adelaide Petroleum NL (1990) 54 SASR 87 (SA) the full Court of the Supreme Court of South Australia was *inter alia* required to consider whether the applicant had standing under section 320 (1) of the 1981 Companies Code of Australia. White J, at pp 103-104 said the following:

"Niord had no standing whatsoever under s 320 (1) of the Companies Code to apply to the Court for an order for the relief therein envisaged because such an application can only be made under s 320 (1) (a) 'by a member who believes' that oppressive, prejudicial or unfairly discriminatory action has been taken by the company. The only other person or body who can bring this kind of action is the Commission: s 320 (1) (b). Niord could not rely for standing or right to sue upon an equitable interest. Niord was nothing but an intermeddler, an outsider desperately seeking to throw itself into the way of being oppressed within the meaning of s 320. It is not necessary on this appeal to go into Niord's relationship with Poseidon nor into its reasons or motives. The plain fact is that Niord was not a 'member' and had no right to complain of oppressive or other conduct towards members and no other standing to apply under s 320 (1). It was crucial to Niord's standing under s 320 (1) that it be registered, at the time of issuing of summons, on the Adelaide Register. The register evidences the fact of membership of a company. Only a person or a company on the Register can bring an action complaining *inter alia* of oppressive conduct. It is not possible for Niord now or in the future to

convert non-membership into membership by making some further amendment to its already amended statement of claim. Neither the first nor the second statement of claim in this action alleges any fraud by Adelaide in deliberately holding up the registration of the transfers lodged on 12 April 1989 for more than 10 days. It may well be that Adelaide was too busy with the imminent meeting to get around to registering late share transfers. Indeed, the registration of 82,000 shares on one day and of 18,000 shares some weeks later indicates that lodgement of share transfers might have been on different days or that 'busy-ness' might be the explanation for lateness of registration. Whatever the explanation, lack of the status of membership is fatal to Niord's claim under s 320. Niord was, until registration on the Register no more than the equitable owner of the shares. The vendors, as registered members, remained the members of Adelaide.

Ford, Principles of Company Law (5th edition) para 1112 observes:

'Shares, like other property, may be held in trust... or there may be an equitable mortgage or [an equitable interest as a] transferee under an unregistered transfer.'

Niord enjoyed no more than an equitable interest as a transferee as at the date of the issue of the summons and for the next four days. Ford continues:

'It would be very inconvenient for a company and for commerce generally if the company had to take notice of such equitable interests.'"

58. In Synergy Classic Ltd v DES Commercial Holdings Ltd the Royal Court of the Island of Guernsey, Civil Action file 1568, the applicant sought relief under section 349 of the Companies (Guernsey) Law of 2008 for unfair prejudice. The remedy was confined to members of the company and to those to whom shares had been transferred by operation of law. In paragraph 9 and 10 the following was reported:

"9. So although Synergy has not appeared today, I think I can accept from their conduct in attempting to make an application for leave to amend that they recognise the point that Babé's had raised was a valid one and that gives me some comfort. An application under

section 349 may only be made by a 'member of a company' or someone to whom shares have been transferred by operation of law (Section 349 (3)). 'Member of a company' is defined in section 121 of the Law as a founder member or registered member. There is no provision for somebody to apply if he is a beneficial owner on whose behalf shares are registered in the name of a nominee or someone else. Only a registered shareholder could bring an application under Section 349.

10. Synergy at the date it brought Synergy's application was not registered as a shareholder and for that reason I accept the first paragraph of DES's application and I make an order striking out Synergy's Application on the ground that it had no standing to apply under Section 349."

59. The principal enunciated in Atlasview and the other decisions referred to above was (without reference to Atlasview) applied in the South African decision in the case of Macmillan NO v Pott and others 2011 (1) SA 511 (WCC). In that case a Trust was the registered member of a company named Tygerberg Minolta Pty Ltd. Alleging oppressive conduct, the Trust instituted proceedings in terms of section 252 of the Act. The prejudice complained of was that Mr McMillan had been unfairly excluded from being a director of the company and from earning a livelihood as its employee. The Trust itself had not sustained pecuniary loss and on that basis the respondents asserted a defence which the learned Judge summarised as follows:

"[27] In the first place, argued Mr Dickerson - perhaps encouraged by my having taxed the applicant's counsel on the point - McMillan had failed to demonstrate that any particular act or omission of the company, or any incidence of the conduct of its affairs, had been unfairly prejudicial, unjust or inequitable to the trust (as distinct from McMillan personally). In this regard it was emphasised that it was the trust, and not McMillan personally, that was the member of the company; and that seeking relief in terms of section 252 was a member's remedy. It was submitted that he could not treat himself effectively as the alter ego of the trust

for the purposes of satisfying the requirement of section 252 (1) of the Act. The argument proceeded that McMillan's exclusion from the company did not prejudice the trust's proprietary interest; there was nothing to prevent it from nominating somebody other than McMillan to represent its interests on the company's board of directors."

60. The argument on behalf of the applicant in resisting that contention was formulated by the Judge at 525F-H, paragraph [28] as follows:

"Mr Goodman SC, who (with Mr Acton) appeared for the applicant, argued on the other hand that, having regard to the relationship between the interests of Macmillan and the trust, and the circumstances in which the trust had come to be a registered shareholder, it would be 'the height of technicality" and quite incongruous with the equity-based remedial objects of the statutory provision to draw too nice a distinction between McMillan and the trust. Mr Goodman submitted that it was clear that the trust held its shares in the company only on the basis that McMillan had entered into the joint venture, namely the understanding that he would have managerial control of the day-to-day running of the company's business and would be employed by it in a capacity ordinarily designated as that of managing director."

61. After a thorough review of English cases the learned Judge endorsed the views expressed therein: that the application of section 459 of the English Companies Act of 1985 must take into account that the interests of a member were not necessarily limited to his strict legal rights under the constitution of the company; that the use of the word "unfairly" in section 495 enabled the court to have regard to wider constructions; that the restriction under section 459 had an elastic quality which enabled the courts to mould the concept of unfair prejudice according to the circumstances of the case; that the wide language of section 459 was not to be cut down; and that the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed.

62. Based thereon, the Judge stated the following at p 527H-528B, paragraph [32]:

> "Adopting the approach contended for by Mr Goodman, which commends itself as eminently sensible in pragmatically furthering the object of section 252, I have concluded that the exclusion of Macmillan from the business is as relevant and pertinent to the trust's position *qua* member of the company, as it would have been had McMillan himself, in his personal capacity, been the member."

63. I respectfully agree with the aforesaid: by interpreting the word "prejudice" in a wide sense, (as did the English decisions); and by holding that although the trust, as member, had not *per se* suffered a pecuniary loss and other prejudice in consequence of the oppression complained of, McMillan's pecuniary loss and prejudice fell to be recouped by the trust.

64. As a matter of principle, the relationship between the beneficial holder, as nominator, and his nominee, falls within the same cadre, namely that, on a proper interpretation of section 252, the actual prejudice suffered by the nominator is properly redressed through the nominee. The "interests" of the nominee are in this regard co-extensive with the interests of the beneficial owner, and are capable of including the economic and contractual interests of the beneficial owners of the shares, to use the words in Atlasview. The wide and liberal construction applied by the courts in England, the Commonwealth and South Africa permit the vindication by the nominee of the rights of the beneficial owner without the need to ascribe to the word "member" in section 252 a meaning other than that which has been applied in all the aforesaid jurisdictions over many decades. The owners' interests are thus fully represented in the main proceedings by the nominees, who are the true

members and who are at all times bound to comply with the beneficial owners' instructions. Any order in favour of the nominee will redound to the benefit of the beneficial owner axiomatically by virtue of the relationship between them.

65. Further support for the view that section 103 of the Act defines what a "member" is, is to be found in the interrelationship between a winding-up order and section 252. In the ordinary course section 252 may constitute an alternative remedy to a winding-up order. However, only a shareholder whose name has been entered in the register of members for a period of at least six months immediately prior to the date of the application, or whose shares have devolved on him through the death of a former holder, has *locus standi* to apply in given circumstances for the winding-up of a company.

66. Given the interrelationship which may arise between the remedy of winding-up and that under section 252, it is quite incongruous that only a member in the strict sense may have recourse to a winding-up but that beneficial owners whose names have not been entered in the register of members, may have recourse to section 252, more so as both remedies may be proffered in a single application, albeit in the alternative.

67. Having regard to, *inter alia*, all the aforesaid, it is clear that the word "member" as referred to in section 252, is not capable of being read so as to include a beneficial shareholder whose shares are registered in the name of a nominee.

68. In reply it was submitted on behalf of the 7 main applicants and the intervening applicants that if the applications of the intervening nominees are granted and they are permitted to proceed with the main application, it is wholly unnecessary to decide the *locus standi* issue relating to the 7 main

applicants and the intervening applicants. This is so, according to the argument, because the granting of the nominee intervention applications would have the automatic result that their applications should be granted without more by virtue of their legal interest in the matter. This has the further result that it would be unnecessary for me to decide the issue of *locus standi*.

69. This argument cannot be sustained. Firstly, this view is totally contrary to what the parties agreed to in the separation agreement, which gave birth to the proceedings before this court. Secondly, as a matter of logic I cannot make a finding in respect of the nominee intervention applications without deciding the issue of *locus standi* and all it entails. Furthermore, as a matter of construction section 252 allows for one entity to make application to court and that would be the registered member and no one else. The section simply does not allow for a multiplicity of applications or actions in respect of the same shares as envisaged by the applicant. Even if the beneficial holders are detrimentally affected by actions of the majority, same would not entitle them to intervene in any proceedings since the only entities which have a legal interest to act are the members mentioned in section 252 of the Act. Lastly, the Uniform Rules of Court and the principles in respect of joinder and intervention never intended to expand the class of claimants on whom a cause of action is conferred by primary legislation. See Atlasview (*supra*) paragraph 31.

70. A mere legal interest, which falls short of a right to assert a claim, cannot be the basis for joinder and intervention as an applicant. I cannot imagine a situation, *ceteris paribus*, where a party who cannot or will not assert a claim, can assume the role of *dominis litis*. The right to assert a claim is required by

Rule 12, read with Rule 10, and is a prerequisite for joinder as an applicant. The question of whether a person has a legal interest in the outcome of litigation inevitably arises in the context of joinder of or intervention by a respondent. See Vitorakis v Wolf 1973(3) SA 928 (W) and Shapiro v SA Recording Rights Assoc Ltd (Galeta Intervening) 2008(4) SA 145 (W).

71. Consequently only a registered member has *locus standi* to approach the court in terms of section 252 and not the person who owns the ultimate economic interest in shares registered in somebody else's name. A person whose name is not registered in the register of members has no right to participate as an applicant in section 252 proceedings.

72. An ancillary issue to the issue of *locus standi* of the nominee which was argued by the parties concerns the fact that it may occur that there were more than one nominee at different intervals during the occurrence of the oppression and/or during the period from the institution of the application until the judgment by the court.

73. In my view the ordinary rules should apply namely that the question of standing is a matter which falls to be assessed at the date of the institution of proceedings. That means that the applicant, being the nominee, must be a registered member at the time of instituting proceedings. See Niord (*supra*) at pp 103 and 104. Section 252 (1) of the Act is also rather specific in this regard in that it provides that a member "may ... make an application to the court". See also Law of South Africa, First Re-issue, Volume 4, Part 2, paragraph 223 at p 418. The wording of section 459 (1) of the 1985 English Companies Act lends itself to the same conclusion.

74. As a result of this court's findings in respect of the *locus standi* issue, and the dismissal of the applications by the 7 main applicants and that of the intervening applicants which must follow as a consequence thereof, other issues have fallen by the wayside and need not be decided by this court. This relates, for example, to certain specific objections which were raised to certain of the intervention applications.

75. Other issues upon which no finding is made by this court include the issue of prescription, objections based on the timing of the acquisition and/or disposal of Randgold shares, and shares not registered in the name of the claimant at any relevant time. Most of these issues would conceivably only affect any proposed buy-out order which the court may make and thus the issue of *quantum* in the main application. Whatever the effect of such issues, I am in any event not satisfied that the evidence relating to these issues has been fully presented to this court. It would consequently not be appropriate to non-suit any party for such a reason at this stage. Those issues could more conveniently be decided by the court hearing the main application on the merits.

76. In the result I come to the conclusion that the 7 main applicants do not have *locus standi* to proceed with the main application for the reason that they are not registered members of Randgold since their names do not appear on the register of members of Randgold. As such the application of the main applicants is refused and they shall be removed as applicants from the main application which shall proceed without them.

77. Similarly, the intervention applications of the beneficial owners should be dismissed for lack of *locus standi*. Initially there were 40 such intervention applications of which only 27 survived. These 27 intervention applications should be dismissed. They are the applications of Malachite International Ltd; CR Zehnder; Computrak Pty Ltd; Eljay Investments Inc; NHW Gubb; PR Gubb; Hentiq 1843 Pty Ltd; DJ Palmer; Raven Crest Property Holdings Pty Ltd; GJ Chappel; HL Menne; RP Mundel; ML Steadman; AE Thompson; N Zehnder; SR Buckle; GD Cahn (Pops Investments); EC Chandler; MF Chandler, MS Ghani; Gary Cahn Family Trust; D Gillfilan; Mafumisa Investment Club; S Maharaj; Smyth Family Trust; AM van der Strieckt; and IC Zambeti.

78. Six of the intervention applications (of the original 40) have apparently withdrawn their applications. These applicants are the so-called "freelance applicants", namely, SSP Investment Trust, MS Ahomed, IC Bell, IW Botha, K Lai and N Wendt. It is not clear whether these applicants have indeed withdrawn their applications since it was submitted on their behalf in reply that their applications should be postponed *sine die*. The apparent basis for such postponement is that it is still open to these applicants either to obtain registration of their shares in their own names or to have nominees apply for leave to intervene on their behalf. In my view this is not a proper basis for a postponement. The applications were opposed and are ripe for hearing and over all the months that have passed these parties failed to have the relevant shares registered in their names or to have a nominee apply for intervention. In my view the respondents are entitled to an order in respect of these applicants. If the applications have indeed been withdrawn, such withdrawal is

noted. Should that not be the case, their applications for postponement should be dismissed as well as their applications for intervention due to lack of *locus standi*.

79. In respect of the 7 intervention applications in respect of which the applicants obtained registration in their own names ("the own name applicants"), it is common cause that such applicants have *locus standi* to intervene in the main application and that their applications should be granted. These applicants are WJS Baily, L Duthie, MM Guise, T Hamilton, Japonica Trust, MJ Robertson and The Garcia Revocable Family Trust.

80. Regarding the intervention applications by the three nominees, SBN, Shap-Aron and BNS it is also common cause that these nominees have *locus standi* to intervene in the main application and that their applications should be granted. SBN is granted leave to intervene in respect of the shares held on behalf of E. Gubb, J Gubb, Milkwood Investments Ltd, Malachite International Ltd and CR Zehnder. Shap-Aron is granted leave to intervene in respect of the shares held on behalf of DJ Smyth, PC Smyth, Anglorand Securities Ltd, Eljay Investments Inc, Hentiq 1843 Pty Ltd, DJ Palmer, Raven Crest Property Holdings Pty Ltd, GJ Chappel, HL Menne, RP Mundel, ML Steadman, AE Thompson, N Zehnder, SR Buckle, GD Cahn (Pops Investments), EC Chandler, MF Chandler, MS Gani, Gary Cahn Family Trust, D Gillfilan, Mafumisa Investment Club, S Maharaj, Smyth Family Thrust, AM van der Strieckt and IC Zambeti. BNS is granted leave to intervene in respect of the shares held on behalf of JGW Gubb, Jag Investments Pty Ltd, Computrak Pty Ltd, NHW Gubb and PR Gubb.

81. Since this court has upheld the objection to the *locus standi* of the 7 main applicants and the 27 remaining beneficial owners, costs should follow the result. The 7 main applicants should thus pay the costs of the first respondent relating to the main application, including the issue of *locus standi*, jointly and severally. The second respondent made no claim for any costs.

82. Similarly, the 27 remaining beneficial owners should pay the first respondent's costs relating to their intervention applications. The second respondent did not oppose these applications.

83. In respect of the intervention applications of 7 of the former beneficial owners (the own name applicants) who now seek leave to intervene in their own name as registered members, it is common cause that such applications should be granted. In respect of costs it was submitted on behalf of these applicants that the reason why they were forced to obtain the registration of their own shares in their own names was that Ferbros Nominees Pty Ltd, an affiliate of Investec, refused to apply for leave to intervene in the main application on their behalf and unilaterally terminated its mandate as nominee for the shareholders rather than to do so. Had it not been for the conduct of Ferbros, influenced, so it was submitted, by its close relationship with Investec, the own name shareholders would have had the nominee apply for leave to intervene on their behalf as was done by the other nominee applicants. It was submitted that in these circumstances it would be most unfair to order the own name shareholders to pay the costs of Investec's opposition to their intervention applications.

84. I do not agree with these submissions. If and when the nominee, Ferbros, refused to join or intervene as co-applicant the own name applicants were not compelled to attempt to intervene in the main application in their own names as beneficial owners. They could have terminated Ferbros' mandate and appointed another nominee who would have intervened. Or, they could have obtained registration in their own names prior to instituting their intervention applications. Consequently the first respondent is entitled to the costs of the intervention applications of the own name applicants until the first respondent was informed of their status as registered owners. That occurred on 2 May 2014 when each of these persons served an affidavit disclosing their subsequent registration as own name members. The own name applicants are entitled to their costs (if any) subsequent to that date.

85. I have considered the submissions made by the parties regarding the costs of the nominee applications and especially in respect of that of Shap Aron. I am of the opinion, however, that the first respondent should pay the costs occasioned by its opposition to the intervention applications of SBN, BNS and Shap-Aron. The second respondent did not oppose the nominee intervention applications.

86. The 6 intervention applicants (the freelance applicants) who have withdrawn their applications should pay the costs of first respondent relating to their applications which, if withdrawn, would be until the time of the withdrawal thereof.

87. **In the result the following order is made**:

1. The application of the 7 main applicants is refused and they are removed as applicants from the main application which shall proceed without them.

2. The 7 main applicants are ordered jointly and severally to pay the costs of the first respondent relating to the main application of the 7 main applicants including the *locus standi* objection.

3. The intervention applications of the following 27 beneficial owners are dismissed: Malachite International Ltd; CR Zehnder; Computrak Pty Ltd; Eljay Investments Inc; NHW Gubb; PR Gubb; Hentiq 1843 Pty Ltd; DJ Palmer; Raven Crest Property Holdings Pty Ltd; GJ Chappel; HL Menne; RP Mundel; ML Steadman; AE Thompson; N Zehnder; SR Buckle; GD Cahn (Pops Investments); EC Chandler; MF Chandler; MS Ghani; Gary Cahn Family Trust; D Gillfilan; Mafumisa Investment Club; S Maharaj; Smyth Family Trust; AM van der Strieckt; and IC Zambeti.

4. The 27 remaining beneficial owners mentioned in the previous paragraph are ordered to pay the first respondent's costs relating to their intervention applications.

5. It is noted that the 6 intervention applications of SSP Investment Trust, MS Ahomed, IC Bell, IW Botha, K Lai and N Wendt ("the freelance applicants") have been withdrawn. If these applications have in fact not been withdrawn, the application to postpone these applications is dismissed and the intervention applications of the aforesaid freelance applicants are dismissed.

6. The 6 intervention applicants (the freelance applicants) are ordered to pay the first respondent's costs relating to their intervention applications which, if withdrawn, would be until the time of the withdrawal thereof.

7. The 7 intervention applications of WJS Baily, L Duthie, MM Guise, T Hamilton, Japonica Trust, MJ Robertson and The Garcia Revocable Family Trust in respect of which the applicants obtained registration in their own names ("the own name applicants") are granted.

8. The 7 own name applicants are ordered to pay the first respondent's costs in respect of their applications until 2 May 2014.

9. The 3 intervention applications by the three nominees, SBN, Shap-Aron and BNS are granted as follows:

   9.1. SBN is granted leave to intervene in respect of the shares held on behalf of E. Gubb, J Gubb, Milkwood Investments Ltd, Malachite International Ltd and CR Zehnder;

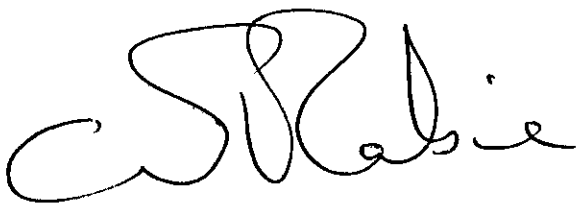
   9.2. Shap-Aron is granted leave to intervene in respect of the shares held on behalf of DJ Smyth, PC Smyth, Anglorand Securities Ltd, Eljay Investments Inc, Hentiq 1843 Pty Ltd, DJ Palmer, Raven Crest Property Holdings Pty Ltd, GJ Chappel, HL Menne, RP Mundel, ML Steadman, AE Thompson, N Zehnder, SR Buckle, GD Cahn (Pops Investments), EC Chandler, MF Chandler, MS Gani, Gary Cahn Family Trust, D Gillfilan, Mafumisa Investment Club, S Maharaj, Smyth Family Trust, AM van der Strieckt and IC Zambeti;

9.3. BNS is granted leave to intervene in respect of the shares held on behalf of JGW Gubb, Jag Investments Pty Ltd, Computrak Pty Ltd, NHW Gubb and PR Gubb.

10. The first respondent and the second respondent are ordered to pay the costs of the 3 nominee intervention applications jointly and severally.

11. Any issue raised in the intervention applications but not decided by this court shall be adjudicated, if necessary, by the court hearing the main application and costs in that regard is reserved.

12. All orders for costs shall include the costs of three counsel.



C.P. RABIE
JUDGE OF THE HIGH COURT

17 September 2015