THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-Reportable

Case no: 1193/2019

In the matter between:

WOMEN IN CAPITAL GROWTH (PTY) LTD **FIRST APPELLANT**

AKHONA TRADE & INVESTMENT (PTY) LTD **SECOND APPELLANT**

and

MPHO INNOCENT SCOTT **FIRST RESPONDENT**

ABDOOLRAWOOF AHMED **SECOND RESPONDENT**

AFRICAN LEGEND INVESTMENT (PTY) LTD **THIRD RESPONDENT**

Neutral citation: *Women in Capital Growth (Pty) Ltd and Another v Scott and Others* (1193/2019) [2020] ZASCA 95 (20 August 2020)

Bench: Wallis, Mbha and Nicholls JJA and Weiner and Unterhalter AJJA

Heard: Matter disposed of without a hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 20 August 2020.

Summary: Proxy undertakings to vote at company meeting – such meetings held and resolutions passed and implemented – undertakings due to expire – decision on appeal would not have a practical effect or result – appeal dismissed in terms of s 16(2)(a) of Superior Courts Act 10 of 2013.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Dippenaar J sitting as court of first instance):

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel, such costs to be paid by the Appellants jointly and severally, the one paying, the other to be absolved.

JUDGMENT

Unterhalter AJA (Wallis, Mbha, Nicholls JJA and Weiner AJA concurring):

[1] The appellants are shareholders of the third respondent (ALI). In February 2019, the appellants each gave an irrevocable undertaking in favour of the first and second respondents (Messrs Scott and Ahmed) to vote their shares in ALI, at any meeting of the shareholders of ALI, in favour of certain resolutions. Messrs Scott and Ahmed were directors of ALI and procured the undertakings on behalf of ALI, and for its benefit.

[2] Among the resolutions referenced in the undertakings, two are relevant. First, the appellants undertook to vote in favour of the performance and implementation of certain agreements (the transaction agreements). The transaction agreements arose from the funding by Glencore South Africa Oil Investments (Pty) Ltd (Glencore SA) of the acquisition by Off The Shelf Investment Fifty Six (RF) (Pty) Ltd (OTS56) of the shares in the companies that owned Chevron's assets in South Africa and Botswana, and the sale and transfer to Glencore SA of these shares by OTS56. ALI controls OTS56. Undertakings were obtained from ALI shareholders, including the appellants, so as to ensure that ALI implemented the sale of shares by OTS56 to Glencore SA. Second, the appellants undertook to vote in favour of the removal of Mr. Mashudu Ramano as a director of ALI.

[3] Messrs Scott and Ahmed, fearing that Mr. Ramano was seeking to take control of the board of ALI and derail the implementation of the transaction agreements, sought assurances from the appellants that they would honour their undertakings. Correspondence followed from which it became apparent that the appellants did not consider their undertakings valid and enforceable.

[4] A meeting of the shareholders of ALI was called to take place on 4 April 2019. Resolutions were proposed that included a special resolution to approve the sale of shares to Glencore SA and an ordinary resolution to remove Mr. Ramano as a director and the chairperson of ALI. While the appellants were willing to give fresh undertakings to support the special resolution, they maintained their position that their irrevocable undertakings were invalid and unenforceable. Hence, they would not vote their shares in support of the resolution to remove Mr. Ramano.

[5] This caused Messrs Scott and Ahmed to bring an urgent application seeking declaratory relief that would oblige the appellants to honour their irrevocable undertakings at the shareholders' meeting to be held on 4 April 2019. The appellants opposed the application and sought by way of a counter application that the irrevocable undertakings be declared unlawful, invalid and unenforceable. Mr. Ramano, cited as the third respondent in the application, did not oppose the relief.

[6] Dippenaar J heard the urgent application and, on 3 April 2019, made an order. In relevant part, the order declared the appellants bound by their irrevocable undertakings; required the appellants in terms of these undertakings to procure the implementation and performance of the transaction agreements; and obliged the appellants to attend the general meeting of shareholders to be held on 4 April 2019, or any postponed meeting, and at that meeting cast their votes, in person or by proxy,

in favour of the special resolution to approve the sale of shares by OTS56 to Glencore SA and the ordinary resolution to remove Mr. Ramano as a director of ALI. It dismissed the counter application and ordered the appellants to pay the costs.

[7] Dippenaar J considered the challenge to the validity and enforceability of the appellants' irrevocable undertakings. First it was contended that the undertakings contravened s 58(8)(c) of the Companies Act. This provision stipulates that if a company issues an invitation to shareholders to appoint one or more persons named by the company as a proxy, it must not require the proxy appointment to be made irrevocable. Second, the appellants submitted that the irrevocable undertaking requiring them to vote in support of the removal of Mr. Ramano as a director offended the requirement of s 71(2)(b) of the Companies Act that a director must be heard before a vote is taken to remove them. The requirement to support the removal resolution, it was submitted, negated the purpose of a hearing.

[8] These challenges found no favour with the court below. Dippenaar J held that s 58(8)(c) is only of application if the company issues an invitation to shareholders to appoint persons named by the company as a proxy. This was not so on the facts – ALI had issued no such invitation. The proxy provision in the undertakings was, in any event, severable. As to the s 71(2)(b) challenge, citing cases of some pedigree,[1] the court below held there was no prohibition upon agreements between shareholders as to how they will vote at a general meeting.

[1] *Amoils v Fuel Transport (Pty) Ltd and Others* 1978 (4) SA 343 (W) at 347 A-G; *Stewart v Schwab and Others* 1956 (4) SA 791 (T); *Desai and Others v Greyridge Investments (Pty) Ltd* 1974 (1) SA 509 (A); *Ben-Tovim v Ben-Tovim and Others* 2001 (3) SA 1074 (C).

[9] With the leave of the court below, granted on 9 August 2019, the appellants appeal to this court.

[10] As the application of Messrs Scott and Ahmed was brought on an urgent basis, in contemplation of the general meeting of shareholders, to be held on 4 April 2019, this court enquired of the parties what had transpired since the grant of the order by the court below on 3 April 2019. We were informed that the general meeting took place on 4 April 2019. The special resolution to approve the sale of shares by OTS58 to Glencore SA was passed. The resolution to remove Mr. Ramano as a director was not put to a vote. The shareholders adopted a resolution to refer the matter to a shareholders' oversight committee. However, at the annual general meeting of ALI, held on 27 February 2020, the resolution to remove Mr. Ramano was carried.

[11] These facts, taken together with the fact that the irrevocable undertakings are binding for a period of 18 months, and thus would have expired before the determination of this appeal, led us to require the parties to file short supplementary heads of argument to address the issue as to whether this appeal was moot, as contemplated in s 16(2)(a)(i) of the Superior Courts Act 10 of 2013.

[12] The parties adopted contrasting positions. The first appellant contends that the validity of the irrevocable undertakings remains a live issue. The appellants in this appeal, together with seven other shareholders of ALI, have launched an application in the high court in which they seek the rectification of the share register of ALI and that the results of the votes cast by the shareholders of ALI at the annual general meeting should accord with the voting rights reflected in the rectified share register. Messrs Scott and Ahmed have opposed the rectification application and have

reserved the right to set aside the votes cast by the appellants at the annual general meeting on the basis that the appellants cast their votes in breach of their undertakings. This, it is submitted, renders the appeal of practical effect.

[13] The second appellant accepted that there is no longer a live dispute between the parties. It urged us nevertheless to determine the appeal in the interests of justice. That interest was said to arise from the need to decide whether the interpretation given by the court below to ss 58(8)(c) and 71(2)(b) of the Companies Act is correct.

[14] Messrs Scott and Ahmed explained that at the annual general meeting of 27 February 2020 a resolution was proposed to remove Mr. Ramano. This resolution was carried. Contrary resolutions were also proposed to remove other directors and appoint directors aligned to Mr. Ramano. These resolutions failed. The appellants voted against the resolution to remove Mr. Ramano and for the appointment of persons aligned to Mr. Ramano. Mr. Ramano and certain other shareholders, including the appellants, then brought the rectification application to set aside an issue of shares in ALI, together with consequential relief that would reinstate Mr. Ramano as a director and appoint persons aligned to him as directors. Alternatively, these applicants sought an order to convene another general meeting to consider again the resolutions that were put to the annual general meeting on 27 February 2020. In opposing this relief, Messrs Scott and Ahmed contended that, even if the share register is rectified, Mr. Ramano should not be reinstated because had the appellants and two other shareholders not voted contrary to their undertakings at the annual general meeting, the outcome of the voting at that meeting would not have been different. Accordingly, the only relief that should be issued is that a general meeting of shareholders be convened to reconsider the resolutions. Should the high

court ever make such an order, by the time the general meeting takes place, the undertakings would have lapsed. Consequently, the decision sought of this court will have no practical effect.

[15] I proceed to consider the issue of mootness. If there are no longer live issues between the parties, then the appeal has no practical effect and the matter is moot.[2] Section 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 provides that where the issues in an appeal are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. The point of principle has been formulated as follows: 'This principle is based on the notion that judicial resources should be efficiently employed and not be used for advisory opinion or abstract propositions of law.[3]'

[16] The urgent application sought to exact compliance from the appellants with their irrevocable undertakings so as to implement the sales of shares to Glencore SA and secure the removal Mr. Ramano as a director of ALI. The high court made the order in contemplation of the general meeting of shareholders to be held the following day.

[17] The purpose for which the order was sought has been achieved; the sale of shares has taken place and Mr. Ramano has been removed as a director. The terms of the order made by the high court concerned the implementation of the transactions and, in particular, the special resolution to approve the sale of shares to Glencore SA

[2] *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC).
[3] *JT Publishing (Pty) Ltd v Minister of Safety and Security* [1996] ZACC 23; 1197 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15.

and the ordinary resolution to remove Mr. Ramano as a director. These resolutions have been voted upon and were carried. That this was achieved without the concurrence of the appellants as to Mr. Ramano's removal does not alter the fact that the outcome sought to be achieved by the order has taken place.

[18] This would indicate that our consideration of the validity of the irrevocable undertakings will have no practical effect or result. However, the first appellant contended that the validity of the irrevocable undertakings has again become a live issue because of the opposition offered in the rectification application to certain of the consequential relief sought by the applicants in that application. It will be recalled that the applicants seek the reinstatement of Mr. Ramano. That relief is resisted on the basis that had the appellants, and two other shareholders, not voted at the annual general meeting in breach of their undertakings, the result, being the removal of Mr. Ramano as a director, would have been the same.

[19] The contention of the first applicant is unavailing. First, it requires us to determine the validity of the undertakings in the appeal before us on the basis that this issue might have relevance in other proceedings that are not before us. Second, whether the undertakings were of application for the purpose of the resolution proposed at the annual general meeting of 27 February 2020 is a mixed question of fact and the proper interpretation of the undertakings that we are not called upon to determine in this appeal. Third, whether the court that hears the rectification application ever reaches the proposition as to what would have been required of the appellants in terms of their undertakings had they not voted as they did is a matter of conjecture, too speculative to warrant this court entertaining the appeal. Fourth, and upon the assumption that the rectification of the share register is ordered and a

meeting of shareholders is convened to consider afresh the resolutions that served before the annual general meeting, the undertakings will, by then, have lapsed. The validity of the undertakings is thus rendered academic.

[20] For these reasons, I find that the decision sought from this court on appeal has no practical effect or result.

[21] I turn to consider the submission of the second appellant. The second appellant accepted that the appeal was moot, but it contended that it would be in the interests of justice to determine whether the high court was correct in the interpretations it gave to the provisions of the Companies Act that were debated in the urgent application.

[22] The interests of justice are not engaged on the basis of *res iudicata* or issue estoppel. In *Goldex*,[4] this court explained that the plea of the *exceptio res iudicata* requires that the question raised has been finally adjudicated upon in proceedings between the same parties, for the same relief, based upon the same cause of action. The less exacting defence of issue estoppel requires that the parties must be the same and the same issue of fact or law must be an essential element of the judgment already rendered.

[23] Neither *res iudicata* nor issue estoppel arise in respect of the rectification application that serves before the high court. Distinctive relief is sought in that application, at the instance of parties that include, but are not confined to, the

[4] *Prinsloo NO and Others v Goldex 15 (Pty) Ltd and Another* [2012] ZASCA 28; 2014 (5) SA 297 (SCA) para [10].

appellants, and the validity of the undertakings will figure, if at all, as an ancillary issue concerning an appropriate remedy. Accordingly, the rectification application can be determined on its merits, without reference to the judgment in the urgent application.

[24] There is also no reason why the judgment of the court below enjoys such strong precedential value that its review by this court is necessary. First, the judgment of the court below was given in an application brought as a matter of urgency, thus allowing less time for deliberation than a court would ordinarily desire. This is not in any way to denigrate the judgment, but simply to recognize the circumstances in which it was rendered. Second, the judgment relied principally upon whether the factual predicate for the application of s 58(8)(c) of the Companies Act had been met, a matter of no precedential significance. As to s 71(2)(b), the court below interpreted the provision in the light of well-known principles, entailing little novelty. Should another court consider these principles of less interpretative significance to a proper understanding of s 71(2)(b), it will no doubt say so.

[25] I do not consider, therefore, that the interests of justice should incline this court to entertain the appeal.

[26] The remaining issue is that of costs. The first appellant referenced the fact that substantial costs were incurred by the parties in the court below as a result of the length of the papers, the heads of argument filed in the matter, the briefing of senior and junior counsel, and the heads filed in the application for leave to appeal. These were said to amount to exceptional circumstances that warrant this court taking account of the costs incurred by the parties in deciding whether our decision on

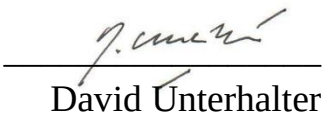
appeal would have a practical effect or result. This submission was made to bring this matter within the savings provision of s 16(2)(a)(ii) of the Superior Courts Act.

[27] The submission failed to do so. The costs that were referenced are those ordinarily incurred by parties who engage upon litigation of commercial importance in urgent circumstances. No exceptional circumstances were disclosed. Hence this court, in terms of s 16(2)(a)(ii), cannot attach any weight to the costs incurred as a basis to hold that our decision on appeal would have a practical effect or result.

[28] The parties before us did not raise the question of mootness. The court did so. However, the appellants elected to pursue this appeal. They should have been aware from the outcome of the annual general meeting held on 27 February 2020 that their efforts to defend the position of Mr. Ramano had been unsuccessful and that the second of the two resolutions that occasioned the urgent application and the judgment of the court below had been determined. The appellants chose to prosecute the appeal, notwithstanding. They are liable for the costs occasioned by that choice.

[29] In the result I make the following order:

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel, such costs to be paid by the Appellants jointly and severally, the one paying, the other to be absolved.



David Unterhalter
Acting Judge of Appeal

APPEARANCES:

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For Second Appellant:	A A Gabriel SC (with him I Veerasamy)
	Instructed by: Pather and Pather, Durban Claude Reid Incorporated, Bloemfontein
For First to Third Respondents:	J G Dickerson SC (with him J D Mackenzie)
	Instructed by: Cliffe Dekker Hofmeyer Inc, Cape Town Honey Attorneys, Bloemfontein