

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

Case No: 108/2023

In the matter between:

SPECTRUM-ALERT ITS (PTY) LTD

First Applicant

GRANVILLE PETER MALGAS

Second

Applicant

MARTIN BOOYSEN

Third

Applicant

PHILLIP ARENDS

Fourth

Applicant

WINSTON HILTON VAN ROOYEN

Fifth

Applicant

RUWAYNE WILLIAMS

Sixth

Applicant

CARDINAL KIRIL VENCENCIE

Seventh

Applicant

and

ABSA BANK LIMITED

First

Respondent

TERENCE ALDRIDGE LANGTRY Respondent	Second
CHRISTIAN ARCHIBALD KING Respondent	Third
RICARDO TROMP Respondent	Fourth
FAHEEM WILLIAMS Respondent	Fifth
DINA MAGDALENE DU PREEZ Respondent	Sixth
CLIFFORD JOSEPH Respondent	Seventh
CHRISTOPHER HENRY SAMPSON Respondent	Eighth
KEENON DERECK BARENDSE Respondent	Ninth
DEON TUMBY DICK Respondent	Tenth
SONGEZO MPANDA Respondent	Eleventh
MTUTUZELI MADWARA	Twelfth Respondent

and

REASONS FOR JUDGMENT

BANDS AJ:

[1] This application, which concerns the corporate coup d'état, of the first applicant company (*"the company"*), was launched as an urgent application on 19 January 2023.

[2] The company hijacking occurred by the removal of the second to sixth applicant directors¹ at a meeting purporting to be a shareholders meeting, held on 18 October 2022, and their replacement with the second to tenth respondent directors (*"the dissident directors"*). The application was postponed on various occasions. By the time the matter came before me on 21 February 2023, the initial urgency had dissipated on account of two prior orders of court, granted on 25 January 2023² and 10 February 2023,³ (*"the*

¹ From the company's board of directors.

² Order of court granted by Smith J in the following terms:

- "1. The matter is postponed for hearing on 9 February 2023, the date having been set in conjunction with the DJP of this Division.
2. The Second to Tenth Respondents are jointly and severally ordered to forthwith refrain from any attempts to open or operate any bank account with any bank account on behalf of the First Applicant prior to the hearing of the application.
3. The First Respondent shall immediately upon receipt of this order, transfer the amounts reflected in Annexure A hereto, into the First Applicant's employees' banking accounts as reflected therein, as payment of the First Applicant's listed employees' bonuses.
4. Each of the parties' (Second to Seventh Applicants and Second to Tenth Respondents) undertake not to partake in or instigate any acts of violence is noted and forms part of the court order.

interim orders”). Neither of the interim orders, which were granted by agreement,⁴ expressly pronounced on the issue of urgency and accordingly, insofar as it was necessary to do so, the respective parties addressed me on the issue of urgency as well as on the merits.

- [3] Each of the interim orders served to regulate the affairs of the company, pending the outcome of the final relief; as well as to regulate the further conduct of the proceedings. The most pressing issues for determination on

5. *The Nelson Mandela Bay Municipality may, if so advised, supplement its application to intervene by no later than 16h00 hours on 26 January 2023.*

6. *The costs of 24 January 2023 and 25 January 2023 are reserved.”*

³ Order of Court granted by Botha AJ in the following terms:

- “1. *The opposed matter is postponed for hearing on 21 February 2023 on the motion court roll for hearing on that date, the date having been set in conjunction with the DJP of this Division.*
2. *The Second to Tenth Respondents are jointly and severally ordered to forthwith refrain from any attempts to open or operate any bank account with any bank account on behalf of the First Applicant pending the finalisation of the above matter.*
3. *Each of the parties’ undertaking not to partake or instigate any acts of violence is noted and forms part of the court order.*
4. *During the interim period until the finalisation of the hearing, the NMBM’s undertaking in terms of the Vehicle Operating Company Agreement to implement the following action is noted and forms part of the court order:*
- 4.1 *To appoint an independent administrator and/or employee of the NMBM to implement, administer and oversee the operations and the municipal transport services which Applicant is failing to provide forthwith;*
- 4.2 *The NMBM, through its independent administrator, will make use of all the operational employees of the Applicant, which employees will be remunerated at their normal salaries as per their employment contracts with the Applicant.*
5. *The Applicants will index and paginate by close of business on or before Monday 13th February 2023.*
6. *The Applicants will deliver supplementary heads of argument on or before 12h00 on Wednesday 15th February 2023.*
7. *The Second to Tenth Respondents and Nelson Mandela Bay Municipality will deliver supplementary heads of argument on or before 12h00 o’clock on Friday 17th February 2023.*
8. *The costs of today are reserved.”*

⁴ Albeit that the second to tenth respondents opposed the granting of the postponement on 10 February 2023 and sought to proceed with their counter application.

an interim basis,⁵ were: (i) the immediate release of funds, by the first respondent, for the payment of the company's employees' bonuses; which failure to pay had led to strike action; (ii) the payment of the company's employees' salaries and shareholders' compensation, as and when payment become due; (iii) the restoration of control of the company's business premises to the second to seventh applicants; and (iv) interdictory relief against the second to twelfth respondents preventing *inter alia* the interference of the day-to-day operations of the company; and the harassment and intimidation of the company's directors; shareholders; or employees. The remainder of the relief sought by the applicants,⁶ concerned the regularisation of the company affairs, and more particularly, the composition of the board of directors and the restoration of the status quo ante.

- [4] In response, the second to tenth respondents launched a counter application (*"the respondents' counter application"*) in which they sought an order directing the first respondent to comply with a purported resolution of the company's board of directors, purportedly passed on 3 January 2023 by the dissident directors (annexure "RES22" to the respondents' counter application). The purported resolution related, in part, to the management of the company's bank account and the purported authority of the signatories thereto. Implicit in the relief sought in the respondents' counter application is that if I were to find that the meeting, held on 18 October 2022, was not a shareholder's meeting of the company, annexure "RES22" would be null and void and the counter application would fail. In addition, the Nelson Mandela Bay Municipality sought leave to intervene in the applicants' application on the basis that it had a direct and substantial legal interest in the matter.

⁵ This is apparent on a reading of the notice of motion, together with the papers, notwithstanding the criticism levelled by the second to tenth respondents at the manner in which the applicant formulated the relief sought in the notice of motion.

⁶ In the notice of motion, such relief was sought by way of a rule nisi, returnable on 31 January 2023, this being one week after the original date of hearing. This was later overtaken by events, given the interim orders.

[5] On 24 March 2023, having been satisfied that the applicants' application was of sufficient urgency to have warranted approaching the court in the manner in which they did, I granted an order in favour of the applicants, *inter alia*, declaring the purported decisions to remove the second to sixth applicant directors and to elect the dissident directors at the meeting, held on 18 October 2022, void *ab initio* and of no force and effect. I further granted orders dismissing: (i) the respondents' counter application; and (ii) the application for leave to intervene brought by the Nelson Mandela Bay Municipality.⁷ What follows are my reasons for the order.

Urgency

[6] I recently had occasion to recount the trite principles applicable to urgent applications in *Ascon Trading CC Trading as Ascon Civil Engineering v Wilson and another*,⁸ which must be judged against the background of Rule 6(12) of the Uniform Rules of Court. Pertinently, the question is whether an

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- ⁶ "1. The applicants' non-compliance with the Rules of the above Honourable Court relating to forms, time periods and service are condoned, and leave is granted to the applicants to move this application as a matter of urgency in terms of the provision of Rule 6(12) of the Uniform Rules of Court.
2. The purported decisions to remove and elect directors at the meeting held on 18 October 2022 are void *ab initio* and are accordingly of no force and effect.
 3. The first respondent is ordered and directed to forthwith unfreeze and/or release the hold on the first applicant's bank account, with account number 4[...], held with the first respondent bank.
 4. The second to twelfth respondents are interdicted and restrained from:
 - 4.1 interfering unlawfully in the day-to-day operations of the first applicant; and
 - 4.2 collectively holding themselves out to be the first applicant's board of directors.
 5. The applicants are entitled to approach this Court on the same papers, duly supplemented, in the event that the respondents breach the order contained in paragraph 4 of this order.
 6. The respondents are ordered to pay the costs of this application, including the reserved costs, jointly and severally, the one paying, the other to be absolved.
 7. The respondents' counter application is dismissed with costs.
 8. The application for intervention by the Nelson Mandela Bay Municipality is dismissed with costs.
 9. Reasons to follow."

⁸ [2022] JOL 57361 (ECP); and *Ascon Trading CC t/a Ascon Civil Engineering v Wilson and Another* (3387/2022) [2023] ZAECQBHC 2 (17 January 2023), and the authorities cited therein.

applicant, in urgent proceedings, has set out objective grounds, why the matter is urgent and whether he or she has established that substantial redress cannot be obtained at a hearing in due course.

[7] Not only is an applicant required to persuade the court that non-compliance with the Rules is justified on the grounds of urgency, but he or she is also required to demonstrate that the extent to which he or she has sought to curtail the Rules, procedures, and time periods, is justified in the circumstances.

[8] An applicant cannot content itself to merely sit back and delay the assertion of his or her rights, and by doing so, create his or her own urgency. Such conduct does not amount to urgency justifying the determination of the matter in accordance with Rule 6(12).⁹

[9] As previously stated, I formed the view that, on the facts of this matter, the application was properly launched. The second to tenth respondent's main contention in respect of urgency, apart from their objection pertaining to the degree of urgency and the time periods selected by the applicants,¹⁰ is that the second to sixth applicants had known about their purported removal as early as 19 October 2022 and waited some three months to launch the present proceedings.

[10] Whilst it may be so that the second to sixth applicants were aware of their purported removal on 19 October 2022, the validity of which they have at all times disputed, it was business as usual for the applicants until 3 January 2023, when the dissident directors, with the assistance of the eleventh and twelfth respondents, forcibly took over the company's business premises.

[11] Whilst such a takeover is denied by the second to tenth respondents, the explanation offered by them as to the events of 3 January 2023 is not only

⁹ *Lindeque and Others v Hirsch and Others, In Re: Prepaid24 (Pty) Limited* (2019/8846) [2019] ZAGPJHC 122 (3 May 2019); and *Masipa and Another v Masipa* (23224/2020) [2020] ZAGPPHC 214 (4 June 2020).

¹⁰ Which I found to be justified in the circumstances of this matter for the reasons to which I turn.

inadequate but amounts to little more than a bald denial if regard is had to the detailed allegations narrated by the applicants over some 20 paragraphs, many of which are left unanswered.¹¹ Moreover, the second to tenth respondents' allegations and denials, on their own version, are clearly untenable.

[12] That Ms Heydenrych, a member of the first applicant's senior management, would simply hand over the keys for the business premises to the second to tenth respondents, voluntarily, after moments before having refused them access to the building and contacting the police for assistance, which facts are admitted by the second to tenth respondents, is in itself contradictory and far-fetched. Significantly, it raises the question as to why Ms Heydenrych, upon leaving the premises, immediately attended upon the Mount Road police station to open a criminal case against the second to twelfth respondents under CAS28/1/2023, which is not denied by the respondents.

[13] Equally implausible is the second to tenth respondents' explanation that they simply attended upon the company's business premises to hold a meeting, after having previously been refused access on 24 October 2022, and in circumstances in which they did not hold keys for the premises. The second to tenth respondents are decidedly silent on: (i) the events which unfolded from the time that they entered upon the premises¹² to the time that the police arrived; (ii) what precipitated the calling of the police by Ms Heydenrych; (iii) the verbal exchanged between Ms Heydenrych and any or all of the second to twelfth respondents; (iv) what meeting the dissident directors allegedly planned on holding at the premises on the day in question; and (v) whether such alleged meeting was in fact held.

¹¹ But for a bald denial.

¹² Together with the eleventh and twelfth respondents.

- [14] To raise a genuine dispute of fact,¹³ which the second to tenth respondents have failed to do, it was incumbent upon them to seriously and unambiguously address the facts that it wished to place in dispute. This is particularly so in circumstances where the facts averred by the applicants are such that the second to tenth respondents necessarily possess knowledge of such facts and are able to provide an answer thereto; alternatively, countervailing evidence, if such facts are not true or accurate.¹⁴ I am satisfied as to the inherent credibility of the applicants' factual averments regarding the events of 3 January 2023 and proceed on the basis of the correctness thereof.
- [15] The inherent urgency was exacerbated, when it became known to Ms Heydenrych, whilst attempting to process the payment of the employees' bonuses on 10 January 2023, that the company's bank account had been frozen by the first respondent. During the period of 10 January 2023 and 12 January 2023, the applicants engaged with the first respondent in an endeavour to process the payments, to no avail. As a result of the non-payment of the employees' bonuses, the employees embarked on strike action, including the burning of tyres on a public road at the entrance of the company's business premises.
- [16] I have previously detailed the most pressing issues, which fell for determination on an urgent basis, most of which were resolved by the granting of the interim orders. The submission made on behalf of the second to tenth respondents that they were *ad idem* with the applicants regarding the need for the payment of the employees' bonuses and accordingly, that such need did not found urgency, is not born out from the papers before the court.

¹³ *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (AD) at 634I – 635A-C.

¹⁴ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paragraph 13.

- [17] Contrary to such assertion, the second to tenth respondents, in their answering affidavit, continuously sought to lay blame on the second to sixth applicants for the non-payment of the bonuses;¹⁵ and adopted the stance that the applicant directors lacked the necessary authority to seek the release of the funds from the first respondent, which fell within the purview of the second to tenth respondents' authority.
- [18] Despite this latter allegation, the second to tenth respondents did not contend that they had engaged with the first respondent for this purpose. Significantly, there exists no indication, whatsoever, that the second to tenth respondents would have acceded to the payment of the bonuses, but for the launch of this application on an urgent basis. To the contrary, the second to tenth respondents' papers demonstrate an attitude of laxity regarding such payment, in which they aver that payment will be attended to upon finalisation of the dispute relating to the directorship of the company, which dispute they contend ought to have been brought in the ordinary course.
- [19] For the above reasons, I was satisfied that the application was of sufficient urgency to warrant the abridgment of the time periods in accordance with those set out by the applicants.
- [20] I now turn to consider the validity of the purported shareholders meeting.

Meeting of 18 October 2022

- [21] The issue central to these proceedings, is the validity of the meeting held on 18 October 2022. The factual background leading up to the purported shareholders meeting is narrated by the second applicant in the applicants' founding affidavit. What follows is a summary of these facts.

¹⁵ The allegation that the payment of the bonuses ought to have been made from the funds paid to Ah Shene Attorneys by the applicants does not assist the second to tenth respondents. The amounts set out in annexure A to the notice of motion exceed the funds paid to Ah Shene Attorneys, which is consistent with the explanation contained in the applicants' replying affidavit.

- [22] Subsequent to a failed attempt by the company to host a shareholders meeting during July 2022, the company, during September 2022, appointed a local attorney, practicing in Gqeberha, as the company secretary to “assist with the preparation, advices and attending to the meeting of shareholders.” The company secretary thereafter prepared a document termed “*Notice to Shareholders Regarding Shareholders Resolutions.*” *Ex facie* the notice, its purpose was to, *inter alia*, (i) inform the company’s shareholders that a meeting of shareholders was planned for 12 October 2022, at the Feather Market Hall, at 09h00; (ii) that the directors of the company had decided to allow for further proposed resolutions to be submitted by shareholders on or before 27 September 2022; (iii) the procedure for the submission of the further proposed resolutions; and (iv) that the formal notice of the shareholders meeting would be distributed to the shareholders shortly. There is no evidence, nor suggestion, on the papers that the notice was ever disseminated by the company secretary to the shareholders. To the contrary, it is apparent that as of 2 October 2022, the company secretary did not have the email addresses of all the directors, nor those of the shareholders. Nothing turns on this.
- [23] On 28 September 2022, the company secretary transmitted an email to Ms Heydenrycht; the second applicant; the eleventh respondent; and one other recipient, whose identity is not disclosed, in which he recorded that “...*due to further matters that were not resolved by the Board and the Regional Taxi Council facilitators, the meeting will now take place on 18 October 2022 at 09h00. The venue will remain the Feather Market Centre Hall.*” Thereafter, at 22h51 on 2 October 2022, the company secretary transmitted an email to several of the company’s directors with a link to the notice of the meeting, and a draft shareholders pack for the shareholder’s meeting, which was divided across three emails, transmitted at 22h51; 22h55; and 22h57, respectively. The company secretary requested the recipients to forward a copy of the documents to the directors, who had not been copied in on the email,¹⁶ and to favour him with the shareholders email addresses. The

¹⁶ Given that the company secretary was not in possession of their respective email addresses.

company secretary further recorded that delivery of hard copies of the documents would be facilitated on the morning of 3 October 2022. According to the applicants, the majority of the company's shareholders are elderly persons and are not technologically advanced. As a result, any documents disseminated electronically had to be followed up with hard copies.

[24] Prior to the board of directors having approved the draft agenda and the shareholders pack, which was incomplete, the company secretary created a WhatsApp group,¹⁷ and via this platform, disseminated the documents to the shareholders.

[25] When this came to the attention of the second applicant, on 3 October 2022, he sent a voice-note on the WhatsApp group informing the shareholders that the notices were unauthorised and that they should be ignored. He thereafter contacted the company secretary to express his disapproval as to the premature and unauthorised dissemination of the notice of meeting. This elicited a response via email, from the company secretary on the same day. In addition to recording the above impasse, he further recorded that he was of the understanding that he had a mandate to send the notice to the shareholders timeously and indicated that 3 October 2022 was the last day for the delivery of the notice. He proposed a meeting, with the Regional Taxi Council being present, to review the situation, which had arisen, and ultimately resigned on 12 October 2022. I pause to mention that at the time of his resignation, only one shareholder had received a hard copy of the necessary documentation for the shareholders meeting.

[26] Following his resignation, the applicants contend that the company's board of directors immediately met and resolved that the shareholders meeting could not go ahead on 18 October 2022 in that: (i) there was no longer a company secretary; (ii) the necessary documentation could not be delivered

¹⁷ This being separate from the WhatsApp usually utilised by the board of directors for the purposes of electronic communication with the shareholders.

to all the shareholders timeously; (iii) all the requirements regarding the proposed resolutions had not been met; and (iv) the contents of the shareholder packages were not in order.

[27] Accordingly, on 14 October 2022, the second applicant, issued a formal notice of cancellation¹⁸ of the meeting to the shareholders, the validity of which was challenged by the second to tenth respondents.¹⁹ The applicants contend that notwithstanding the above, the second to tenth respondents proceeded to convene a purported shareholders meeting on 18 October 2022, during which the second to sixth applicant directors were removed and replaced by the dissident directors.

[28] The second to tenth respondents, save for a bald denial, do not challenge the facts upon which the applicants rely. Instead, they contend in their answering affidavit, without laying a factual basis therefor, that the shareholders meeting was properly convened “*in accordance with the requirements of the Act*” by the company secretary, to whom such duty had been outsourced. The entire basis for such contention is recorded at paragraph 97.4 of the second to tenth respondents’ answering affidavit, which reads as follows:

“The Second to Tenth Applicants, having outsourced the duty of convening the shareholders meeting of 18 October 2022, cannot be heard to complain, it is submitted, that certain minutiae related to the typical holding of a shareholders meeting were not to their liking, such as the fact that there was no longer secretary. A meeting of shareholders is precisely that and cannot be made subject to or controlled by a Board of Directors of a Company of which they are shareholders. A meeting properly convened cannot be

¹⁸ That the applicants utilised the words “cancelled” and “postponed” interchangeably, is of no consequence.

¹⁹ The contention being that once a shareholders meeting is properly convened, it cannot be cancelled or postponed by the directors in that section 61 of the Act does not make provision for such a cancellation; alternatively, postponement. Whilst I do not agree with this contention, it is not necessary for me to determine this aspect given the finding to which I have arrived.

cancelled, at the whim of the Board of Directors. In particular, I submit, to purportedly cancel a scheduled meeting properly convened.”

[29] More than this, the second to tenth respondents do not say, in relation to the factual allegations put up by the applicants, in the absence of which, the contention that the meeting was properly convened amounts to no more than a broad conclusion.²⁰ I am accordingly not satisfied that a genuine dispute of fact arises on the papers regarding the events leading up to the meeting on 18 October 2022, which facts are in any event supported by the objective documents attached to the applicants’ founding affidavit. Accordingly, whether or not the meeting was properly convened, needs to be determined on the basis of the correctness of the facts set out by the applicants.

[30] In terms of section 61(1) of the Companies Act 71 of 2008 (“*the Act*”), the board of a company, or any other person specified in the company’s Memorandum of Incorporation (“*MOI*”) or rules, may call a shareholders’ meeting at any time. Moreover, in terms of section 61(3) of the Act, the board of the company, or any other person specified in the Company’s MOI, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, which is subject to certain conditions in relation to the demands.²¹ What is clear in both instances, is with whom the authority vests to call a shareholders meeting.

[31] The company’s MOI did not form part of the papers before me, nor was it suggested that the MOI gave authority to any person other than the board to call for such a meeting. In *D Frenkel Ltd v Liquidators Susman Jacobs & Co*

²⁰ More particularly, the second to tenth respondents have failed to present evidence of a single primary fact in support of the aforesaid contention.

Rees and Others v Harris and Others 2012 (1) SA 583 (GSJ).

See also: *Swissborough Diamond Mines (Pty) Limited and Other v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W).

See also: *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A).

²¹ See sections 61(3)(a) and 61(3)(b) of the Act.

Ltd,²² to which I was referred by the applicants' counsel, it was held that in legal proceedings, in the absence of evidence to the contrary, the court will presume that a secretary who convenes a meeting has been authorised accordingly by the directors. On the facts of this matter, to which I have referred, I am not satisfied that the company secretary, at the relevant time, had the necessary authority to convene the shareholders meeting given that the notice of the meeting and the draft agenda and shareholders pack were disseminated to the shareholders prior to the board of director's approval.

[32] In the absence of such authority, the meeting is rendered invalid, entitling the applicants to an order that the purported decisions to remove and elect directors at the meeting held on 18 October 2022 are void *ab initio* and are accordingly of no force and effect.

[33] If I am incorrect in this finding, I am in any event of the considered view that the meeting was invalid for want of proper notice to the shareholders in accordance with section 62(1) of the Act, which requires the company to deliver a notice of the shareholders meeting, in the prescribed manner, to *all of the shareholders*. The purpose of giving notice is self-evident. All registered shareholders have an interest in the running of the company and are entitled to be present and to fully participate in the proceedings. In the absence of the MOI, which may or may not prescribe the manner in which the notice of the shareholders meeting is to be given, and in the absence of any evidence to the contrary, I must accept the applicants' version that notice of the meeting was to be disseminated not only electronically to the shareholders, but also via hardcopy, given the age of the main constituency of the shareholders. Barring what I have set out above, this was not done, rendering the meeting invalid.

[34] In light of the aforesaid finding, it is not necessary to determine the further allegations upon which the applicants rely for their contention that the meeting was invalid.

²² 1923 GWLD 182 at 184-185.

- [35] For the reasons traversed above, and more particularly having regard to the events of 3 January 2023, this being the takeover by the dissident directors, with the assistance of the eleventh and twelfth respondents, coupled with my finding in relation to the meeting of 18 October 2022, the applicants were entitled to the interdictory relief,²³ which I granted at paragraphs 4.1 and 4.2 of the order of court on 24 March 2023.²⁴
- [36] Seven points *in limine* were raised by the second to tenth respondents on the papers before court, in which I find no merit. I turn to deal with these briefly.
- [37] The first point *in limine*, regarding the lack of filing of a certificate of urgency by the applicants, has been abandoned, with the second to tenth respondents having accepted that a certificate was filed. The second point *in limine* raises the issue of urgency. I have dealt with this above.
- [38] Regarding the third point *in limine*, I do not agree with the second to tenth respondents that the applicants' failure to deal more fully, in their founding affidavit, with the circumstances relating to the payment of the funds to Ah Shene Attorneys or the correspondence to the attorneys representing the Nelson Mandela Bay Municipality in respect of such payment is "*so crucial to the matter that the non-disclosure is material and the application cannot properly be dealt with on the founding papers as they stand.*" These issues, given that the matter was brought on notice to the respondents,²⁵ were more fully ventilated in the further papers filed in these proceedings, to which I

²³ Which is final in nature.

In *Liberty Group LTD and Others v Mall Space Management CC* 2020 (1) SA 30 (SCA) (1 October 2019), the Supreme Court of Appeal recounted the requirements of a final interdict at paragraph 20, which requirements I found to be present on the facts of the present proceedings:

"[22] The law in regard to the grant of a final interdict is settled. An applicant for an interdict must show the clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other remedy. It was held by this court in *Hotz v University of Cape Town* that once the applicant has established the three requisite elements for the grant of an interdict the scope, if any, for refusing relief is limited and that there is no general discretion to refuse relief."

²⁴ Recorded in footnote 6 (*supra*).

²⁵ And not *ex parte*.

gave consideration. As alluded to previously,²⁶ the monies paid over to Ah Shene Attorneys were insufficient to meet the company's obligations in respect of the payment of the employees' bonuses, this being the aspect with which the second to tenth respondents primarily took issue. Those respondents, who are entitled to an accounting in respect of the monies paid, are not without their legal remedies.

- [39] The second to tenth respondents' fourth point *in limine* pertains to the alleged non-joinder of the Nelson Mandela Bay Municipality. I deal with this issue later in this judgment when dealing with the application for intervention, suffice at this stage to record that I do not agree that the Municipality has a direct and substantial interest in the subject matter of the litigation between the applicants and the respondents and accordingly, the point *in limine* must fail.
- [40] The fifth point *in limine* pertains to the alleged misjoinder of the company as the first applicant, which can only act as directed by its board of directors. The company was cited as the first applicant, with the proceedings in its name on the basis of a resolution taken by the second to seventh applicants. Given my finding in respect of the meeting on 18 October 2022, this aspect requires no further comment.
- [41] The second to tenth respondents contend, by way of their sixth point *in limine*, that the relief sought in the notice of motion is "*incorrect*". In essence, the applicants, in their founding affidavit refer to the relief being set out in two parts in the notice motion, part A and part B. However, factually, this is not so. Consequently, the second to tenth respondents aver that they have been grossly prejudiced in the manner in which the notice of motion and founding affidavit have been drafted as they are "*at a loss to precisely what procedure the Applicants intend to follow and precisely what relief the Applicants seek*". On this basis, they request that the matter to be dismissed. The applicants, in their replying papers explain the anomaly as

²⁶ See footnote 14.

follows. An original notice of motion, with a part A and part B had been prepared prior to approaching the duty judge in chambers for a directive, with the intention of moving for an initial order in terms of part A, which addressed the issue of the employees' bonuses, on "*an extremely urgent basis*". When the duty judge refused to hear the matter as proposed and instead directed that it be heard on an ordinary motion court day, the notice of motion was amended, with the deletion of part A and part B.

- [42] On a reading of the papers, in context, together with the notice of motion, I do not hold the view that it is drafted in such a manner as to cause prejudice to the second to tenth respondents. To the extent that any such prejudice did exist, if any, such prejudice was cured by the granting of the two interim orders, which served, in part, to direct the further conduct of the matter.
- [43] The seventh and last point *in limine* pertains to the manner of service utilised by the applicants. Service of the application (on all respondents) was originally effected on the offices of the second to tenth respondents' attorney of record. The second to tenth respondents raise two issues. Firstly, that their attorney of record had no mandate to accept service on behalf of the second to tenth respondents and no order for substituted service existed. And secondly, that their attorney of record did not, nor had they ever represented the eleventh and twelfth respondents. They accordingly seek, once again, that the application ought to be dismissed for lack of proper service. I disagree.
- [44] From the papers before me, all parties cited received notice of the proceedings, with the first respondent electing to abide by the decision of the court. The second to tenth respondents have, at all times, been fully legally represented in the proceedings. Not only did they elect to oppose the applicants' application, but they filed a counter application herein. By their own admission, they have not suffered any prejudiced by the manner in which service was effected. The eleventh and twelfth respondents did not enter the fray.

[45] In support of the submission that the dismissal of the application was the appropriate order, I was referred to *Dada v Dada*.²⁷ *Dada* is not authority for such proposition. In *Dada*, which concerned an action for divorce, and not an urgent application, the plaintiff obtained a decree of divorce, by fraudulent means, without notice to the defendant. Accordingly, the order of divorce was null and void *ab initio*. The circumstances of the present proceedings differ vastly from those in *Dada*. In any event, insofar as there was a departure from the ordinary rules of service, the order granted by me on 24 March 2023 condones such non-compliance.

[46] Accordingly, for the above reasons, I found no merit in the points *in limine* raised.

The respondents' counter application

[47] Success by the second to tenth respondents in their counter application, was dependent upon a finding that the meeting had been properly convened. Consequent upon my aforesaid finding, the respondents' counter application must fail.

[48] The relief²⁸ belatedly raised by the second to tenth respondents in the heads of argument filed on their behalf²⁹ is incompetent on the papers before me.

Application to intervene

[49] It is settled law that the joinder of a party to proceedings is only required as a matter of necessity, and not of convenience. The substantial test is whether the party that is alleged to be a necessary party has a direct and substantial

²⁷ 1977 (2) 287 (TPD).

²⁸ In which the second to tenth respondents seek: (i) a full accounting regarding the monies transferred to Ah Shene Attorneys; and (ii) an order of court directing the convening of a shareholders meeting. In respect of the latter relief, no application in terms of section 61(13) of the Act serves before me.

²⁹ In the counter application.

interest in the matter, more commonly stated as a legal interest in the subject matter of the litigation, which may be affected prejudicially by the judgment of the court in the proceedings concerned.³⁰

[50] I do not intend to detail the Municipality's submissions as to why it contends to have a direct and substantial interest in the matter, which will only serve to unduly burden this judgment. Distilled to its essence, the applicants' application concerns an internal impasse relating to a private company, in which the Municipality does not have a direct and substantial interest. This much is apparent from the Municipality's recordal that the intended intervention was unlikely to introduce any cumbersome material and or factual controversy; and that it intended on abiding by the decision of the court. That the Municipality has outsourced the function of its municipal public transport service for a designated route to the company in terms of a service level agreement, "*the Vehicle Operating Company Agreement*", is of no consequence.

[51] The Municipality, if granted leave to intervene, and in the event of a finding in favour of the applicants, intended on seeking an order that the company be ordered to convene a shareholders' meeting; and that the company be directed to provide the Municipality with a full accounting in respect of the monies paid to Ah Shene Attorneys. The Municipality has no *locus standi* to seek an order requiring the company to convene a shareholders meeting, which falls within the purview of the shareholders.³¹ Insofar as the Municipality contends that there has been a breach of the Vehicle Operating Company Agreement,³² by the company, such issue falls outside the ambit of the present proceedings and does not entitle the Municipality to an order for intervention. Significantly, the Municipality has failed to indicate how the

³⁰ *Aquatur (Pty) Ltd v Sacks* 1989 (1) SA 56 (A) at 62A-F; *Bowring N.O. v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) at paragraph 21; *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) paras 64-66).

³¹ Section 61(13) of the Act.

³² That the Municipality is currently asserting its rights in terms of such agreement, which was recorded, by agreement, in the order granted by Botha AJ, also does not create such an interest.

order sought by the applicants, which was ultimately granted by me, would or could prejudicially affect the legal interests of the Municipality. This on its own is dispositive of the application for leave to intervene.

[52] I accordingly dismissed the application for leave to intervene.

Costs

[53] In the result, I dismissed the respondents' counter application and the Municipality's application for leave to intervene with costs. There existed no reason to depart from the usual order as to costs in either application.

[54] Regarding the applicants' application, the respective legal representatives, in argument, addressed me on the events, which transpired at court on 24 and 25 January 2023, as well as on 9 and 10 February 2023, to which I gave due consideration.³³

[55] Following the filing of the second to tenth respondents answering affidavit and the applicants' replying affidavit on 24 January 2023, the parties reached agreement on the terms of the first interim order late that afternoon. The first interim order, which was ultimately granted the following day, on 25 January 2023, afforded the applicants interim relief. So too did the second interim order, granted on 10 February 2023. The manner in which the conduct of the proceedings was regulated on each occasion is apparent *ex facie* the interim orders.

[56] The reserved costs related only to 24 and 25 January 2023, and 10 February 2023. No provision was made, in the interim order, dated 10 February 2023, for the reservation of the costs of 9 February 2023, on which date the applicants filed a notice in terms of Rule 6(5)(d)(iii) in respect of the

³³ To the extent that I do not deal with each and every submission made in argument in respect of costs, this should not be taken to mean that they were not considered by me. All submissions were taken into account in exercising my discretion.

Municipality's application. In short, the applicants, in their notice, took issue with the Municipality's *locus standi* and their failure to establish the necessary requirements for the relief sought. I pause to mention that I do not agree that the Municipality was ambushed by the content of the notice.³⁴ I am of the view that the issues raised therein are issues which an applicant is in any event required to be mindful of when bringing such an application, whether on an opposed or unopposed basis.

[57] In determining the issue of costs, I was also mindful of my findings regarding the urgency of the matter and the time periods adopted by the applicants, in the circumstances of this matter; as well as my finding on the merits of the dispute, resulting in the applicants being the successful litigants herein, all of which are relevant.

[58] I accordingly formed the view that the applicants are entitled to the costs of the application, including the reserved costs referred to above. No cost order was sought against the first respondent. The reference to respondents in the order of costs relating to the applicants' application is to the second to twelfth respondents. Given the crisp issue which fell to be determined, I was not in agreement that the costs of two counsel was justified in this case.

[59] Having already granted the order herein, I need not make any further order.

I BANDS
ACTING JUDGE OF THE HIGH COURT

Heard: 21 February 2023

Judgment granted: 24 March 2023

³⁴ This being one of the reasons advanced by the Municipality for a postponement of the application on 10 February 2023.

Reasons:

31 March 2023

For the applicants: Ms Crouse SC, together with Ms Masiza
Instructed by: Nkontso & Co. Attorneys

For the 2nd to 10th respondents: Mr Niekerk
Instructed by: DVL Attorneys

For the NMBM: Mr Moorhouse
Instructed by: Kuban Chetty Attorneys