

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

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| (1) | NOT REPORTABLE |
| (2) | NOT OF INTEREST TO OTHER JUDGES |

CASE NO: 2022-058058

DATE: 6TH FEBRUARY 2024

In the matter between:

ENSEMBLE HOTEL HOLDINGS (PTY) LIMITED

First Applicant

EL-BARAG, ZIAD JAMAL ALI

Second Applicant

and

SWANVEST 328 (PTY) LIMITED

First Respondent

LEGACY MANAGEMENT HOLDINGS (PTY) LIMITED

Second Respondent

BREARLEY, ALLAN PATRICK

Third Respondent

DORRESTEIN, ALBERTUS HENDRICUS

Fourth Respondent

YATES, NEIL GEORGE

Fifth Respondent

LEGACY HOSPITALITY MANAGEMENT (PTY) LIMITED

Sixth Respondent

LEGACY HOTELS AND RESORTS (PTY) LIMITED

Seventh Respondent

SHAWSH, MOHAMED MAHMOUD ALZAROUQ

Eighth Respondent

Neutral Citation: *Ensemble Hotel Holdings and Another v Swanvest 328 and Others (2022/058058) [2024] ZAGPJHC --- (6 February 2024)*

Coram: Adams J

Heard on: 31 January 2024 – ‘virtually’ as a videoconference on *Microsoft Teams*.

Delivered: 06 February 2024 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 06 February 2024.

Summary: Civil procedure – application for extension of the time period prescribed in Uniform Rule of Court 7(1) – application for condonation of non-compliance with Rule 7(1) in delivering the said notice – authority of attorneys acting on behalf of a respondent disputed by applicants – rule 7(1) notice delivered out of time – good cause to extend the period not shown by applicants – applicants’ rule 7(1) challenge to the attorneys’ authority has no prospects of success – explanation for non-compliance wholly inadequate – application dismissed.

Uniform Rules of Court – rule 7(1).

ORDER

- (1) The first and the second applicants’ application for an extension of the period prescribed in rule 7(1) and for condonation of their non-compliance with the service requirements of the said rule, is dismissed with costs.
- (2) The first and the second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first to the seventh respondents’ costs of this application, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel.

JUDGMENT

Adams J:

[1]. This is an interlocutory application by the first applicant (Ensemble) and the second applicant (Mr El-Barag) in the main application against the first to the seventh respondents. The parties in the interlocutory application are the same parties as in the main application, which concerns a dispute between the shareholders of the seventh respondent (Legacy Hotels), those shareholders being Ensemble, the first respondent (Swanvest 328) and the second respondent (LMH) in the following ratio: 39.79% (Ensemble); 19.39% (Swanvest) and 40.84% (LMH). In this judgment I am assuming the nomenclatures adopted by the parties. Mr El-Barag, the third respondent (Mr Brearley), the fourth respondent (Mr Dorrestein), the fifth respondent (Mr Yates) and the eighth respondent (Mr Shawsh) are the five directors of Legacy Hotels. Messrs El-Barag and Shawsh are the appointees of Ensemble and the other three directors had been appointed by Swanvest 328 and by LMH.

[2]. The applicants apply for an extension of the time period contemplated in Uniform Rule of Court 7(1) and for condonation of 'such non-compliance as there may have been' on their part with the provisions of Rule 7(1) in delivering the said notice.

[3]. The application is opposed by the first to the seventh respondents ('the respondents'), who contend that the rule 7(1) challenge has no prospects of success. Moreover, so it is submitted on behalf of the respondents, the explanation given by the applicants for the non-compliance with the time limit imposed by rule 7(1) is wholly inadequate, which means that good cause to condone the non-compliance has not been demonstrated by the applicants.

[4]. The question to be considered in this interlocutory application is simply whether the applicants have shown 'good cause' to condone the non-compliance with the rule 7(1) time period. This, in turn, requires a consideration firstly of the

reasonableness of the explanation given by the applicants for the non-compliance, and, secondly, of the prospects of success of the authority challenge.

[5]. Rule 7(1) provides as follows: -

‘7 Power of Attorney

(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.’ (Emphasis added).

[6]. From this it is clear that, as already indicated above, I need to decide whether the applicants have demonstrated ‘good cause’ entitling them to dispute the authority of the respondents’ attorneys to act on behalf of Legacy Hotels in the main action. Furthermore, I need to consider whether Messrs Brearley, Dorrestein and Yates are authorised to act on behalf of Legacy Hotels in its opposition to the main application and in the counter-application. These issues are to be decided against the following backdrop.

[7]. The relationship between the shareholders – Ensemble on the one side, and LMH and Swanvest 328 on the other – has broken down irretrievably. Ensemble and Mr El-Barag launched an application to sever the shareholders’ relationship (the main application). The applicants seek that this be done by means of a private auction at which Ensemble will bid for the shares of Swanvest and LMH, and *vice versa*.

[8]. The first to seventh respondents (including Swanvest 328, LMH and Legacy Hotels) oppose the main application. The respondents are opposed to the manner in which the applicants seek to sever the shareholder relationship, and Swanvest 328, LMH and Legacy Hotels counter-apply for the repurchase by Legacy Hotels of Ensemble shares (the counter-application).

[9]. On 24 January 2023, the respondents’ attorneys, Simpson Incorporated, delivered a notice of intention to oppose the main application, on behalf of the respondents. On 22 February 2023, an answering affidavit in the main application was served by Simpson Inc on behalf of the respondents, together with the first,

second and seventh respondents' notice of counter-application. The answering affidavit doubled as the founding affidavit in the counter-application.

[10]. On 9 March 2023 – some seven weeks after the notice of intention to oppose was delivered on behalf of the respondents, including Legacy Hotels – the applicants' attorneys of record delivered a notice in terms of rule 7(1). In the main, the applicants challenge the validity of the resolutions which ostensibly authorise the opposition of Legacy Hotels to the main application and, according to the respondents, the institution of the counter-application, as well as the appointment of Simpson Inc as its legal representative in the main proceedings.

[11]. The Rule 7(1) notice was therefore not filed within the ten-day period stipulated in the rule, and it was accordingly necessary for the applicants to apply to this Court for condonation of such non-compliance.

[12]. As regards, 'good cause', it is trite that there are two clear requirements: (a) a satisfactory explanation for the delay, and (b) a *bona fide* case on the merits with some prospect of success. As was held by the Constitutional Court in *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd*¹, an applicant for condonation 'must establish that the extent of its default is pardonable in the light of its prospects of success on the merits of the appeal, combined with the strength of its explanation for its default, in order for condonation to be granted'.

[13]. Therefore, the main issue, in my view, relates to whether or not the applicants' rule 7(1) challenge to the attorneys' authority to act on behalf of Legacy Hotels has any prospects of success. The question is this: Has the company authorised the proceedings in this matter? At first blush the answer to this question must be in the affirmative for the simple reason that the resolutions authorising the legal action were agreed to by three of the five directors of the company, when a simple majority vote was required.

¹ *Laerskool Generaal Hendrik Schoeman V Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at para 11.

[14]. Section 73 of the Companies Act² ('the Companies Act') authorises a director to call a meeting of the board. Section 73(4) provides that the board of a company may determine the form and time for giving notice of its meeting, but such determination must comply with any requirements set out in the Memorandum of Incorporation ('MOI') or the rules of the company; and no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).

[15]. Section 74 of the Companies Act permits directors to act other than at a meeting. Section 74(1) provides that except to the extent that the MOI of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.

[16]. In *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others*³, the SCA had the following to say about so-called 'round robin resolutions': -

[20] Section 74 of the Act enables "a majority of the directors" to pass a round robin resolution in order to avoid a formal meeting of directors provided that, if this were to happen, "each director has received notice of the matter to be decided". The proviso enables directors to make an informed decision on the subject-matter contained in the resolution.

[21] The proviso to s 74 requiring notice is to ensure that directors know what is being decided. Our courts have emphasised the importance of giving notice to directors of a meeting so that the participants are aware not only of the existence of a meeting but of the nature of the business. The purpose of the notice is not only to inform directors of the date of the meeting but the reason therefor. There can surely be no difference between the importance of a notice where a board meeting is called in terms of s 73 of the Act and a notice when the provisions of s 74 of the Act are invoked.'

[17]. Applying the foregoing principles *in casu*, I conclude that Legacy Hotels, through its board of directors and a resolution duly passed by them, had authorised the opposition to the applicants' application and the institution of the counter-application. I am bolstered in this conclusion by the fact that the applicants chose not to challenge the authority of Simpson Inc, despite seeking

² Companies Act, Act 71 of 2008.

³ *CDH Invest NV v Petrotank South Africa (Pty) Ltd and Others* 2019 (4) SA 436 (SCA).

substantive relief against Legacy Hotels and despite notification of Legacy Hotels' opposition and appointment of Simpson Inc. Their aforesaid election was based, as correctly submitted by Mr Subel SC, who appeared in the matter on behalf of the first to the seventh respondents with Mr Pretorius, on the misguided belief that Legacy Hotels would not participate meaningfully in the main application. The simple point is that it cannot possibly be, as contended by the applicants, that Legacy Hotels should not have opposed the main application as no substantial relief was being sought against it. Therefore, the explanation given by the applicants for not complying with Rule 7 (1) is in the circumstances wholly inadequate. The averment by the applicants that they do not seek substantive relief in the main application against Legacy Hotels is belied by what is actually sought by the applicants as per their notice of motion.

[18]. What is more is that the round robin resolutions were approved by the majority of directors of Legacy Hotels. This resolution expressly authorised Legacy Hotels' opposition to the main application, the institution of the counter application and the appointment of Simpson Inc.

[19]. There is, in my view, no merit in the applicants' challenge of the validity of the said resolutions on the basis that it did not comply with s 74 of the Companies Act and the shareholders' agreement in respect of the notice and the quorum required for the valid passing of a resolution by the board. In that regard, the applicants refer to the provisions of the shareholders' agreement, which require that twenty-one days' notice be given of any meeting of the board of directors and an agenda of the matter or matters to be discussed. It also provides that a quorum of the board shall be five directors, comprising two directors nominated by LMH, two directors nominated by Ensemble and one by Swanvest 328.

[20]. Mr Subel submitted that the above provisions in the shareholders' agreement relate to the taking of decisions at a meeting of directors. It does not prescribe the procedure to be followed for the taking of decisions by directors other than at a meeting. I find myself in agreement with these submissions. The applicants' reliance on the notice period for meetings in the shareholders' agreement is misplaced and I say so for the reasons which follow.

[21]. Section 74 of the Companies Act provides for the taking of decisions by directors other than at a meeting by the majority of directors by written consent. The resolution in question was adopted by the majority of directors by written consent – about this there can be no dispute. The two Ensemble directors (Messrs El-Barag and Shawsh), who did not vote on the resolutions, were provided with same on 23 January 2023. It was sent to them under cover of an email, which stated that: -

‘Legacy Hotels & Resorts (Pty) Ltd has been cited as a respondent in an application launched in the High Court. The Company needs to oppose this application. The Company is wanting to appoint Simpson Incorporated to handle this matter on its behalf. Attached is a company resolution appointing Bart and/or myself to do all that is necessary for the opposing of the application. Please sign the resolution and return it to me ...’.

[22]. This email, in my view, complies with the requirements set out in s 74, as elaborated upon in *CDH Invest NV*, referred to above. Clearly, all of the directors, including Messrs El-Barag and Shawsh, were provided with the proposed resolutions and, having received it, they were all able to consider its subject matter and to vote either in favour or against it. Mr El-Barag and Mr Shawsh did not respond, and it can safely be assumed that they voted against the resolutions. All the same, the requirements of s 74 were met.

[23]. As regards the quorum requirement, it is so, as contended by the respondents, that the shareholders' agreement deals with the quorum 'for meetings of the board'. The articles of association of Legacy Hotels provides that, unless otherwise determined by the company in general meeting, or by a meeting of the directors (at which all the directors are present), the quorum necessary for the transaction of the business of the directors shall be a majority of the votes of the directors present at the meeting at which it is proposed. Importantly, article 48 of the memorandum of incorporation provides that, subject to the provisions of the Act, a resolution signed by directors 'whose number is not less than that of a quorum for a meeting of directors, and inserted in the minute book, shall be valid and effective as if it had been passed at a meeting of directors'.

[24]. Legacy Hotels has five directors and the resolutions in question were adopted in writing by a simple majority of the directors. As required by the

constitution of Legacy Hotels, the resolutions were signed by directors 'whose number is not less than that of a quorum for a meeting of directors'. Clause 46 of the articles of association provides that a quorum necessary for the transaction of the business of the directors shall be a majority of the votes of the directors present at the meeting at which it is proposed. These provisions of the articles require nothing more than a simple majority for the passing of a round robin resolution.

[25]. For these reasons, I am of the view that the resolutions passed by the board of directors was compliant with s 74 of the Companies Act and Legacy Hotels' articles of association.

[26]. There is also no merit in the applicants' contention that the said resolutions are invalid on the basis of s 75 of the Companies Act. In that regard, it is submitted by the applicants that Messrs Brearley, Yates and Dorrestein, as co-respondents in the main proceedings, have 'a personal financial interest in the outcome of the application' which precluded them from voting on the said resolutions.

[27]. Section 75(5)(e) of the Companies Act provides if a director of a company has a personal financial interest in respect of a matter to be considered at a meeting of the board, the director must not take part in the consideration of the matter. Personal financial interest 'when used with respect to any person' is defined in the Companies Act as meaning 'a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed'.

[28]. The resolution impugned by the applicants approved that Legacy Hotels opposes the relief sought against it in the main application, and that it may bring 'any related proceedings' which Legacy Hotels is advised to launch. As correctly submitted on behalf of the respondents, Messrs Yates, Brearley and Dorrestein had no personal financial interest in respect of the resolutions, as none of them had a direct material interest, of a financial, monetary or economic nature, or which a monetary value may be attributed, in whether Legacy Hotels opposes the main application, or whether it brought related proceedings, such as the counter-application.

[29]. Resolution 2 approved the appointment of Simpson Inc by Legacy Hotels. It cannot be said with any conviction that the three directors which voted in favour of this resolution had a direct material interest, of a financial, monetary or economic nature, or to which a monetary value may be attributed, in whether Legacy Hotels appointed Simpson Inc. Similarly, they had no personal financial interest in resolution 3, which approved that Yates or Dorrestein, as directors of Legacy Hotels, be authorised to depose to affidavits on behalf of Legacy Hotels and to sign documents as necessary and generally do all that is necessary to implement the aforesaid resolutions in DS5.

[30]. Accordingly, I conclude that the s 75 ground of objection to the resolutions is equally without merit.

[31]. For all of the foregoing reasons, I conclude that there is no prospect of the rule 7(1) challenge succeeding. That, coupled with the wholly inadequate explanation for the failure to timeously deliver the rule 47(1) notice, which may very well be tantamount to acceptance by the applicants of the validity of the resolutions passed, lead me to the conclusion that good cause to condone the applicants' failure to comply with Rule 7 (1) has not been demonstrated.

[32]. I am therefore of the view that the applicants' application for an extension of the period prescribed in rule 7(1) and for condonation of their non-compliance with the service requirements of the said rule, should be refused.

Costs

[33]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁴.

[34]. I can think of no reason why I should deviate from this general rule.

[35]. I am therefore of the view that the first and the second applicants should pay the first to the seventh respondents' costs of this application.

⁴ *Myers v Abramson* 1951(3) SA 438 (C) at 455.

Order

[36]. Accordingly, I make the following order: -

- (1) The first and the second applicants' application for an extension of the period prescribed in rule 7(1) and for condonation of their non-compliance with the service requirements of the said rule, is dismissed with costs.
- (2) The first and the second applicants, jointly and severally, the one paying the other to be absolved, shall pay the first to the seventh respondents' costs of this application, such costs to include the costs consequent upon the employment of two Counsel, one being Senior Counsel.

L R ADAMS
Judge of the High Court
Gauteng Division, Johannesburg

HEARD ON:	31 st January 2024
JUDGMENT DATE:	6 th February 2024
FOR THE FIRST AND THE SECOND APPLICANTS:	Adv John Peters SC, together with Adv Dominic Hodge
INSTRUCTED BY:	David Shapiro & Associates, Fellside, Johannesburg
FOR THE FIRST TO THE SEVENTH RESPONDENTS:	Adv Arnold Subel SC, together with Adv Hendrik Pretorius
INSTRUCTED BY:	Simpson Incorporated, Killarney, Johannesburg
FOR THE EIGHTH RESPONDENT:	No appearance
INSTRUCTED BY:	No appearance