

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Reportable: No
of Interest to other Judges: No

8 March 2024 Vally J

CASE NO: 2022-007672

In the matter between:

REGIMENTS FUND MANAGERS (PTY) LTD

First Applicant

REGIMENTS SECURITIES (PTY) LTD

Second Applicant

ASH BROOK INVESTMENTS 15 (PTY) LTD

Third Applicant

CORAL LAGOON INVESTMENTS 194 (PTY) LTD

Fourth Applicant

and

EUGENE NEL N.O.

First Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Respondent

JUDGMENT - Leave to Appeal

Vally J

[1] On 1 December 2023 I issued an order dismissing an application by the present applicants. Aggrieved by the order, they have filed an application for leave to appeal to the Supreme Court of Appeal (SCA). Relying, *inter alia*, on the judgment of *Islandsite*¹ issued by the SCA on the same day as I issued my judgment and order, they contend that there is a reasonable prospect that

¹ *Islandsite Investments 180 (Pty) Ltd v National Director of Public Prosecutions and Others* (Case no 894/2022) [2023] ZASCA 166 (1 December 2023)

another court would come to a different conclusion. In *Islandsite* the court held that ‘a decision to enter into litigation on behalf of the company, whether as initiator or defender, has potential costs implications which bear on the property of a company.’² This is not very different from my finding that by instituting proceedings and appointing Smit Sewgoolam Inc. to represent the applicants, the board, which is denuded of all its powers, is dealing in the property. By exposing the applicants to cost orders, which (by the way) has already occurred in the main order, the various boards are prejudicing the companies. By bringing this application, they have already (and are continuing to) defeat the purpose of the Prevention of Organised Crime Act 121 of 1998 (POCA) which is to preserve the property of the applicants.

[2] However, on the day this judgment was to be released another judgment from this court was released which made reference to the issue of ‘dealing in’. It is *Lebashe*.³ The court there adopted a view that is different from the one I adopt. In that case the court held that ‘a narrow’ definition of ‘dealing in’ should be adopted, as this is how the Constitutional Court (CC) defined it in *Phillips*.⁴ In my judgment the definition I accord is not inconsistent with that of the CC. The CC did not engage in a detailed exposition of the phrase ‘dealing in’. It simply made it clear that the definition must accord with the purpose of the POCA, which is to preserve the property that is the subject of the restraint order, and to achieve that objective it, based on the facts of that case, adopted what it called ‘a narrow definition’. Nevertheless, I am not insensitive to the fact that a

² Id at [20]

³ *Lebashe Investment Group (Pty) Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd*, Case No 2022-060488 (9th February 2024)

⁴ *Phillips and Others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC).

plausible and persuasive argument can be made to another court, which court could come to the conclusion that the directors by taking the resolutions were not 'dealing in' the restrained property.

[3] As for the rest of the contentions made in support of the application for leave, these are repeats of the ones they advanced at the main hearing. They have been rejected for their lack of merit. This matter involves an interpretation of a court order. The applicants being companies can only approach the court on the basis of a resolution properly taken by its board of directors.⁵ This court has issued a confiscation order against the applicants. This confiscation order is unambiguous in denuding the applicants' directors of all their powers, and in removing their rights to perform any of the functions of the applicants. The boards of the respective applicants are thus prohibited from engaging in the affairs of the restrained property, or conducting any business with or on behalf of the restrained property. This, the applicants submit, is a lack of authority issue and not a *locus standi* one. It is this issue that I now address.

[4] The issue of *locus standi* was raised by myself *mero motu*. The applicants say the issue of *locus standi* does not arise in this case. The issue of authority to bring the application might do, they say. Normally, a challenge to the authority of a company to approach court for relief is raised by the other party. It is done by utilising the process established by sub-rule 7(1) of the Uniform Rules. Two issues arise as a result: (i) could the court *mero motu* raise

⁵ Section 66 of the Companies Act No 71 of 2008 (Companies Act)

the issue of lack of authority; and (ii) if so, were the applicants given an opportunity to respond thereto.

[5] The reasons I furnish in the main judgment as to the power of the court to *mero motu* raise the issue of *locus standi*, apply with equal force to the issue of lack of authority. It too is an issue fundamental to the court's power to grant a party relief. If a party is not authorised to seek relief from a court, the court would be committing an injustice by granting it the relief. Having been granted the status of a juristic personality⁶ a company has a right to approach the court for relief. A company would enjoy the protections incorporated in, amongst others, ss 25 and 38 of the Constitution of South Africa Act 108 of 1996 (the Constitution). To that end, the issue of authority of a company to approach court is a constitutional issue. In other words, the issue of the authority to approach court for relief is umbilically linked to the right to approach court. Further, a determination on authority is in this instance dispositive of the case. In short, the issue of authority, while ideally it should be raised by a party, and preferably through the invocation of the provisions of rule 7, it can nevertheless be raised *mero motu* by the court, and should be so raised if it is dispositive of the case.

[6] I have found that the directors by passing the resolution to launch the application acted outside the scope of their authority to do so.

⁶ Sub-section 19(1)(b) of the Companies Act

[7] In my view, on the facts of this case the issue can be dealt with as a *locus standi* or a lack of authority one. These facts show that there is really no iron curtain separating the two. Whether one analyses this as a *locus standi* or lack of authority issue makes no difference to the outcome of the case. It bears mentioning that the applicants addressed this issue both in their written and oral submissions. Hence, I would have come to the same conclusion had I characterised it as an authority as opposed to a *locus standi* issue.

[8] Another complaint of the applicants is that I misdirected myself by approaching the issue of *locus standi* as a purely legal one - by making a finding on the issue on the undisputed facts as they were presented in the papers - as this issue is one that involves a mixture of facts and law. The applicants, however, do not identify any facts that would impact on the issue which were not on the papers. They simply assert that there may be such facts. Interestingly, they made the same submission in their response to my invitation to address the issue. They did not call for an opportunity to present new facts, nor did they allude to new facts which would have a bearing on the determination of the issue. They simply asserted that the issue could not be raised *mero motu* as it involves a combination of facts that were not placed before the court. The assertion in my view does not hold any merit. All the facts that are necessary to determine the *locus standi* issue or even the authority issue were before court.

[9] The conclusion I reached in this matter, and the order I issued, do not result in the individual directors being completely paralysed or without any

opportunity to acquire relief. Denuding the board of its powers does not affect the rights of individual directors, whether as shareholders or as persons who may be able to show that they have a real and substantial interest in the confiscation order. They can, in those circumstances, approach the court for the very relief they sought here. Only they would be approaching the court in their personal capacities. The applicants, which are separate legal personalities, would have no involvement in the matter. Hence, despite my finding and order, the directors are not without options. They can still seek the same relief. Should they do so they may attract a costs order against them personally, but that is of no moment.

[10] In the light of the different approach adopted in *Lebashe* it would be prudent to grant leave to appeal. Although they ask for leave to appeal to the SCA, I am of the view that it would be more appropriate to refer it to the full bench of this court. Should parties file their papers soon, including heads of argument, the matter can be finalised in a few months.

[11] The following order is made:

a. Leave to appeal to the full bench of this court is granted.

b. Costs of the application shall be costs in the appeal.


Vally J
Gauteng High Court, Johannesburg

Date of hearing:	29 January 2024
Date of judgment:	8 March 2024
For the applicant:	DJ Smit with T Scott
Instructed by:	Smit Sewgoolam Inc
For the respondents:	K Saller with S De Villiers
Instructed by:	Seneke Attorneys (for the third respondent)