

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2021/11126

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: ✓

In the application of:

INVESTEC SECURITIES (PTY) LTD

Applicant

versus

CORWIL INVESTMENTS HOLDINGS (PTY) LTD

1st Respondent

CORWIL INVESTMENTS LIMITED

2nd Respondent

NATHAN LINDSEY HITTLER

3rd Respondent

Coram: Wepener J

Date of hearing: 28th June 2022

Date of Judgment: 20th July 2022

This judgment is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge his secretary. The date of this Order is deemed to be 22 June 2022.

JUDGMENT

Wepener, J:

[1] Investec Securities (Pty) Limited (Investec) seeks a declarator that the third respondent, Mr N.L. Hittler (Hittler) be prevented from acting on behalf of the first and second respondents (Corwil) in any legal capacity in any legal proceedings that has been ongoing between Investec and Corwil, and in which Hittler was joined as a respondent in his personal capacity by order of court.

[2] The history of the litigation thus far is set out by Manoim J in a judgment dated 5 April 2022.¹ Manoim J held²

[20] Investec argues that he cannot represent Corwil. It argues he is not an attorney or advocate and hence he cannot represent them. Hittler is also not a director of Corwil because despite the dispute over his removal, given his sequestration, he cannot hold the position of a board director.

[21] Thus the legal position is quite clear. He cannot, since he is not a legal practitioner, nor a director represent Corwil in resisting the joinder application and I ruled to this effect at the beginning of argument.'

[3] This finding of Manoim J was due to the fact that Hittler is not an advocate or attorney. He is, as far as it may be relevant, also not a director of Corwil, inter alia, due to him being an rehabilitated insolvent.

¹ *Corwil Investments Holdings (Pty) Ltd and Another vs Investec Securities (Pty) Ltd* (11126/2022) [2022] ZAGPJHC 201 (5 April 2022).

² At paras 20-21.

[4] Despite the finding of Manoim J, Hittler continued to file papers ostensibly as representative of Corwil. It is common cause that the papers so filed were filed by Hittler, who during argument, said that he acted as representative or agent of Corwil with the approval of the Corwil board. This is also contained in his heads of argument. Hittler further indicated during argument that he intended filing further documents on behalf of Corwil in due course.

[5] The law in relation to representation of companies in legal proceedings is clear and was succinctly stated by Manoim J as set out above.

[6] Hittler made much of the fact that the directors of Corwil authorised him to act on behalf of Corwil by issuing a power of attorney to him to act as 'their' (Corwil's) agent in the proceedings. This however, missed the point. The board of directors may only appoint a person to represent a company in the High Court in civil proceedings who is a qualified legal practitioner. Any authority derived from the directors' resolution does not cure this obstacle. This rule has long since been applied in our courts. In *Manong*³ it was said:⁴

'Right of appearance

[3] Before turning to consider the merits of the appeal it is necessary to first consider whether Mr Mongezi Stanley Manong (Mr Manong), the managing director of the company, who signed the heads of argument on behalf of the company and purported to represent it before us, has what can be described as a right of audience on behalf of the company before his court.

[4] The rule that a company cannot conduct a case in this court except by the appearance of counsel on its behalf was laid down in *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue*. The rule may well have originated in early seventeenth century metaphysical reasoning that a corporation has "no soul, is invisible and cannot do homage". It, according to Viscount Simon LC, secures that a court like this will be served by persons who observe the rules of their profession, are subject to a disciplinary code and are familiar with the methods and scope of advocacy to be employed in presenting argument.

³ *Manong and Associates (Pty) Ltd vs Minister of Public Works and Another* 2010 (2) SA 161 (SCA).

⁴ At paras 3,4,5,6 and 10.

[5] There is nothing to suggest that Mr Manong's decision to secure the benefits of incorporation was not a genuine one. He did after all have the option of establishing and conducting the business as an unincorporated sole proprietorship. There is thus a persuasive argument that having chosen the benefits of incorporation, he must bear the corresponding burdens and not be allowed to escape them lightly.

[6] It has been thought, somewhat cynically I dare say, that the rule is based on some misguided attempt to preserve an unjustified monopoly for legal practitioners. This is not the case. Litigation is based on the adversary system. In determining a dispute, a court is dependent on the way in which the case is presented. Factual admissions or denials are made from time to time and a course of conduct has to be chosen by the litigants. When a corporation instructs an attorney who in turn instructs an advocate the law recognises their authority to bind the corporation for the purpose of litigation. In those circumstances a court need not concern itself about authority. Litigation will become very difficult indeed if a court had to be concerned at every step of the proceedings as to the authority of the person conducting the litigation to make binding decisions. The litigant in person can of course make those decisions without any question of authority, but a corporation cannot act except through its agent and an agent cannot have more authority than the corporation legally gives to it. Yet a further consideration is that corporate officers could cause impecunious companies to litigate hopeless causes without any fear of personal risk. Thus, apart from the fact that there are usually rules of court that preclude a company from being represented by anyone other than a qualified practitioner, a review of the cases in England, Ireland, Australia, New Zealand and Canada shows that the courts, for pragmatic and policy reasons, have set their face against unqualified persons presenting and conducting cases unless they are doing so on their own behalf. So too, in Zimbabwe and South Africa.

[10] It follows that cases will arise where the administration of justice may require some relaxation of the general rule. Their occurrence, in my view, is likely to be rare and their circumstances exceptional or at least unusual. I thus consider that our superior courts have a residual discretion in a matter such as this arising from their inherent power to regulate their own proceedings. After all, it seems to me that the power of a court to give leave to a corporation to carry on a proceeding otherwise than by a legal representative is of necessity an integral part of the rule itself.'

[7] The result is that Hittler may not appear or file documents on behalf of Corwil. Manoim J specifically held that Hittler cannot represent Corwil. Despite this, Hittler continues to purport to represent Corwil and it is in these circumstances that Investec seeks a declarator.

[8] Although Hittler attacks the basis of the entitlement of the declarator, I am of the view that his appearance and submissions are ultra vires, not only since the attorneys from Corwil withdrew but particularly since the finding made by Manoim J who ruled accordingly before hearing the matter that was before him. Despite the ruling, Hittler continues to file documents and continues to appear before this court.

[9] Having regard to the legal position, I find that Investec is entitled to the declarator sought by it. That being so, all the conduct of Hittler purporting to act on behalf of Corwil is irregular and all documents filed by him, purporting to act on behalf of Corwil, is similarly irregular.

[10] The submission by Hittler that the board of Corwil has an absolute right to arrange its own affairs in accordance with its decisions misses the legal obstacle that a legally unqualified person is not so entitled to represent Corwil and such a decision by the Corwil board is irregular.

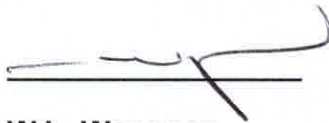
[11] In so far as Hittler attacks the relief being sought as being a final interdict, and by relying on the requirements of such an interdict, I am of the view that those requirements have duly satisfied. Investec's right not to be harassed by the filing of irregular papers and to be subjected to irregular opposition in matters before the court, speaks for itself. This is clearly an injury to Investec as it has to incur costs to approach the court to obtain relief while Hittler is an rehabilitated insolvent.

[12] This is a case where the appropriate relief would be to put an end to the irregular conduct of Hittler by issuing the order sought by Investec.

[13] In the circumstances I issue the following order:

1. The Notice of Withdrawal of the main application dated 30 May 2022, filed by Hittler on behalf of Corwil Investments Limited, is set aside,

2. Hittler is not permitted to represent Corwil in any proceedings under case number 11126/2021.
3. The costs of this application are to be paid by Corwil Investments Limited.

A handwritten signature in black ink, appearing to be 'W.L. Wepener', written over a horizontal line.

W.L. Wepener

Judge of the High Court of South Africa

Attorneys for the Applicants: ENSAfrica

Counsel for the Applicants: G. Herholdt

For Respondents: N.L. Hittler