

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH-AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 063430/2025

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
DATE 12 June 2025  SIGNATURE	

Heard on: 29 May 2025

Judgment: 12 June 2025

In the matter between:

**IPP MINING AND MATERIALS KOORNFONTEIN
(PTY) LTD**

Applicant

and

**BLACK ROYALTY MINERALS KOORNFONTEIN
(PTY) LTD**

First Respondent

**BARBERRY HOLDINGS (PTY) LTD
K2021923741 (SOUTH AFRICA) (PTY) LTD**

**Second Respondent
Third Respondent**

JUDGMENT

STRIJDOM, J

[1] This is an urgent application wherein the applicant ("IPP"), a 49% shareholder in the third respondent ("K2"), seeks two sets of relief.

1.1 Leave in terms of section 165(6) of the Companies Act 71 of 2008 to institute and prosecute these proceedings derivatively in the name and on behalf of K2.

1.2 Contingent upon such leave being granted, an urgent order restoring to K2 possession of the Koornfontein Siding ("the Siding") and its associated business operations.

1.3 This matter is opposed by the first respondent.

THE FACTS

[2] The applicant ("IPP") holds a 44% shareholding in the third respondent ("K2").¹ IPP acts herein, subject to the leave of this Court, on behalf of K2.

[3] First respondent ("BRMK") owns the Siding and was K2's counter-party to the Rapid Loading Terminal Recommissioning and Lease Agreement² ("RLT Agreement").

[4] On 14 October 2021, IPP, BRMK and K2 concluded the RLT Agreement. K2 was to lease the RLT from BRMK. On 16 April 2025 BRMK cancelled the RLT Agreement. The lease of the Siding was intended to endure until October 2028.

[5] The second respondent ("Barberry") was purportedly appointed by BRMK as the new Siding operator and actively participated in K2's alleged dispossession.³

[6] K2 is the entity on whose behalf this application is brought. K2 conducted its business at the Siding until its dispossession.⁴ Mr Wiseman Nkululeka Khumalo, a director of K2 nominated by IPP, deposes to the affidavits on behalf of IPP.

¹ FA, page 006-14, para 18(i). AA, page 011-42, para 118.

² AA, page 011-7, paras 8-9

³ FA, page 006-23, para 42.2. AA page 011-9, para 16

⁴ FA, page 006-11, para 10. AA, page 011-9, para 16.

- [7] The majority (51%) shareholding in K2 is held by Machelo, which entity was nominated by BRMK to hold this shareholding.⁵
- [8] Ms Zandile Nothando Mdanda and Mr Ndavheleseni Lodwick Mareda are directors of K2 nominated by Machelo.⁶ Ms Mdanda and Mr Mareda are also the only directors of BRMK (the very entity responsible for K2's dispossession.)⁷
- [9] Ms Mdanda is also the deponent to BRMK's answering affidavit, defending the actions taken against K2.
- [10] Since November 2021, K2 has been in peaceful and undisturbed possession of the Siding, operating it under the terms of the RLT Agreement.
- [11] K2's Siding business involved the management of receiving, stockpiling, handling, and loading coal for diver's clients (including IPP and BRMK using the Sidings Rapid Loading Terminal.⁸ K2 directed its site manager (Mr Potgieter) and operational personnel, to manage all site logistics and essential equipment."⁹
- [12] Prior to its dispossession, K2 handled approximately 101,574 tonnes of coal monthly, generating revenue (R5,28m) and net profit (R1,536m),¹⁰ and had significant ongoing supplier liabilities (R21,6m) and customer receivables (R54m).¹¹
- [13] On the morning of 23 April 2025, at approximately 06:00, BRMK and Barberry dispossessed K2 of the Siding. This was achieved by-¹²

13.1 informing K2's site manager, Mr Potgieter, that BRMK had instructed a seizure of K2's operations;

⁵ FA, page 006-14, para 18(ii). AA, page 011-10, para 19.

⁶ FA, page 006-14, para 18(v). AA, page 011-10, para 19; page 011-24 para 56.

⁷ FA, Annexure WK2, page 006-51.

⁸ FA, page 006-17, para 25; page 006-11, para 9. AA, page 011-8, para 12.

⁹ FA, page 006-17, para 27.

¹⁰ FA, page 006-42, paras 86.1 and 86.2

¹¹ FA, pages 006-42 to 43, paras 86.3 and 86.4.

¹² FA, pages 006-22to 24, paras 42 to 42.10 AA, page 001-9, para 16.

- 13.2 preventing K2's operational staff from accessing the Siding, then informing them they would henceforth be employed by Barberry, who was taking over operations;
 - 13.3 denying K2's Siding Manager access to the Siding;
 - 13.4 Barberry bringing its own machinery onto site and taking over operations;
 - 13.5 BRMK's representative, Ms Mdanda (also a director of K2), confirming the dispossession in an email;¹³
 - 13.6 Barberry's representative confirming via WhatsApp that Barberry had assumed loading responsibility; and
 - 13.7 The dispossession occurred without K2's consent and without any Court order authorising such action. Subsequent letters of demand for restoration of possession were ignored.¹⁴
- [14] On 23 April 2025, an urgent spoliation application was launched in K2's name by Mr Daniel Seabra Menezes, who is reflected in CIPC records as K2's sole director and who had solely been managing K2's operations.¹⁵
- [15] In response, BRMK challenged Mr Meneze's authority to act for K2, asserting K2's board comprised Ms Mdanda and Mr Mareda alongside Mr Khumalo.¹⁶ The urgent application was subsequently removed by agreement on 29 April 2025 with wasted costs tendered by Mr Menezes.¹⁷
- [16] Steps were then taken to engage the full de facto board on K2. On 30 April 2025, Mr Khumalo issued a notice in terms of section 74 of the Companies Act to his co-directors, proposing resolutions for K2 to institute the urgent spoliation application or, alternatively, not to oppose IPP's application for leave to bring such proceedings on behalf of K2.¹⁸ Ms Mdanda and Mr Mareda demanded

¹³ FA, 006-24 para 42.8 Annexure WK11 006-164.

¹⁴ FA, pages 006-24 to 25, paras 42.9, 42.13

¹⁵ FA, page 006-13, para 16

¹⁶ FA, page 006-13, para 17

¹⁷ FA, page 006-15, para 21

¹⁸ FA, page 006-30, para 53

extensive documentation before they could consider the resolutions.¹⁹ This conduct, coupled with correspondence from BRMK's attorneys threatening punitive costs against Mr Khumalo prompted IPP's for application for leave to proceed derivatively under section 165 of the Companies Act.

LEAVE TO INSTITUTE DERIVATIVE PROCEEDINGS (SECTION 165 OF THE COMPANIES ACT)

[17] IPP is a registered shareholder of K2, holding 49% of the issued share capital and therefore has *locus standi* to bring the application, in terms of section 165 of the Companies Act ("the Act").

[18] Section 165(6) provides that:

"(6) In exceptional circumstances, a person contemplated in subsection (2) may apply to a Court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that-

(a) The delay required for the procedures contemplated in subsection (3) to (5) to be completed may result in-

(i) Irreparable harm to the company; or

(ii) Substantial prejudice to the interest of the applicant or another person;

(b) There is a reasonable probability that the company may not act to prevent that harm or prejudice, or set to protect the company's interests that the applicant seeks to protect; and

(c) That the requirements of subsection (5)(b) are satisfied."

[19] In *Mbethe v United Manganese of Kalahari (Pty) Ltd*,²⁰ it was held that:

¹⁹ FA, page 006-31, para 56

²⁰ 2017 (6) SA 409 (SCA)

- “(i) an applicant carries the onus of proving each of the requirements of section 165(5)(b), on a balance of probabilities, (ii) the individual requirements of section 165(6)(5)(b)(i),(ii) and (iii) are conjunctive, but this does not mean that they are to be considered in isolation and (iii) although the test for good faith is subjective, relating as it does to the state of mind of an applicant, it is nevertheless subject to an objective control. In this respect, the state of mind of an applicant has to be determined by drawing inferences from the evidence. The enquiry is whether the evidence reveals reasonable (and therefore objective) grounds for an applicant’s statement that he acts in good faith. If the evidence establishes the presence of a collateral or ulterior purpose on the part of an applicant, the pursuit of which does not involve the trial of a serious question of material consequences to the company, or which is not in the best interests of the company, this may also constitute cogent evidence of the absence of good faith on the part of the applicant.”

EXCEPTIONAL CIRCUMSTANCES

[20] The question of what constitutes “exceptional circumstances” as used in section 165(6) will necessarily depend upon context. Regard might be had to Wallis JA’s interpretation in *Knoop NO and Another v Gupta, (Execution)*²¹ of the same words as used in section 18(3) of the Superior Court’s Act, 2013; namely, “something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule.”

[21] The applicant contends that:

- 21.1 Ms Mdanda and Mr Marenda’s response to the section 74 notice was a clear delaying tactic designed to frustrate any action by K2. They demanded extensive and irrelevant documentation before they could “consider” the resolutions.

²¹ 2021 (3) SA 135 (SCA).

21.2 This conduct, coupled with correspondence from BRMK's attorneys threatening punitive costs orders against Mr Khumalo personally, demonstrates that Ms Mdanda and Mr Mareda are acting in the interest of BRMK, not K2, and that K2 is consequently unable or unwilling to take steps to protect itself from the ongoing harm.

21.3 These exceptional circumstances necessitate GPP's application for leave to proceed derivatively under section 165(6) of the Act.

[22] The first respondent contends that the essence of the applicant's case is that K2's board is deadlocked and that is hardly "exceptional circumstances". If it were, then it would be open to a shareholder to proceed under section 165(6) in every instance where there was deadlock amongst the directors.

[23] When confronted with Mr Khumalo's section 74 demand on just a few hours' notice, Mr Mareda and Ms Mdanda requested sufficient documentary material so as to enable them to ascertain whether the proposed litigation engaged clause 23 and item 1.29 in Schedule 1 to the MOI, and to establish whether the proposed resolutions were in K2's best interests. In my view, this does not mean Ms Mdanda and Mr Mareda left K2's Board of Directors paralysed or that their action was "obstructive and designed to protect BRMK's interests, not K2's."

[24] Ms Mdanda and Mr Mareda's response to the section 74 demand was in conformity with their duties under sections 15(6)(c)(i) and section 76(3)(b) of the Act. Mr Khumalo provides no explanation for his refusal to provide the information requested by the respondents. Mr Khumalo contends that the requested information was "largely irrelevant, he does not explain why IPP did not provide the balance of that information, which IPP presumably accepts could be relevant. The first respondent made numerous requests to the applicant for relevant documentary material between May 2024 and April 2025.²²

[25] Mr Khumalo claims to have taken "all steps ... to ensure that K2's Board of Directors resolve to act in K2's best interests."²³ The only evidence of action by Mr Khumalo is (i) he deposed a confirmatory affidavit in support of Mr Meneze's

²² AA, 011-13 to 15, paras 27 to 33

²³ FA, at [14]

founding affidavit in the urgent application (which included wrong claim that Mr Menezes was K2's sole director), (ii) he dispatched a section 75 request on 30 April 2025, on instruction by IPP to him set out in a letter dated 29 April 2025;²⁴ and (iii) he deposed to the founding affidavit in this application. No evidence was placed on record of any interaction between Mr Kumalo and his fellow directors of K2 in the immediate aftermath of the alleged dispossession.

[26] I conclude that there are no "exceptional circumstances" that justify the applicant bypassing the demand procedure in sections 165(2) to (5) and instead invoking section 165(6).

[27] In the result, the following order is made:

- (1) The application for leave in term of section 165(6) of the Companies Act 71 of 2008 to institute and prosecute proceedings derivatively in the name and on behalf of the third respondent is dismissed.
- (2) The applicant is ordered to pay the costs of the application on party and party Scale C which costs include the costs of senior and junior counsel.


JJ STRIJDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

²⁴ Annexure WK 16

For the Applicants:
Adv Adv. PG Cilliers SC

Adv. EJJ Nel

Instructed by:
JW Botes Attorneys

For the first and second Respondent:
Adv. P Daniels SC
Adv. LI Schafer

Instructed by:
White and Case Incorporated Attorneys