

**IN THE HIGH COURT OF SOUTH AFRICA
EAST LONDON CIRCUIT LOCAL DIVISION**

CASE NO. EL 1139/2013

ECD 2639/2013

GLYNIS BEVERLY LARRETT

APPLICANT

AND

**COEGA DEVELOPMENT CORPORATION
(PTY) LIMITED**

FIRST RESPONDENT

**THE STANDARD BANK OF SOUTH AFRICA
LIMITED**

SECOND RESPONDENT

MR K B NDZIMELA

THIRD RESPONDENT

JUDGMENT

STRETCH J:

- [1] The applicant in this matter is a director of a company called Independent Crushers Consortium (Pty) Limited ("ICC"). She was instrumental in the institution of an action purported to be in the name of ICC as against the first respondent in this matter (Coega Development Corporation (Pty) Limited) and the second respondent (The Standard Bank of Africa Limited) by way of a summons issued out of this court on 6 September 2013.

- [2] It is common cause between the parties that when the summons was issued the applicant lacked the necessary authority from the board of directors of ICC to instruct attorneys to institute the action. Not surprisingly, the second respondent duly challenged the authority of ICC's attorneys to institute the action. They were unable to establish the requisite authorization.
- [3] That action has thus been held in abeyance pending the outcome of this application, in which the applicant seeks orders, the effect of which would be for this court to authorize the applicant on behalf of ICC to mandate the aforesaid attorneys to pursue the said action, and that all steps already taken in pursuit of the relief sought in that case to date be condoned. In seeking such relief she relies on the provisions of section 163 of the Companies Act¹ ("the Act").
- [4] In the application she has cited both the first and second respondents together with her co-director of ICC, one Mr K. B. Ndzimela, he and she being the only two directors of the company. The company itself has not however, been cited.
- [5] Only the second respondent has opposed the application. The grounds of its opposition to the relief sought are essentially twofold, being firstly, a fatal non-joinder of ICC in these proceedings (it having a direct and substantial interest therein), and secondly, that section 163 of the Act does not encompass the relief sought and that the applicant's purported reliance thereon is accordingly misplaced.

¹ No. 71 of 2008

[6] By way of background, the applicant's case is essentially that ICC secured an agreement with the first respondent in terms of which it was awarded certain road surfacing contracts. These contracts, or a portion of these, were duly carried out in terms of the agreement, and certain payments were made by the second respondent on behalf of the first respondent into a nominated account for and on behalf of ICC. After further work had been performed in terms of the contract further demands were made for payment. This payment, which amounted to the sum of R2 087 000, was not paid into the nominated account but was paid into the account of one of the shareholders of ICC. After further investigation, the applicant ascertained that the co-director (the third respondent), had been instrumental in fraudulently diverting this sum of money into that account, presumably for his own benefit. As a result of this the third respondent, together with another, have been charged with criminal fraud, which case is still pending. According to her, the third respondent has become completely and utterly supine and has refused to remain involved in the running of the affairs of the company despite many attempts on her part, and on that of her attorney, to secure his cooperation. A strong inference is thus created that he refuses to become involved in the affairs of the company because of the fact that he is aware of his own misdeeds which have resulted in severe prejudice to ICC.

[7] The upshot of all of this is that the applicant cannot and has not been able to set up the required board meeting between herself and the third respondent in order to secure the necessary authorization for the institution of the action mentioned earlier in this judgment. Based on these allegations, the applicant has alleged that she falls within the provisions of section 163 of the Act in that she (as both a shareholder and a director of the company), has been oppressed and unfairly prejudiced, and/or that her

interests have been unfairly disregarded as a result of an act or omission by the company, or by a related person.

- [8] The applicant's counsel initially contended that the issues mentioned above as raised by the second respondent could not be so raised by virtue of the fact that they had not been pertinently alluded to in the application papers. It is so that the question of non-joinder was not raised in the answering affidavit, but this is a matter of law and a question of prejudice which the court itself can raise *mero moto* in an appropriate case. As regards the question of the ambit of section 163, this aspect was pertinently raised in the answering affidavit. In any event, it is incumbent upon the applicant to establish the legal basis upon which she seeks relief. Even if this matter had not been opposed by the second respondent, the applicant would have had to satisfy the court that the section is applicable.
- [9] There have also been a number of skirmishes with regard to questions of disputes of fact and otherwise, most of which to my mind are irrelevant to the main issues which I referred to earlier.
- [10] As regards the question of non-joinder of ICC, the applicant's counsel has argued that the fact that both the directors of ICC (the applicant and the third respondent), have been cited in these proceedings is sufficient in the circumstances and that it is thus highly technical to require that the company itself be joined. In this regard he has referred to the case of *Wholesale Provision Suppliers v Exim International CC and Another*² for the proposition that the rule relating to non-joinder "is not simply a mechanical or technical rule which must ritualistically be applied, regardless of the circumstances of the case". This is clearly so, but whether it applies in this case is not an

² 1995 (1) SA 150 T at 158 D-E

aspect which is necessary for me to decide because of the view which I take with regard to the ambit of section 163.

[11] Accepting, for the purposes of this matter, that the applicant may have made out a case in her papers to the effect that she falls within the ambit of subsection 163(1)(a) of the Act, the question arises as to whether or not the consequent relief she seeks falls within the ambit of subsection 163(2). For the purposes of this judgment it is necessary to set out the subsection in full:

“(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including-

- (a) an order restraining the conduct complained of;
- (b) an order appointing a liquidator, if the company appears to be insolvent;
- (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131 (4) (a) apply;
- (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
- (e) an order directing an issue or exchange of shares;
- (f) an order-
 - (i) appointing directors in place of or in addition to all or any of the directors then in office; or
 - (ii) declaring any person delinquent or under probation, as contemplated in section 162;
- (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;

- (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
- (i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
- (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
- (k) an order directing rectification of the registers or other records of a company; or
- (l) an order for the trial of any issue as determined by the court.”

[12] The applicant’s counsel contends that the opening words of the subsection make it clear that the court has a very wide discretion to grant orders that “it considers fit”. This is so. The court has a reasonably wide discretion in this regard. Indeed, it seems that the scope of the equivalent section under the old Companies Act, 1973 (being section 252), has been considerably widened by its successor. The question arises however as to whether or not it is sufficiently wide to grant the court the power to authorize the institution of an action by the company as against a third party where such institution has not been duly authorized by the board of directors of the company.

[13] On the other hand, the second respondent’s counsel contends that there are two compelling reasons as to why this cannot be so. Firstly, so it is argued, there is a separate section of the Act, namely section 165, which has been designed to deal with this very situation and, in the circumstances, it could not have been contemplated by the legislature that section 163 would afford the court such parallel powers. Secondly, that

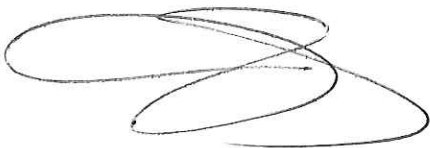
section 163 is designed to deal more with internecine strife amongst shareholders and directors of a company, and not with its external relations with third parties.

- [14] After consideration of the subsection, I am of the view that it was not contemplated by the legislature that the broad powers granted to the court by section 163(2) incorporate the power to authorize the institution of an action against a third party in the absence of a proper company resolution to that effect. It seems to me that the legislature has specifically designed section 165 for the very purpose of securing the rights of someone such as the applicant in these circumstances whilst at the same time ensuring that the rights of the company and those of the third party concerned are properly taken into account. Extensive procedures have been created by that section towards these very ends, such as subsection 16(4)(a) which provides that the company must (upon a demand being made to commence or continue legal proceedings), appoint an independent and impartial person or committee to investigate the matter and to report to the board on various aspects including the probable costs which would be incurred. There are a number of checks and balances built into a reasonably extensive section the ultimate purpose of which is to create a form of statutory derivative action. Having gone to all this length to create such a vehicle for derivative actions, it seems to me that the legislature could never have contemplated that section 163 would allow, in effect, a derivative action on the part of a person in the position of the applicant.

[15] This view is supported by Henochsberg³ where the following is stated:

‘Wide though they are, the powers which are committed to the Court do not include the power to "authorize" shareholders to institute action in the name of the company’.

[16] I come to this conclusion somewhat reluctantly in view of the fact that, if all the facts which the applicant alleges are true (in particular that of the fraud perpetrated by the third respondent on the company), it may well be that ICC has a claim. However, it seems to me that the proper section that ought from the outset to have been invoked was section 165 and not section 163. In the circumstances I am constrained to dismiss the applicant's claim with costs.



I T STRETCH
JUDGE OF THE HIGH COURT

13 March 2015

APPEARANCES:

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³ Henochsberg on the Companies Act, 71 of 2008, at page 574 (4)