IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

Case number: 03/19214

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: (YES)/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/(NO)
(3) REVISED.
3/12/04 DATE
SIGNATURE

In the matter between:

KUDU GRANITE HOLDINGS LIMITED Plaintiff

and

CATERNA LIMITED First Defendant

RUENYA GRANITE (PVT) LTD Second Defendant

JUDGMENT

SNYDERS J:

[1] This matter concerns the adjudication of an agreed special case in terms of Rules 33(1) and 33(2) of the Uniform Rules of Court, which has been set down as the only issue to be determined, subsequent to a court order separating the issue arising from the first defendant's Special Plea from the remaining issues in the action, which order was issued on 5 April 2004. For purposes of determination of the special case I am to accept the facts pleaded in the Intendit and the Special Plea as common cause.

[2] The plaintiff is an *incola* of the Republic of South Africa and of this court. The first defendant is a *peregrinus* of South Africa, it being incorporated in the British Virgin Islands and having its principal place of business in Guernsey.

The second defendant is also a *peregrinus* of South Africa, is incorporated in Zimbabwe, where it also has its principal place of business. Both the plaintiff and the first defendant are shareholders in the second defendant. The first defendant is in control of the board of directors of the second defendant and the plaintiff is a 49% shareholder.

[3] In its Intendit the plaintiff alleges that the first defendant is indebted to the second defendant, however that the second defendant is not enforcing its claim against the first defendant, in circumstances which entitles the plaintiff to institute a derivative action against the first defendant in an attempt to recover the indebtedness of the first defendant in favour of the second defendant. The plaintiff relies on a so-called " fraud on the minority"[1] as the basis for the derivative action.

[4] In order to found jurisdiction, the plaintiff made an attachment in terms of a court order issued on 11 June 2003, of a debt due to the first defendant. The issue is whether the attachment was effective in establishing jurisdiction. The answer to this issue depends on whether the plaintiff, suing to enforce a claim of the second defendant, can rely on the rule that an *incola* plaintiff can found jurisdiction by attachment alone, as opposed to a *peregrine* plaintiff, which has to, in addition to the attachment, demonstrate that some other *causa jurisdictionis* exists.[2] If the second defendant itself tried to enforce the claim, the latter rule would have applied. It is common cause that no other *causa jurisdictionis* exists.

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[1] In **Sammel v President Brand GM Mining Co Ltd 1969 (3) SA 629 (A)** at 679: *"[F]raud in that expression does not necessarily mean fraud in its technical sense; it is there used in its wider connotation of being any abuse or misuse of power by the majority of shareholders."* See also **Blackman, Jooste, Everingham: "Commentary on the Companies Act" (Vol 2)** (Juta & Co Ltd, 2002) at 9-78 to 9-95 for a general discussion on this cause of action.

[2] **American Flag plc v Great African T-Shirt Corporation CC: In Re Ex Parte Great African T-Shirt Corporation CC 2000 (1) SA 356 W** at 370J to 371A: *"A court of whose area the plaintiff is a peregrinus cannot secure jurisdiction by attaching property of a peregrine defendant ; nor can it obtain jurisdiction by relying on the submission of such a defendant."*

[5] The derivative action has been accepted as part of our common law,[3] even prior to its introduction into statutory law.[4] In this matter the plaintiff is relying on the common law derivative action. It originates from the English law where it has its roots in the decision of Foss v Harbottle (1843) 2 Hare 461; 67 ER 189, conveniently summarised by the authors Blackman, Jooste, Everingham in their leading work on the Companies Act[5], as follows:

> *"...the court, while accepting the general principle that in order to redress a wrong done to a company the action should prima facie be brought by the company itself, recognised that in certain exceptional cases the courts will permit departures from that principle and allow the individual shareholder to bring a derivative action to enforce his company's rights."*

[6] Since the decision in Foss v Harbottle the derivative action has been developed as one of the exceptions to the rule stated in that decision. That process is ongoing and the precise content, nature and extent of it has not been comprehensively stated.[6] Since the beginning of its development it has been likened to agency and indeed, there are similarities, for example the minority seeks to obtain redress on behalf of the company and enforces the claim of the company.[7]

[7] It is on this likeness that the defendant basis its submissions that only the *peregrine* status of the "principal" should be considered in order to decide the

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[3] **Eales and Others v Turner and Another 1928 (WLD) 173** at **179**: *"There has doubtless been a development of the law since Foss v Harbottle (supra) in this respect – that a classification of cases which fall within the exception has begun and may perhaps be capable of further development. One class of case within the exception undoubtedly is where the majority are abusing their powers or are depriving the minority of their rights. From fraud or oppression of this kind the Court will deliver the minority at their own suit as plaintiff."* See also **Gundelfinger v African Textile Manufacturers Ltd and Others 1939 AD 314** at **324-325**; **Sammel and Others v President Brand Gold Mining Co. Ltd 1969 (3) SA 629** at **679D-E**. In **Francis George Hill Family Trust v South African Reserve Bank and others 1992 (3) SA 91 A** at **97E-F**, Hoexter JA quoted, with approval, Lord Denning MR in **Wallersteiner v Moir (No 2) [1975] 1 All ER 849 (CA)**, at **857d-f**, where it was reiterated that justice demands the recognition of a derivative action of a minority shareholder.

[4] Section 266 of the Companies Act, 61 of 1973.

[5] *Supra*, fn 1.

[6] **Sammel and Others v President Brand General Mining Co. Ltd**, *supra*, at **679H**.

[7] **Wallersteiner v Moir (No 2)**, supra, at **858c-e**.

issue of jurisdiction, based on the decision in the matter of **Skelbreds Rederi A/S and Others v Hartless (Pty) Ltd 1982 (2) SA 710 AD**. The dictum relied upon appears at **736A-C**:

> *"In the light of all the aforegoing I am of the view that the written agreement of cession is not a true reflection of the real agreement between the parties thereto; that there was no real intention to enter into an agreement of cession; that what is stated by the parties to have been an agreement of cession was one in form only, designed to enable the respondent, an incola of the Court's area of jurisdiction, to institute proceedings in its name against Skelbreds; and that the true agreement between the parties is one in terms of which the respondent would act as Freedom Tramping's mandatary in enforcing Freedom Tramping's claim against Skelbreds.*
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> *Holding this view of the relationship between the parties, I consider it to be clear that the respondent cannot claim an attachment order in order to found jurisdiction when its mandatory, on whose behalf it is acting cannot do so."*

[8] However, the nature of the derivative action also differs fundamentally from that of agency. Agency is established by way of agreement[8] in the nature of a mandate, whereas the derivative action does not arise from a mandate by the company, quite the contrary[9]. The company, as beneficiary in the event of success and having an interest in the litigation, is required to be a party to the action and is entitled to oppose the action. An agent is not entitled to institute an action in its own name[10], unlike in the case of the

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[8] **Whittal v Alexandria Municipality 1966 (4) SA 297 E at 301G.**

[9] **Blackman, Jooste, Everingham**, *supra*, at **9-113**: *"In these cases, the minority shareholder is the true plaintiff, prompted by a desire to protect his own interests by obtaining corporate recovery, and the company (which in fact opposed the action) is a true defendant (together with those persons against whom relief is sought)."*

[10] **Sentrakoop Handelaars Bpk v Lourens and Another 1991 (3) SA 540 W at 542B-C; S.W.A. Amalgameerde Afslaers (Eiendoms) Bpk v Louw 1956 (1) SA 346 A at 355B-D.**

derivative action where the minority shareholder does institute action in its own name[11].

[9] The conclusion is justified, having regard to the development of the derivative action in our law, that it is not purely a situation of an agent acting for and on behalf of a principal. In my view it would also be unrealistic to deny the personal interest of the minority shareholder in the suit instituted by way of the derivative action. Although a shareholder in a company has no direct proprietary interest in the business of the company, it has a financial interest.[12] As such the minority shareholder, when it institutes the derivative action is not merely putting on the cloak of the company, but is also pursuing its own interests. In so doing the minority shareholder does not step out of its peculiar identity and characteristics and fully adopt those of the company.

[10] In addition, there are sound policy considerations why the characteristics of an *incola* should not be ignored or overlooked. Although the facts in the decision of American Flag PLC v Great African T-Shirt CC 2000 (1) SA 356 W differs substantially from the current matter, the policy stated applies equally. At 371E it was stated:

> *"...the policy of our law is to assist incolae to litigate in their local courts,...".*

[11] The policy emphasized further in that judgment, which I intend to also follow in this instance, is not to adopt a restrictive attitude to jurisdiction[13].

[12] Consequently I find that this court has jurisdiction in the matter and dismiss the First Special Plea with costs. In view of the novelty of the point

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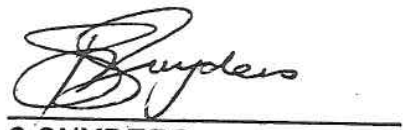
[11] **Eales and Others v Turner and Another**, *supra*, at 179: *"Notwithstanding that he complains of an illegality by the company he must still allege facts which show that justice demands that he should be allowed to sue personally."*
[12] Stellenbosch Farmers' Winery Ltd v Distillers Corporation (SA) Ltd and Another 1962 (1) SA 458 AD at 485F-486A; Kalinko v Nisbet and Others 2002 (5) SA 766 at 779C-D.
[13] At 375B-376I

and the importance thereof, such costs are to include the costs of two counsel.



S SNYDERS
Judge of the High Court of South Africa

Counsel for the plaintiff:	Adv N van der Walt SC Adv F A Ponelis
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Counsel for the first defendant:	Adv N B Tuchten SC
Attorneys for the first defendant:	Cuzen, Woods & Randeree
Date of hearing:	14 October 2004
Date of Judgment:	3 December 2004