HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) REPORTABLE: Yes.
(2) OF INTEREST TO OTHER JUDGES: Yes.
(3) REVISED.

....
DATE SIGNATURE

Case No: 40036/16

In the matter between:

L D Applicant

and

TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD 1st Respondent
ANDREA CORNELLI 2nd Respondent
TONY DA SILVA 3rd Respondent
IQBAL HASSIM 4th Respondent
WAYNE IMPEY 5th Respondent
AYESHA BHULA 6th Respondent
ROY COLIN STOLER 7th Respondent
S D 8th Respondent

And in the matter between:

Case No: 35926/16

S D Applicant

and

L D 1st Respondent
TECHNOLOGY CORPORATE MANAGEMENT (PTY) LTD 2nd Respondent

***Case summary*: Company Law – Companies Act 71 of 2008 - Matrimonial Property Law – Matrimonial Property Act 88 of 1984 - whether an ex-spouse, who was married in community of property, upon divorce becomes the owner of 50% or the co-owner of 100% of shares registered in the name of the other ex-spouse, and, vis-à-vis the company, entitled to be registered as shareholder or co-owner of such shares and to payment of 50% of the dividends attaching to the shares when declared and due for payment or to an order interdicting the company from paying out such dividends or half thereof to the ex-spouse registered member in circumstances where the community of property between them had been dissolved by divorce, the court had not divided the joint estate, the ex-spouses have failed to reach agreement on a division and a liquidator had not yet been appointed to the task.**

JUDGMENT

MEYER J

INTRODUCTION

[1] The parties agreed, for practical considerations and due to overlapping issues, to a 'consolidated' hearing and the simultaneous determination of three applications: First, an application launched by Ms. S D (S) on 13 October 2016 under case no. 35926/16 (S's application). Second, an application launched by Mr. L D (D) on 11 November 2016 under case no. 40036/16 (D's application). Third, a counter–application launched by S during the course of D's application. D, in his application, also seeks the setting aside of the interpleader proceedings set in motion by Technology Corporate Management (Pty) Ltd (TCM) on 13 October 2016 under case no. 36126/16 (the interpleader proceedings).

[2] Central to the background and determination of these applications and interpleader proceedings is an action brought at the instance of two minority shareholders of TCM, D and Jose Manuel Garcia Diez (Diez), in December 2010 under case no. 50723/10 for relief in terms of s 252 of the Companies Act 61 of 1973 (the old Companies Act) against TCM, and, in the alternative, against the majority shareholders of TCM (the s 252 action). The trial in the s 252 action concerned only the merits thereof and was protracted. It was heard for a period of 69 court days before Boruchowitz J, commencing in 2014 and concluding in April 2016, when judgment was reserved. A comprehensive judgment was handed down by Boruchowitz J on 31 March 2017 (the s 252 judgment).

MATERIAL FACTS

[3] Despite the considerable length of the papers in S's application, D's application and S's counter-application, the material facts are uncontroverted and there are only a limited number of legal issues to be determined. S, who in her counter-application sought the 'consolidation' of these applications, makes the following undisputed statements:

'It is patently evident that this application, the dividend application, as well as the interpleader proceedings, deal with the very same facts. They accordingly ought, with respect, to be consolidated and heard simultaneously.'

And-

'…the evidence and submissions that will be advanced in this application, the dividend application and the interpleader proceedings will be exactly the same. It would thus be appropriate and fitting for all the matters to be consolidated and heard at the same time.'

[4] S and D were married for almost 28 years. They were married in community of property on 14 November 1987, and divorced by order of this court on 26 October 2015, when an order for the division of their joint estate was also made. However, the joint estate has as yet not been divided. They have three major children (between the ages of 22 and 28) and two minor grandchildren (4 and 5 years old respectively). S left their matrimonial home in Midrand during February 2012. She remarried during 2016 and lives in East London, Eastern Cape.

[5] D became involved in an information technology business with Mr. Andrea Cornelli (Cornelli) during the late 1980's and early 1990's. From very humble beginnings at that time, TCM, of which D and Cornelli were the founding fathers, was built up into a multimillion rand enterprise, the turnover of which was estimated to have grown to over 1 billion rand in recent years. Several other shareholders had been introduced along the way. The registered shareholding of TCM is held as follows: Cornelli and D, 30% each; Diez and Mr. Tony da Silva (Da Silva), 7.45 % each; and the trustees of the Iqbal Hassim family trust, one of whom being Mr Iqbal Hassim (Hassim), 25.1%. They, together with TCM, are the parties to the s 252 action. The current directors of TCM are Cornelli, D, Diez, Da Silva, Mr Wayne Impey (Impey), Ms Ayesha Bhula (Bhula), and Ms Monique Harris (Harris). Hassim ceased to be a director of TCM on 1 October 2016. He was replaced by Harris who is employed by TCM in corporate sales. Harris, Impey (the chief financial officer of TCM) and Bhula (the chief procurement officer of TCM) do not hold any equity in TCM. All the registered shareholders and two others – Impey and Bhula – were (and the only) directors of TCM until 30 September 2016. Cornelli, Da Silva, Hassim, Impey and Bhula in their capacities as directors of TCM are the second to sixth respondents in D's application.

[6] On 29 June 2005, the shareholders of TCM - Cornelli, D, Da Silva, Diez and Hassim - concluded a shareholders' agreement to regulate their relationship as shareholders in TCM. Subclauses 5.1, 5.1.1 and 5.1.2 thereof provide as follows:

'5.1 Notwithstanding anything to the contrary contained in the articles of association of the company, the shareholders shall take all steps, do all things and vote in favour of all resolutions necessary to procure that-

5.1.1 Andrea [Cornelli] and Luis [D] shall as long as they hold at least 30% (thirty percentum) each of the company's total issued share capital be entitled to appoint 2 (two) directors to the board and to remove and replace such appointed directors;

5.1.2 The remaining shareholders being Tony [Da Silva], Jose [Diez] and Iqbal [Hassim] shall as long as they hold at least 15% (fifteen percentum) each of the company's total issued share capital be entitled to appoint one director each to the board and to remove and replace such appointed directors;'

[7] Clause 5.1.6 provides that 'a quorum for meetings of the board shall be comprised of any three directors, provided that both Luis and Andrea shall be present at all such meetings'. The day to day management and administration of TCM are, in terms of clause 9.1, undertaken by the managing director (appointed by board resolution from time to time), with strategic decisions to be taken by the board as constituted from time to time. Cornelli, it is common cause, has been the duly appointed managing director ever since the conclusion of the shareholders' agreement.

[8] The shareholders' agreement contains detailed provisions relating to shareholders' rights to appoint directors designed for each specific shareholding percentage, exit clauses, sale of shares restrictive clauses designed for each individual member, pre-emptive rights clauses, restraint clauses, company funding provisions, and considerably more. Clause 15 of the shareholders' agreements provides that-

'[n]otwithstanding anything contained in this agreement, the parties agree that no third party shall be admitted as a shareholder in the company unless:-

15.1 all parties to this agreement and the board consent thereto; and

15.2 the third party shall have bound itself in writing to all the terms and conditions contained in this agreement.'

[9] The shareholders also undertook, in terms of clause 18, to lodge the share certificates in respect of their respective shares (together with duly signed share transfer forms in respect thereof in negotiable form) with the auditors of TCM on the basis that the auditors shall be instructed to only release such documents in order to give effect to a sale of shares in terms of the shareholders' agreement. The provisions of the shareholders' agreement are, in terms of clause 18, binding *inter alia* on any 'receiver' or 'other person authorised to deal with any shareholders' estate'. Clause 22 prohibits the cession or transfer of rights without the prior written consent of all the parties to the shareholders' agreement, and reads thus:

'Save as otherwise provided in this agreement no rights which any party may have in terms of this agreement and no rights which any of the shareholders may have against the company shall be capable of cession or transfer without the prior written consent of all parties hereto.'

[10] Clause 17.2 of the shareholders agreement deals with the dividend policy, and reads as follows:

'17. The Shareholders shall procure that –

17.1 . . .

17.2 the companies shall, subject to 17.1 and 17.3, declare and pay a dividend, within thirty days of the signature of the company's annual financial statements, equal to a percentage of the company's net after tax profits earned during the preceding financial year, which is resolved by the board to be available for distribution as a dividend;'

The board of directors is thus obliged by the dividend policy of TCM to determine a percentage of the previous financial year's net profit after tax in which a dividend is to be made available, and that, pursuant thereto, the shareholders have the right to procure that such dividend be declared and paid within a month after the date of a meeting. TCM has annually complied with that dividend policy and dividends were annually paid to the registered members proportionate to their shareholding.

[11] Although at the beginning D and Cornelli as well as their wives were close friends and business associates, the relationship between the two of them began to sour since about 2007. According to D it became clear in 2009 that the relationship amongst the shareholders of TCM – D and Diez on the one hand and Cornelli and the other shareholders on the other – had become untenable and broken down to such an extent that it was no longer possible to conduct the affairs of TCM in the manner always envisaged and as later reflected in the shareholders' agreement and in the unwritten expectations and understanding which had formed the basis of the relationship of mutual trust and understanding. Cornelli, according to D, caused his dismissal from his employment with TCM in early 2009. He was dismissed following a disciplinary enquiry against him. His internal appeal failed. He referred the matter to the CCMA, but it was found that his dismissal had not been unlawful. A few years later Diez was constructively dismissed. Both, however, remained directors and shareholders of TCM to date. Da Silva was of the view that the affairs of TCM were being conducted in a manner unfairly prejudicial, unjust and inequitable to himself and Diez, as minority shareholders.

[12] The s 252 action was instituted in December 2010. It was preceded by an application that had been instituted in 2009 under the same provision of the old Companies Act (the s 252 application). The relief sought by D and Diez in the s 252

action was essentially that TCM, or the remaining shareholders of TCM, should purchase their shares against payment of a consideration of R160 million or such other amount as the court may determine.

[13] S consented to the institution and pursuit of both the s 252 application and the s 252 action, and she participated in the pursuit thereof, although the extent of her participation is in dispute, but that factual issue is irrelevant for present purposes. It is common cause that D's membership of TCM is the asset of the greatest value in the former joint estate of S and him. S, however, withdrew her consent to the further continuation of the s 252 action during December 2013, essentially because D failed to communicate to her an offer of settlement which he received from Cornelli. The offer was made some four years after the commencement of the litigation and in the midst of all its extreme acrimony, hostility and the severe mistrust amongst the parties concerned. The offer was, according to D, nothing more than a demand for his capitalisation. It reads:

'In the spirit of Nelson Mandela's legacy and principles, subject to TCM board approval, I offer you 7 days to unconditionally withdraw your case, each party paying their own costs.

I will thereafter apply my mind, on how to best effect transfer of your shares to good faith and synergy investors, on a willing buyer, willing seller basis.

This offer expires at 10 am on Monday 16 December 2013.'

[14] This offer was referred to in the evidence as the 'Mandela offer'. In the s 252 judgment, Boruchowitz J considered that offer to have been–

'[n]o offer at all as no price is stipulated for the purchase of the plaintiffs' shares.'

I respectfully agree with the view of Boruchowitz J.

[15] To date, D had spent some R28 million on legal costs essentially in respect of the s 252 action, which he mainly paid from the dividends declared by TCM. On the other hand, the costs of defending the s 252 action have at all times been paid exclusively by TCM itself, except on two occasions when TCM was expressly excluded by an order of Boruchowitz J from doing so. During August and September 2014, S, through her attorney, Mr Michael Saltz (Saltz), sought to prevail upon TCM, through its attorney, Mr Roy Stoler (Stoler), to pay S 50% of that portion of the dividend which was

about to be declared for the 2014 year and payable to D. Refusing to do so, TCM, through Stoler, specifically advised Saltz that –

'…the registered shareholder in the share register is [D] and [TCM] is thus obliged to make payment to him, unless he consents otherwise in writing, or we have a court order to do so…'

S then launched an urgent application under case no. 37599/14 to compel TCM either to pay no dividend to D or only to pay 50% of the dividend due to him and for the balance to be held in trust pending the outcome of other proceedings. That application was struck off the roll for lack of urgency and never pursued. The dividend was then paid to D, timeously and in full.

[16] A dividend for the 2015 year was declared by TCM at a board meeting on 14 December 2015 in an amount of R14 million to be paid out to members proportionately in two instalments of R6 million and R8 million on 15 January 2016 and 15 February 2016 respectively. D's portion of the dividend amounted to R4.2 million. Three days before the meeting S demanded that TCM pay over the dividend not to D but into Stoler's trust account pending her application for the appointment of a receiver and liquidator of the joint estate. TCM agreed that the proceeds of the dividend be placed in trust with Stoler and that interpleader proceedings would be instituted in order to determine to whom the dividend was to be paid. An interpleader summons under case no. 394/16 was issued on 7 January 2016 by TCM. D responded by launching an urgent application in terms of s 163 of the Companies Act 71 of 2008 (the new Companies Act). Therein he sought that TCM also pays his legal expenses in the s 252 action and the expenditure incurred in respect of his expert, KPMG's Services (Pty) Ltd (KPMG). In the alternative he sought a declaration that he was 'entitled as registered shareholder of [TCM] to payment of 30% of the dividend of R14 million declared by [TCM] on 14 December 2015' and for an order that TCM forthwith pay to him 'such dividend in the net after tax sum of R3.57 million' (the s 163 application).

[17] The s 163 application was heard by Boruchowitz J before the re-commencement of the continuing s 252 trial in late January 2016. At the commencement of the hearing, Boruchowitz J required that notification be given to the attorney representing S, Saltz, who in turn instructed counsel, Mr Riley, to appear on her behalf. Argument commenced, but, except for costs, the s 163 application was settled amongst the

parties. The matter of costs was reserved. On 1 April 2017, Boruchowitz J ordered Cornelli, Da Silva and Hassim to pay the costs of the s 163 application, including those of two counsel, on a punitive scale.

[18] Boruchowitz J said the following in the s 252 judgment about TCM's withholding of the dividend declared on 14 December 2015 from D:

'[69] The following conduct affords clear evidence of the defendants' intention to deprive the plaintiffs of the financial wherewithal to pursue the present claim. Clause 17.2 of the shareholders' agreement obliges the board of directors of TCM to pay a dividend, within thirty days of the signature of the company's annual financial statements, equal to a percentage of the company's net after tax profits earned during the preceding financial year. According to the evidence it was TCM's practice to decide upon the amount and date of payment of a dividend between July and September of each year when the audited annual financial statements of TCM were approved. For reasons best known to Cornelli and the board of directors, the financial statements for 2015 were only approved on 11 November 2015, but no mention was made of a dividend. Eventually, a dividend was declared at a board meeting held on 14 December 2015, but D's dividend – amounting to approximately R4 million – was withheld from him. Instead of paying it to D the dividend was paid into TCM's attorneys' trust account. TCM's attorney then invoked interpleader proceedings alleging that there was a competing claim for the dividend from D's former wife, S D (S).

[70] The withholding of the dividend placed the plaintiffs in an intolerable position as they were funding the litigation from their own pockets. D has assisted Diez in paying for his legal costs. Cornelli would have known that the only financial benefits received by the plaintiffs from TCM were the dividends and that the withholding of the dividend would place undue financial pressure on D.

[71] It is common cause that the legal costs incurred by the second to fifth defendants have been and are presently being charged to TCM. The plaintiffs were accordingly driven to launch an application in terms of s163 of the Companies Act, 71 of 2008, to compel payment of the dividend and for an order that their legal costs would also be paid by TCM. D's wife purported to intervene in these proceedings. Prior to 26 October 2015, D was married to S in community of property; he was the registered shareholder, and she, the beneficial owner of an indivisible half of such shares. Whatever rights S may have to the shares is of no concern to TCM, which was obliged to pay the declared dividend to D, the registered member. After hearing argument, I ordered that the dividend be paid forthwith to D. This obviated the need for the plaintiffs to

proceed with the s 163 application. The time taken up in dealing with the s 163 application had the effect of further lengthening the duration of the trial.

[72] TCM had no legal right to withhold payment of the dividend from D. Unless a company's articles provide otherwise, dividends are payable to the persons who are registered in its register of members *(see Henochsberg on the Companies Act*, 71 of 2008, 24; Blackman, *Commentary on the Companies Act,* Vol 1, 5-152). The full dividend should have been paid to D, as he is the registered holder of the shares. As a matter of law, a company recognises only its registered shareholders, that is, those whose names are entered in its register of members. The company is not concerned with the principal whose name does not appear on the register, usually described as the *"beneficial owner"* (*Sammel* at 666D; *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (PTY) Ltd* 1976 (1) SA 441 (A) at (453 A-B), and *Standard Bank of South Africa Limited v Ocean Commodities Inc.* 1983(1) SA 276 (A), 289B).

[73] The legal position in regard to the payment of dividends is described by Lindley LJ in *Société Générale de Paris v Tramways Union Company Limited* (1884) 14 QBD 424 (at 451-452) as follows:

"If a shareholder in a company governed by the Companies Act… does not transfer his shares, but agrees to transfer them or to hold them upon trust for another, either absolutely or by way of security, there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it.

As between them the agreement or trust can be enforced; but as regards the company the shareholder on the register remains a shareholder still. He is the person to exercise the rights of a shareholder, for example, to vote as such, to receive dividends as such, and to transfer the shares… The person having the beneficial interest in the shares has as against the company, no right to them; he has, as against the company, no right to have them registered in his own name."

[74] In *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) (at 453), the then Appellate Division expressed the position in relation to nominee and beneficial shareholders as follows:

"The principal, whose name does not appear on the register, is usually described as the 'beneficial owner'. This is not, juristically speaking, wholly accurate; but it is a convenient and well-understood label. Ownership of shares does not depend upon registration. On the other hand, the company recognises only its registered shareholders."

See also *Standard Bank of South Africa Limited v Ocean Commodities Inc* (1983) (1) 276 (A) at 289.

[75] It is settled law that upon declaration of a dividend the sum due becomes a debt due from the company to the registered shareholder (Blackman *et al, Commentary on the Companies Act* (vol 1, 5-149). I consider the delay in declaring the dividend and the payment thereof into TCM's attorneys' trust account as a stratagem employed by Cornelli to deprive the plaintiffs of the means to properly pursue the present litigation. The launching of the interpleader proceedings by TCM's attorney was legally unjustified. It goes without saying that the withholding of the dividend in the circumstances described unduly prejudiced D in his capacity as a shareholder.'

[19] Shortly before the delivery of the s 252 judgment, S launched an application to intervene as the 6th defendant in the s 252 action for purposes of filing a plea and counterclaim and TCM and the shareholders, other than Da Sousa and Diez, applied for leave to amend their plea so as to allege that the court lacked jurisdiction to make an order that any of the defendants purchase the shares owned by S, either solely or in co-ownership with D. He held:

"[76] … The intervention application was brought on the basis that upon the divorce from D 26 October 2015, she became the owner of 15% of the shares in TCM, alternatively, a separate and free co-owner with D of 30% of the shares registered in his name. She asserted in her proposed counterclaim that because the joint estate is still to be divided, she is entitled to retain *"her portion"* of the shareholding and to have a 15% shareholding in TCM registered in her name; furthermore, that her interests would be prejudicially affected if the relief sought in the present action were granted.

[77] On March 2017, the defendants opportunistically applied for leave to amend their plea so as to allege that this Court lacks jurisdiction to make an order that any of the defendants purchase shares owned by S either solely or in co-ownership with D. The alleged basis for this new-found plea is that the defendants cannot be ordered to buy shares from a person who refuses to sell them.

[78] The argument that S had a legal entitlement to have 15% of the shares registered in her name is specious. The effect of the granting of the order of divorce is to bring an end to the community of property that previously existed between S and D and to require an equal division of the joint estate after payment of liabilities (*see Meyer v Thompson NO* 1971(3) SA 376 (D) at 377 F). Absent an agreement to the contrary, S did not, upon the divorce, acquire any right to the shares themselves or any portion thereof. She could not claim any asset of the joint estate

in specie or in an undivided form, and was merely entitled to a share of the net proceeds of the joint estate after the realisation of liabilities.

[79] The fact that S is presently a separate and free co-owner with D of 30% of the shares in TCM does not entitle her to be registered as a member in the register of members. The right to be on the register is independent of the ownership of the shares (see *Davis* v *Buffelsfontein Gold Mining* Co Ltd *and another* 1967 (4) SA 61 (W) at 633 C-F and in the reference therein to the case of *Jeffery v Pollack and Freemantle* 1938 AD1 at 18; also see Hahlo, *"South African company law through the Cases (6 ed) at 175)*.

[80] For these reasons I held that S did not have a direct and substantial legal interest that would justify her intervention in the present action.

[81] It is as well also to bear in mind that s 252(3) endows this Court with the discretion to make *"such order as it thinks fit . . . with a view to bringing to an end the matters complained of"*. The wide nature of the discretion would permit the Court, where appropriate, to make an order for the di disposal of shares, contrary to the wishes of the owner or the beneficial owner thereof.

[82] I dismissed the intervention application and the defendants' proposed amendment as they were, in my view, devoid of any merit. Should the Court have been inclined to grant the orders sought, this would have had serious and far-reaching consequences. The plaintiffs would have suffered grave prejudice, such, that cannot be catered for by an appropriate costs order. This Court would have been required to re-open the case and give consideration to a whole range of factual disputes concerning the joint estate of D and S, all of which are irrelevant to the relief sought in the present action. In proceedings under s 252, the Court is not concerned with the personal disputes between husband and wife. Had the trial been reopened, the Court would have to consider afresh what relief other than the disposal of the plaintiffs' shares would be appropriate. This would have opened up new avenues of enquiry requiring further evidence to be led.

[83] Nowhere in the application for intervention did S seek to explain, or credibly explain, the reasons why her application was brought on the eve of the delivery of this judgment. It is considered to be an abuse of process where there is an inordinate, unexplained or inexcusable delay causing prejudice (see *Mahommed Cassimjee v The Minister of Finance* 2014 (3) SA 198 (SCA) paras [10] to [12] and cases there cited). The excessive unexplained lateness of the application warranted the conclusion that it was brought with the ulterior purpose of derailing this judgment. The launch of the application to intervene and to amend the defendants' plea was in my view a well-orchestrated stratagem with clearly defined ulterior motives; S and Cornelli had together conspired to derail the imminent judgment in the trial and to deprive D of

the capacity to enforce his rights. This conduct constituted an abuse of the process of court. For that reason I ordered that the costs of the applications be paid by S and the defendants on a punitive scale.

[84] A most disturbing fact that emerged in the intervening application is that TCM had again deliberately withheld payment of the 2016 dividend to which D was entitled. Instead, the dividend was again paid into the trust account of TCM's attorney, who instituted an interpleader proceeding. An urgent application by D to compel payment of the dividend was struck off the Roll by Windell J on 14 February 2017 on the grounds that it lacked urgency, and that application is to be determined on the opposed roll of this Court in August 2017. For the reasons stated, TCM had no legal right to withhold payment of the dividend from D.'

[20] On 14 September 2016, during the course of a meeting of TCM's board of directors, a dividend was declared by TCM in a total amount of R16 million, of which R4 080 000 was determined to be payable to D in two equal tranches of R2 040 000 on 15 October 2016 and 15 November 2016 respectively. At the meeting the fact that S had made a claim against TCM for half of the dividend declared in the previous year, 2015, was raised by Cornelli. It was thereafter resolved by way of a proposal from Cornelli, therein supported by all the other directors save for D and Diez - but against D's contention that, as a registered member, he was entitled to payment by TCM of the dividend in full - that 'a mutually agreed instruction from [D and S] would be sought, which, if not forthcoming … [Impey] will seek and take legal advice to protect TCM from any conflicting claims'.

[21] In his answering affidavit in D's application, Stoler states the following:

'I applied my own mind to the situation that TCM again found itself in and also briefed reputable senior and junior counsel for their advice on the stance that should be taken by TCM. The joint advice was that TCM had no right to decide the dispute and that the correct stance was for it once again to issue an interpleader summons. It did so on 14 October 2016. The summons in the interpleader proceedings was issued by me in my capacity as attorney for TCM.'

[22] S's application against D and TCM (cited the first and second respondents respectively) was launched on 13 October 2016. Therein she seeks that TCM be interdicted from paying any dividends due to D pending the outcome of her application for the appointment of a receiver and liquidator of the joint estate between her and D

(case no. 7300/2012), alternatively pending the outcome of the s 252 action. In the alternative she seeks payment from TCM of 50% of any dividend due to D once dividends had been declared pending the outcome of the aforementioned proceedings.

[23] S's application was followed by an interpleader notice issued by TCM and signed by Stoler on 14 October 2016. D and S are cited as the first and second claimants respectively and they were called upon to deliver particulars of their claims within 15 days of the date of service of the notice. They were further notified that TCM would apply to this court for its decision as to TCM's liability or the validity of the respective claims. D's particulars of claim were filed and served on 4 November 2016. Therein it is specifically stated that the delivery of the particulars of claim 'is without prejudice to any of his rights, including, but not limited to, his right to advance the contentions' that the 'interpleader proceedings'-

2.1.1 have been set in motion with the improper aim of depriving the first claimant of a dividend payment in the sum of R4 080 000 which has in fact been declared by the applicant and is legally payable to him;

2.1.2 are an abuse of the process of this court;

2.1.3 are purportedly pursued by the applicant, but in fact of pursued at the behest of certain directors of the applicant, improperly using the applicant as a vehicle therefor.'

S filed an affidavit instead of particulars of claim.

[24] D's application was launched on 11 November 2016. Therein he *inter alia* seeks that TCM forthwith pays to him - and that the directors (Cornelli, Da Silva, Hassim, Impey and Bhula), insofar as it lies within their powers, forthwith procure such payment to him - that portion of the dividend declared by TCM on 14 September 2016 in the sum of R4 080 000 plus interest on the sum of R2 040 000 calculated at the rate of 9.75% per annum from 15 October 2016 and interest at the same rate is claimed on the balance from 15 November 2016. Furthermore, he seeks that the interpleader proceedings set in motion by TCM in this court on 13 October 2016 under case number 36126/2016 be set aside. He seeks an order that the costs of his application and of the interpleader proceedings be paid on a punitive scale by the directors and S (if she opposes the application and in such event for any costs which she may be ordered to pay to be deducted in his favour from her half share of the joint estate when it is

divided), and, in the alternative, for TCM and any opposing respondents to pay those costs, also on a punitive scale.

[25] As I have mentioned, Boruchowitz J delivered the s 252 judgment on 31 March 2017. He ordered TCM to purchase the shares of D and Diez and to take transfer thereof against payment to them of a purchase consideration in an amount to be determined by a referee, being the value of their shares in TCM as at the date on which the order was made, 31 March 2017. D and Diez were ordered to notify TCM in writing of their resignation as directors of TCM within 5 days after the payment to them in full of the purchase consideration. All the parties were ordered to take all steps, do all things and sign all documents which are necessary to give effect to the aforesaid provisions of the order as expeditiously as possible, failing which the Sheriff of this court was authorised and directed to take such steps, do such things and/or sign such documents on behalf of a party or the parties for such purpose.

[26] Boruchowitz J found that D and Diez have established three categories of unfair prejudice or inequity: First, that the affairs of TCM have been conducted in a manner that is detrimental to their financial interests. Second, that there is a lack of probity or unfair dealing in the manner in which the affairs of TCM have been conducted that has given rise to a breakdown of confidence and trust. Third, that the majority, under the direction of Cornelli, have excluded D and Diez from participating in the management of TCM's business without affording them an opportunity to dispose of their shares in TCM at fair value or upon reasonable terms.

[27] As far as the third category of unfair prejudice or inequity is concerned, Boruchowitz J *inter alia* said the following:

'[128] That D had a right or, at the very least a legitimate expectation, to participate in the management of the business of TCM can admit of no doubt. TCM may properly be described as a quasi-partnership company. Although technically and legally governed by the strictures of company law, in fact and in reality, the relationship amongst the shareholders was more akin to a partnership in which each held 50% of the shares (see *Emphy and Another v Pacer Properties (Pty) Ltd* 1979 (3) SA 364 (DCLD) at 365- 367 and cases there sited). Since its establishment TCM functioned and was administered under the direct control of its two founding members who

participated equally in its management. D testified that a pact was made between him and Cornelli that for as long as TCM existed they would be equal partners in the business, would earn the same benefits and would have an equal say in its affairs. It was always intended that all shareholders be employed by the company. I also accept that despite the introduction of Diez, Da Silva and Hassim as minority shareholders, TCM retained its identity as a domestic company in the nature of a partnership primarily between D and Cornelli.

[129] As a matter of law, it is irrelevant whether or not Cornelli or the board of directors of TCM were justified in dismissing D from his employment. What matters is that he has been excluded from management and has allegedly not been able to properly dispose of his shares at a fair value. It is alleged in par 14 of the particulars of claim that Cornelli has refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares either to TCM, the remaining shareholders or a third party. They further allege that Cornelli has prevented them from having proper access to the financial documentation of TCM, which is necessary to enable the plaintiffs to arrive at a fair assessment of the value of the shares.'

Boruchowitz J concluded thus:

'[163] The ineluctable conclusion to be drawn from the above facts is that Cornelli and the remaining shareholders of TCM have failed or refused to engage in *bona fide* discussions or negotiations with the aim of permitting the plaintiffs to dispose of their shares at a fair value and without resorting to litigation. The defendants have not made a fair or proper offer to purchase the plaintiffs' shares. This has unfairly prejudiced the plaintiffs. Accordingly, the plaintiffs have proven the allegations made in paragraph 14 of the particulars of plaintiffs' claim.'

(Also see par 44 – 48 and 130-162.)

PRELIMINARY OBJECTION

[28] Before I turn to the core issues in the matters before me, it is convenient to dispose of the preliminary objection of a technical nature raised by TCM, Da Silva, Impey and Bhula (TCM and the directors) to the relief claimed by D for the setting aside of the interpleader proceedings. They argue that D was obliged to bring an application in terms of r 30 of the Uniform Rules of Court to set aside the interpleader proceedings as an irregular step. I disagree.

[29] The grounds upon which D seeks for the interpleader proceedings to be set aside include the ground that such proceedings constitute an abuse of the process of

this court. Vexatious or frivolous litigation amounts to an abuse of the process of this court. Vexatious and frivolous litigation have thus been defined and re-affirmed by the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency* 2017 (1) SA 645 (CC) and in *Niekara Harrielall v University of KwaZulu-Natal* [2017] ZACC 38 para 13:

'What is "vexatious"? In *Bisset* the Court said this was litigation that was "frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant". And a frivolous complaint? That is one with no serious purpose or value. Vexatious litigation is initiated without probable cause by one who is not acting in good faith and is doing so for the purpose of annoying or embarrassing an opponent. Legal action that is not likely to lead to any procedural result is vexatious.'

[30] In *In Re Alluvial Creek* 1929 CPD 532 at 535, it was said:

'An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with a most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear.'

[31] This court, therefore, has a discretion at any appropriate time to deal with the setting aside of such proceedings. In any event, as was said by Schreiner JA in *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273(A), at 278F-G-

'…technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on the real merits.'

[32] The papers in the different proceedings before me are voluminous and argument before me ran over three days. There is not a suggestion of prejudice for any party in the matters before me if heed is not taken of the procedural irregularity, if it is one. Doing so will interfere with the expeditious and more inexpensive present decision of the matters on their real merits. The interests of justice, in all the circumstances,

require me to exercise my inherent jurisdiction by overlooking the procedural irregularity, if it is one, in order to avoid injustice.

[33] In *Red Ant (Pty) Ltd v Mogale City Municipality and others* (16813/2012) [2013] ZAGPJHC 301 (22 March 2013), this court held that the launching of a counter–application after the main application had been withdrawn constituted an irregularity, but it nevertheless decided the matter on its real merits. In this regard it said the following:

'[10] Fidelity's counter-application, however, is in substance a fresh application. It was served on all the parties. It comprises a founding, answering and replying affidavit. In paragraph 14 of its answering affidavit Mogale City specifically incorporated its answering affidavit and annexures thereto filed in Red Ant's application as part of its opposition to Fidelity's counter-application. The record that was delivered in terms of rule 53 in Red Ant's application has been relied upon by Mogale City and Fidelity. Neither party was alive to the issue that Fidelity ought to have enforced its claim against Mogale City by way of a separate application until I raised it with counsel during the course of the hearing. The entire matter was argued over three court days. There is no prejudice to Mogale City if heed is not taken of the procedural irregularity in this matter. Doing so will interfere with the expeditious and more inexpensive present decision of this matter on its real merits. Any further delay in the finalisation of this matter may drastically reduce or even defeat the granting of effective relief. See: *Trans-African Insurance Co. Ltd v Maluleka* 1956 (2) SA 273 (A), at 278F-G; *Federated Trust Ltd v Botha* 1978 (3) SA 645 (A), at 654D-E. I am in all the circumstances of the view that the interests of justice require me to exercise my inherent jurisdiction by overlooking the procedural irregularity in order to avoid injustice. See: *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA), para 19; *South African Broadcast Corporation Ltd v National Director of Public Prosecutions and others* [2006] ZACC 15; 2007 (2) BCLR 167 (CC), paras 35-36; *PFE International Inc (BVI) and others v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC), paras 30-33.'

(Also see *Mogale City Municipality v Fidelity Security Services (PTY) Ltd* (572/2013) [2014] ZASCA 172 (19 November 2014), para 6.)

CORE QUESTION FOR DECISION

[34] The fate of the various proceedings before me essentially depends on the question whether an ex-spouse who was married in community of property, upon divorce becomes the owner of 50% or the co-owner of 100% of shares registered in the name of the other ex-spouse, and, *vis-à-vis* the company entitled to be registered as

shareholder or co-owner of such shares and to payment of 50% of the dividends attaching to the shares when declared and due for payment or to an order interdicting the company from paying out such dividends to the ex-spouse registered member, in circumstances where the community of property between them had been dissolved by divorce, the court had not divided the joint estate, the ex-spouses have failed to reach agreement on the division and a liquidator had not yet been appointed to the task.

CONFLICTING CONTENTIONS

[35] Da Sousa's contentions are simple: he alone is at present entitled to be registered as a shareholder of the 30% shareholding in TCM and as the registered member of TCM he alone is entitled *vis-à-vis* TCM to be paid the declared dividends when payment thereof become due. In support of his argument, he relies on *Société Générale de Paris v Tramways Union Company Ltd* (1884) 14 QBD 424; *Lawrie v Beaton* 1938 TPD 206; *Davis v Buffelsfontein Gold Mining Co. Ltd* 1967(4) SA 631 (W); *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A); *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A); *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A); HR Hahlo *South African Company Law through the Cases* (6th ed) at 175; *Henochsberg on the Companies Act 71 of 2008*, 24; Blackman Jooste Everingham *Commentary on the Companies Act* Vol 1, 5-149-152.

[36] The policy of the law, according to those authorities and commentators, 'is that a company shall concern itself only with the registered holder and not the owner or beneficial owner of the shares' (*Sammel* at 666C-D; *Ocean Commodities Inc* at 289). The 'company recognises only its registered shareholders' (*Oakland Nominees* at 453). The right to have one's name be entered in the register of a company is independent of the ownership of the shares (*Davis*.) The registered shareholder 'is the person to exercise the rights of a shareholder, for example, to vote as such, to receive dividends as such, and to transfer the shares … The person having the beneficial interest in the shares has, as against the company, no right to them…" (*Société Générale de Paris*.) The right to a declared dividend vests in the registered shareholder on the date of declaration (*Lawrie* at 261-262). Unless a company's articles provide otherwise,

dividends are payable to the persons who are registered in its register of members (*Henochsberg on the Companies Act*, 71 of 2008, at 24; Blackman, *Commentary on the Companies Act*, vol 1, 5-152).

[37] S's contentions are also simple: when the community of property between her and D was dissolved by divorce on 26 October 2015, the 'tied' co-ownership of their joint estate became 'free' co-ownership, and their respective shares divisible. By operation of law, she argues, ownership of 15 % of the 30% shares in TCM registered in the name of D then vested in her and she became entitled to be registered as a shareholder in the certificated register of shareholders members and to the benefit of the payment of dividends attaching to the shares.

[38] In support of her argument, she (as well as TCM and the directors) place much reliance on the following passages in *Ex Parte Menzies et Uxor* 1993 (3) SA 799 (C). King J concluded (at 811F)–

'…that the co-ownership of their joint estate by spouses married in community of property is a species of "tied" co-ownership, in which the shares of the spouses are not only undivided but also indivisible, unless a division of the joint estate is ordered in terms of s 20 of the Matrimonial Property Act 88 of 1984.'

King J also considered the legal position upon the dissolution of community of property, such as by divorce. In this regard he said the following (at 815C – G):

'According to *Hahlo* (*op cit* at 175 n 108): 'here, each spouse retains, subject to an order of forfeiture of benefits, his or her half-share until division is effected'. This statement seems to me, with respect, quite in accordance with the logical principles of the common law; it is nevertheless open to doubt. In *Meyer v Thompson NO* 1971(3) SA 376 (D) Fannin J held as follows at 377F:

"The effect of the grant of an order of divorce is, *inter alia*, to bring automatically to an end any community of property previously existing between the spouses and to require an equal division of the joint estate after payment of liabilities (*Joseph v Joseph* 1951(3) SA 776 (N) at 778-9 and the cases there cited), even though no order for the division of the estate is made."

Clearly the court could not order a continuation of community of property ("tied" co-ownership) where there was no longer a marriage. But does it necessarily follow that division of the spouses' joint estate must be ordered, or, if not ordered, that such is an automatic consequence of an order of divorce?

The implication of the above statement by *Hahlo* is that, upon the dissolution of the community by divorce, the ex-spouses become in effect free co-owners *entitled* to a division of the estate. Their shares become divisible. Given the circumstances of divorce, it can rarely arise in practice that they would elect to continue in co-ownership in this new form, and thus possibly the rule has grown up that the granting of a divorce carried with it an automatic order of division. It is open to the divorcing spouses (see s 7(1) of the Divorce Act 70 of 1979) to arrive at a settlement in terms of which they could, for example, continue as co-owners of particular assets.'

[39] TCM and the directors, in order to convince this court that TCM was correct to launch the interpleader proceedings and not to take sides or to involve themselves in the dispute between S and Da Silva, argue that the approach of the courts in 1884 (*Société Générale de Paris*), in 1969 (*Sammel*) and in 1976 (*Oakland Nominees*) did not and could not have taken account of the changes brought about by the advent of the Constitution or the following provisions of the new Companies Act: Section 1 (the definitions of 'shareholder' and of 'beneficial interest'), s 50(4), s 56(9)(a) and (b), s 56(11), s 57(1) and s 59(1), (2) and (3). In terms of those provisions of the new Companies Act, they argue, a person who is not a registered shareholder but the owner of shares in a company, has, amongst other things, the right to participate in shareholders' meetings and the right to dividends.

[40] S (through her counsel) refers to s 7(a) (which provides that one of the purposes of the Act is to promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law) and to s 158(a) of the new Companies Act (which provides that 'a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act' when 'determining a matter brought before it in terms of this Act, or making an order contemplated in this Act') and to the fundamental rights to equality (s 9 of the Constitution), dignity (s 7) and not to be unlawfully deprived of property (s 25) and contends that if S is not granted the relief she seeks and if an order be granted in favour of D, her constitutional rights would be infringed. The definition of 'shareholder' in the new Companies Act, ought therefore, in her submission, be interpreted and extended to include any party that is a co-owner of issued shares in a company and that the word

ought to be defined as meaning '…the holder of a share (or any co-owner thereof) issued by a company and who is entered as such in the certificated or uncertificated register, as the case may be'.

BORUCHOWITZ J ALREADY DECIDED BOTH PARTS OF THE QUESTION UNDER CONSIDERATION

[41] Both parts of the question under consideration, however, have already been decided by this court; the part relating to the withholding of payment by TCM to its registered shareholder (De Silva) of a declared dividend, the payment of which is due, by Boruchowitz J in the s 252 action when he was called upon to make an appropriate costs order in the s 163 application, and the part relating to the registration of half the shareholding or of the co-ownership of the full shareholding in TCM in the name of the former spouse (S) whose marriage in community of property to the registered shareholder (De Silva) had been dissolved by divorce but the joint estate not yet divided, by Boruchowitz in refusing S's application to intervene in the s 252 action.

[42] As to S's right to claim the withholding by TCM of dividend payments to D or that TCM pays her 50% of the dividend payments due to D, Boruchowitz J held as follows:

'[72] TCM had no legal right to withhold payment of the dividend from D. Unless a company's articles provide otherwise, dividends are payable to the persons who are registered in its register of members (see: *Henochsberg on the Companies Act,* 71 of 2008, 24; Blackman*, Commentary on the Companies Act*, Vol 1, 5-152). The full dividend should have been paid to D, as he is the registered holder of the shares. As a matter of law, a company recognises only its registered shareholders, that is, those whose names are entered in its register of members. The company is not concerned with the principal whose name does not appear on the register, usually described as the *"beneficial owner"* (*Sammel* at 666D; *Oakland Nominees (Pty) Ltd v Gelria Mining and Investment Co Ltd* 1976 (1) SA 441(A) at 453A-B, and *Standard Bank of South Africa Limited v Ocean Commodities Inc* 1983 (1) SA 276 (A), 289B).

[43] As to S's legal entitlement to have 15% of the 30% shares in TCM registered in the name of D or her co-ownership of the 30% shares registered in her own name, Boruchowitz J held as follows:

'[78] The argument that S had a legal entitlement to have 15% of the shares registered in her name is specious. The effect of the grant of the order of divorce was to bring an end to the community of property that previously existed between S and D and to require an equal division of the joint estate after payment of liabilities (see *Meyer v Thompson NO* 1971 (3) SA 376 (D) at 377 F). Absent an agreement to the contrary, S did not, upon the divorce, acquire any right to the shares themselves or any portion thereof. She could not claim any asset of the joint estate *in specie* or in an undivided form, and was merely entitled to a share of the net proceeds of the joint estate after the realisation of liabilities.

[79] The fact that S is presently a separate and free co-owner with D of 30% of the shares in TCM does not entitle her to be registered as a member in the register of members. The right to be on the register is independent of ownership of the shares (see *Davis v Buffelsfontein Gold Mining Co Ltd and another* 1967 (4) SA 61(W) at 633C-F and the reference therein to the case of *Jeffery v Pollak and Freemantle* 1938 AD 1 at 18; see also, Hahlo, *"South African Company Law through the Cases"* (6 ed) at 175).'

REASONS FOR FINDING IN FAVOUR OF D AND AGAINST S

[44] I am, for the reasons that follow, of the view that S is not entitled to the relief she claims in her application and in her counter-application, *viz.* to be registered as a shareholder of TCM and for TCM to be interdicted from paying dividends to D or that she be paid 50% of all future dividends declared by TCM pending the determination of certain other proceedings.

(i) Observance of the doctrine of precedent

[45] I agree with the reasoning and legal conclusions reached by Boruchowitz J on both aspects of the question relating to S's registration as a shareholder of TCM and of TCM's obligation to pay the declared dividends to D, as the registered shareholder, when they fall due for payment. I am unable to find that Boruchowitz J was clearly wrong and, therefore, am obliged to observe the maxim *stare decisis* or the doctrine of precedent by not departing from his decision. (See *Camps Bay Rate Payers' and Residents' Association and another v Harrison and Another 2011(4) SA 42 (CC)* paras 28-30; *Firstrand Bank v Kona and another 20003/14* [2015] ZASCA 11 (13 March 2015), paras 21-22.)

(ii) S consented to and acquiesced in the institution and pursuit of the s 252 action

[46] S, by unequivocal conduct, inconsistent with the intention to claim the registration of 15% of the shares in TCM or her co-ownership of 30% of the shares into her own name, consented to the institution and pursuit of the s 252 action, also after the marriage in community of property between her and D had been dissolved by divorce and she had become entitled to a division of the joint estate, and she acquiesced in D claiming that TCM or its remaining shareholders purchase the shares registered in his name against payment of a reasonable consideration. Her conduct leads to the conclusion of an intention not to assail that factual situation. (See the discussion of the principles relating to acquiescence in *Makgosi Properties (Pty) Ltd v Fichard N.O. and others* (24249/2015) [2016] ZAGPJHC 374 (13 July 2016) paras 25-27 and in *Lorentzen v Central Authority for the RSA* (South Gauteng Local Division (A5055/2016) (delivered on 20 February 2018) para 12.) The unilateral termination of her consent during December 2013, long after *litis contestatio* and soon before the trial commenced in 2014, is, in my view, legally ineffective.

[47] I am not suggesting that D, who at the time of the institution of the s 252 action was still married to S in community of property, might not have instituted the s 252 action without the consent of S. Section 17(1) of the Matrimonial Property Act 88 of 1984 provides that '[a] spouse married in community of property shall not without the written consent of the other spouse institute legal proceedings against another person or defend legal proceedings instituted by another person, except legal proceedings … in respect of a matter relating to his profession, trade or business.'

[48] TCM is a small domestic company or what is termed a 'quasi-partnership company'. Its shareholders have entered into association upon the understanding that each of them will also participate in the management of the company. Their right to manage the affairs of TCM is *inter alia* derived from agreement between them, their shareholders' agreement. That agreement as I have mentioned, also contains provisions relating to the rights of the various shareholders to appoint directors, pre-emptive rights to acquire each other's shareholdings and their rights to have dividends declared annually. The conclusion of the shareholders' agreement by D, in my view,

was undoubtedly in respect of a matter relating to his 'business' within the meaning of s 17(1)(c) of the Matrimonial Property Act.

[49] As was said by Boruchowitz J in the s 252 judgment:

'[44] A form of unfair prejudice which is of particular relevance in the instant case arises where a minority shareholder who has a right or legitimate expectation to participate in the management of the company is excluded from so doing by the majority without a reasonable offer or arrangement being made to enable the excluded shareholder to dispose of his shares. The prejudicial inequity or unfairness lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on such member if a reasonable basis is not offered for a withdrawal of his or her capital. It was emphasized in *O'Neill* [*O'Neill and another v Phillips and others* [1999] 2 ALL ER 961 at 974-975] that "*it will almost always be unfair for a minority shareholder to be excluded without an offer to buy his shares or to make some other fair arrangement*".

D's claim in the s 252 action for TCM or the other shareholders to purchase his shares in TCM is equally, in my view, in respect of a matter relating to his 'business' within the meaning of s 17(1)(c). Fairness requires that a minority shareholder, such as D, should not have to maintain his investment in a company, TCM, managed by the majority with whom he had fallen out. (See *Bayley v Nells 2010 (4) SA 438 (SCA) para 23.)*

(iii) Boruchowitz J determined the fate of the 30% shareholding in question

[50] Boruchowitz J determined the fate of the 30% shareholding in TCM which is registered in the name of D: TCM is to purchase them for an amount to be determined by a referee. D, on the other hand, is also in terms of the order obliged to 'take all steps, do all things and sign all documents which are necessary to give effect to the purchase of the shares by TCM. That order, as Boruchowitz J in my respectful view correctly found (para 81), falls within the wide nature of the discretion endowed upon a court in terms of s 252 (3) to make an order for the disposal of shares contrary to the wishes of the owner or beneficial owner thereof.

[51] Furthermore, it is now settled law that a beneficial owner of shares in a company is not eligible to join as a co-applicant or co-plaintiff with the registered member in proceedings in terms of s 252 of the old Companies Act. Petse JA, who wrote the unanimous judgment of the Supreme Court of Appeal in *Smyth v Investec Bank Ltd*

(674/2016) [2017] ZASCA 147 (26 October 2017)*, inter alia* referred with approval to the *Sammel* and *Ocean Commodities* decisions on which Boruchowitz J also relied in his judgment on the question of TCM's withholding of the 2015 dividend that had been due and payable to D. In this regard Petse JA said the following:

'[21] In *Sammel and others v President Brandt Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 666C-D, this court said that a "nominee" is a person who is nominated or appointed to hold the shares in his name on behalf of another and that the nominee is in effect simply an agent of the transferee. And that the reason why "nominee" and not "agent" is used is because the word comes from the English Law. This court went on to state at 666D-E that: "The policy of the law is that a company shall concern itself only with the registered holder and not the owner or beneficial owner of the shares". The nominee does not hold the shares as an agent for another but must himself appear on the register as the holder of the shares. *Henochsberg on the Companies Act* Butterworths Lexis Nexis Service Issue 33 of June 2011 states the fact that the nominee holds the shares on behalf of another, generally known as the "owner" or the "beneficial owner", does not appear on the company's register. This is explained with reference to the decision in *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) at 289. There this court said that it is the policy of the law that a company should concern itself only with the registered owners of the shares.'

The Supreme Court of Appeal concluded that beneficial owners are not members as contemplated in s 252 and 'for as long as the nominees' names remained in the register of members, the beneficial owners lacked a legal interest in the subject-matter of the litigation' (para 55).

(iv) The provisions of the new Companies Act do not vest S with the right to claim, vis-à-vis TCM, what she is claiming in these proceedings

[52] The provisions of the new Companies Act on which TCM, the directors and S rely, do not vest S, as the co-owner of the former joint estate between her and D and who presently is entitled to a share of the net proceeds of the joint estate after the realisation of liabilities, with the right or entitlement to exercise any shareholder rights *vis-à-vis* TCM. She does not have the right to claim, *vis-à-vis* TCM, registration of half the shares registered in D's name or to registration of her co-ownership in its certificated share register or to claim the withholding by TCM of dividend payments to D or for TCM to pay her the dividends attaching to 50% of the shares registered in the name of D.

TCM, the directors and S conflate the concepts of 'beneficial ownership' and 'beneficial interest'. The concept of 'beneficial interest' as defined in s 1 of the new Companies Act is of particular relevance to the disclosure requirements of that Act. (See Richard Rachlitz *'Disclosure of Ownership in South African Company Law'* 2013 *Stell LR* 406 at 414 *et* seq; SM Luiz *' The Companies Act 71 of 2008 and the disclosure of and Rights of Access to Information about securities'* 2014 SA Merc LJ 167.)

[53] I respectfully agree with the conclusion of Rachlitz at 414 '… that South African Company Law distinguishes owners of a share, shareholders, and holders of a beneficial interest, and that shareholder rights can be exercised by the person directly entitled to do so himself, or through a proxy'. It is trite that, in terms of our company law, ownership is a bundle of rights attaching to the share and vesting in the owner, who, from the owner's perspective and not from the company's, alone is entitled to the shareholder's rights. But it is, as a general rule, only the registered shareholder who is entitled to exercise the shareholder rights *vis-à-vis* the company (Rachlitz at 407-408).

[54] 'Shareholder', in terms of s 1 of the new Companies Act, is defined to mean the person who is 'the holder of a share issued by a company and who is entered as such in the certified or uncertified securities register, as the case may be'. A company, in terms of s 51(5), 'must enter in its security register every transfer' of securities. As stated by JS Oosthuizen and PA Delport in the article entitled *'Rectification of the Securities Register of a Company and the Oppression Remedy'* 2017 (80) THRHR 228 at 246, the 'significance of this obligation, and the right of the holder of securities' lie in s 37(9), which provides that a person 'acquires the rights associated with any particular securities of a company … when that person's name is entered in the company's certificated securities register … and … ceases to have the rights associated with any particular securities of a company … when the transfer to another person, re-acquisition by the company, or surrender to the company has been entered in the company's certificated securities register …'. Section 57(1) and (7) of the new Companies Act extends the definition of the term 'shareholder' to include a person who is entitled to exercise any voting rights in relation to the company for governance purposes and with

regard ‘to the exercise of authority within a company in respect of any matter arising in terms of this Act or a company’s Memorandum of Incorporation’.

[55] As was further stated by Rachlitz, ‘there are three means by which a person who is not registered as a shareholder can nevertheless exercise shareholder rights *vis-à-vis* a company, namely by means of a beneficial interest, as proxy, or as a holder of a debenture which has voting rights attached to it’ (at 411). Section 1 defines the concept of ‘holder of a beneficial interest’ – as opposed to the legal concept of ‘beneficial ownership’ – as ‘[t]he right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to (a) receive or participate in any distribution in respect of the company’s securities; (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or (c) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities… .’

[56] Thus, as pointed out by Rachlitz, ‘a person can hold a beneficial interest in a share without being the owner thereof, and there can be many persons who hold a beneficial interest in one and the same share’ (at 412). The new Companies Act distinguishes between certificated and uncertificated shares in respect of the entitlement of a holder of a beneficial interest to exercise shareholder rights. With respect to certificated shares, s 56(9) provides that ‘[a] person who holds a beneficial interest in any [certificated] securities may vote in a matter at a meeting of shareholders, only to the extent that the beneficial interest includes the right to vote on the matter, and the person’s name is on the company’s register of disclosures as the holder of a beneficial interest, or the person holds a proxy appointment in respect of that matter from the registered holder of those securities’. However, a register of disclosure must, in terms of s 117(1)(i), only be established by regulated companies. The voting right, as correctly pointed out by Rachlitz, can therefore not be allocated by means of mere beneficial interest in unregulated companies with certificated shares.

[57] S has not shown any entitlement to exercise shareholder rights *vis-à-vis* TCM in respect of the shares registered in the name of D. It is not suggested that TCM has a register of disclosures or that her name is on TCM’s register of disclosures. She may

therefore also not vote in a matter at a meeting of shareholders, unless, of course, she obtains a proxy appointment from the registered shareholder, D. She also does not rely on any provision of TCM's articles or memorandum of incorporation that vests her with any entitlement to exercise shareholder rights. On the contrary, when D argued in reply he wished to give evidence from the bar and introduce TCM's articles in order to show that dividends are only payable to the registered shareholders of TCM, but his attempt was vehemently opposed by TCM and the directors and by S. I did not permit D to present such evidence. Otherwise, the matter was likely to be postponed on the third day of argument at great cost and inconvenience. Furthermore, it is S who needs to establish her entitlement to exercise shareholder rights.

[58] As I have already mentioned, Cornelli, D, Da Silva, Diez and Hassim have, in terms of their shareholders' agreement, entered into an association upon the understanding that each of them will participate in the management of TCM. They, in terms of their shareholders' agreement, are the persons to be registered as shareholders and to exercise the rights of a shareholder. Cornelli and D each has the right to appoint two directors for as long as they each hold 30% of TCM's total issued share capital. Any three directors comprise a quorum for board meetings, provided Cornelli and D are present at such meetings. They further *inter alia* agreed on pre-emptive rights and specifically that no third party shall be admitted as a shareholder unless all parties to the shareholders' agreement and the board consent thereto. Diez and D have withheld their consent for S to be admitted as a shareholder. Furthermore, it is for the shareholders to procure that TCM declares annual dividends. Dividends have been annually declared and paid to the registered shareholders.

[59] It requires emphasis that S's co-ownership of the former joint estate between her and D and her present entitlement to a share of the net proceeds of the joint estate after the realisation of liabilities, does not *per se* vest her with the legal capacity to exercise any shareholder rights *vis-à-vis* TCM. The right to have one's name entered in the register of a company is independent of the ownership of the shares. The right to a declared dividend vests in the registered shareholder on the date of declaration.

[60] It is also noteworthy that s 15(3)(b)(vi) of the Matrimonial Property Act 88 of 1984, which applied to the marriage in community of property between S and D prior to its dissolution, provides that the spouse in a marriage in community of property shall not without the consent of the other spouse 'receive any money due or accruing to the other spouse or the joint estate . . . by way of dividends or interest on or the proceeds of shares or investments in the name of the other spouse'. When a spouse withholds such consent, a court may, in terms of s 16(1), on application of the other spouse, give such spouse leave to receive the dividend without the required consent if it satisfied that the withholding of the consent was unreasonable. D did not, during their marriage, consent to S receiving the money due to him by way of dividends from TCM nor did S obtain the leave of a court to receive such monies or part thereof without D's consent.

(v) S is only entitled to a share of the net proceeds of the joint estate after the realisation of liabilities and, prior to its division, cannot claim any asset in specie *or in an undivided form*

[61] S (as well as TCM and the directors) read into *Ex parte Menzies* more than what was indeed held to be the legal position upon the dissolution of community of property, such as by divorce. There it was held that the co-ownership of the joint estate by spouses married in community of property is a species of 'tied' co-ownership in which the shares of the spouses are undivided and indivisible. An order of divorce brings an automatic end to the community of property previously existing. Had it not been for the rule that the granting of a divorce order 'carried with it an automatic order of division' the ex-spouses would have continued their co-ownership, but in the form of 'free' co-ownership. In this regard, King J specifically said that-

'[g]iven the circumstances of divorce, it can rarely arise in practice that they would elect to continue in co-ownership in this new form, and thus possibly the rule has grown up that the granting of a divorce carried with it an automatic order of division. It is open to the divorcing spouses (see s 7(1) of the Divorce Act 70 of 1979) to arrive at a settlement in terms of which they could, for example, continue as co-owners of particular assets.'

[62] In *Meyer v Thompson NO* 1971 (3) SA 376 (D), Fannin J held as follows at 377F:

"'The effect of the grant of an order of divorce is, *inter alia*, to bring automatically to an end any community of property previously existing between the spouses and to require an equal division of a joint estate after payment of liabilities (Joseph v Joseph 1951 (3) SA 776(N) at 778-9 and the cases there cited), even though no order for the division of the estate is made."

[63] In LAWSA Vol 16 (2nd Ed.) para 89 it is stated that the spouses or ex-spouses-

'. . . can divide the estate by agreement or they can appoint a liquidator to do so. If they cannot agree on a liquidator, the court can appoint one to this task. Once a liquidator has been appointed he proceeds to liquidate the assets by selling them by public auction, not by private treaty unless the spouses give him permission to do so. Since the community of property has come to an end the spouses lose whatever capacity they had by virtue of their marriage to dispose of the assets of the joint estate, subject to the same exceptions which obtain where the marriage is dissolved by the death of one of them, so that they can use the assets for their maintenance or the maintenance of their dependants or the maintenance of the assets of the joint estate.

The spouses or the liquidator of the estate must also settle the debts of the estate. ... '

[64] I thus agree with Boruchowitz J (para 78), that '[a]bsent an agreement to the contrary, S did not, upon the divorce, acquire any rights to the shares themselves or any portion thereof. She could not claim any asset of the joint estate in *specie* or in an undivided form, and was merely entitled to a share of the net proceeds of the joint estate after the realisation of liabilities.' After all, a marriage in community of property is in a 'community of property and of profit and loss - *communio bonorum*, gemeenschap van goederen. (Prof JR Hahlo *South African Law of Husband and Wife* Fifth Ed. 1985 at 157).

(vi) The expansive interpretation of the word 'shareholder' in s 1 of the new Companies Act for which S contends

[65] Leaving aside the fact S did not raise the constitutional issue nor the expansive interpretation of the word 'shareholder' in the new Companies Act for which she contends in her affidavits and her non-compliance with r 16(A)(1)(i) of the Uniform Rules of Court (the purpose of which provision is 'to bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases, so that they may take steps to protect their interests by seeking to be admitted

as *amici curiae* with a view of drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn' (*Phillips v SA Reserve Bank and others* 2013 (6) SA 450 (SCA) paras 30-32 and 65; *De Lange v Methodist Church and Another* 2016 (2) SA 1 (CC), para 30 (d) and 60-64)), I am of the view that to interpret the definition of 'shareholder' in the manner for which S contends would do violence to the language of the section and of the distinction drawn in the new Companies Act between owners of a share, shareholders and holders of a beneficial interest.

[66] Apposite here is the following *dictum* by Petse JA in *Smyth* (supra):

'[45] In my judgment, to interpret s252 in the manner for which the appellants contend would do violence to the language of the section. In *Standard Bank Investment Corporation Ltd v Competition Commission & others; Liberty Life Association of Africa Ltd v Competition Commission* [2000] ZACSA 20; 2000 (2) SA 797 (SCA) this court, with reference to the judgment of Innes CJ in *Dadoo Ltd & others v Krugersdorp Municipal Counsel 1920 AD 530*, emphasised that it would be wrong for courts to ignore the clear language of a statute under the guise of adopting a purposive interpretation as doing so would be straying into the domain of the legislature.

[46] In *Dadoo*, Innes CJ stated the following (at 543):

"Speaking generally, every statute embodies some policy or is designed to carry out some object. When the language employed admits of doubt, it falls to be interpreted by the court according to recognised rules of construction, paying regard, in the first place, to the ordinary meaning of the words used, but departing from such meaning under certain circumstances, if satisfied that such departure would give effect to the policy and object contemplated. I do not pause to discuss the question of the extent to which a departure of the ordinary meaning of the language is justified, because the construction of the statutory clauses before us is not in controversy. They are plain and unambiguous. But there must, of course, be a limit to such departure. A judge has authority to interpret, but not to legislate, and he cannot do violence to the language of the lawgiver by placing upon it a meaning of which it is not reasonably capable, in order to give effect to what he may think to be the policy or object of the particular measure."

[47] In *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC), the Constitutional Court embraced this theme and said (para 20):

"Interpreting statutes within the context of the Constitution will not require the distortion of language so as the extract meaning beyond that which the words can reasonably bear. It does,

however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. This in turn will often necessitate close attention to the … and institutional context in which the provision under examination functions. In addition it will be important to pay attention to the specific factual context that triggers the problem requiring solution." See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & others* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 89.'

[67] In *Minister of Higher Education and Training v Mthembu* 2012 JDR 1540 (FB), Daffue J explains the principle that a judge has the authority to interpret legislation, but not to legislate, thus:

"[24] Sitting as a Judge having to interpret a section in a statute, I am cautioned by the maxim *iudicis est ius dicere sed non dare/facere*, or put otherwise, it is the duty of the judge to expound, interpret or explain the law, but not to make it. The following warning of Lourens du Plessis should also be adhered to:

"At any rate, tampering with the *ipsissima verba* of a statute, though not precluded, should be an exercise in circumspection and restraint with due deference to one of the cornerstones of constitutional democracy, namely the horizontal division of powers in the state. The wording of a legislative text binds state authority for *trias politica* purposes. The interpreter–judge is no legislator and must constantly remind him- /herself of that. Adaptive interpretation is meant to make sense of the legislature's law as it stands and not to substitute the judge's law for it."

See Du Plessis L Re – interpretation of Statutes, 2002 ed, p229.'

CONCLUSION

[68] I am therefore of the view that S's application and counter-application should dismissed and that D's application should succeed, including the relief for the setting aside of the interpleader proceedings.

COSTS

[69] D, who is cited as the first respondent in S's application and as the fifth respondent in her counter-application, opposed the relief sought by her in each case. Diez, who is cited as the sixth respondent in S's counter-application, opposed the relief sought by her in that application. She should be ordered to pay the costs incurred by D in opposing the relief sought by her in her application and counter-application as well as any costs incurred by Diez in opposing the relief sought in her counter-application, such

costs to include those incurred by the engagement of two counsel, whenever so employed. The costs payable to D should be deducted from S's half share of the residue of the joint estate upon the division thereof.

[70] D in the first instance seeks that Da Silva (the third respondent), Hassim (the fourth respondent), Impey (the fifth respondent) and Bhula (the sixth respondent) as well as S (the eighth respondent), jointly and severally, pay the costs of his application and of the interpleader proceedings, or, in the alternative, that such costs be paid by TCM (the first respondent), together with any other respondent opposing his application, jointly and severally.

[71] In seeking costs against those directors and not the company, TCM, D relies on the principle that where the dispute is in substance one between the shareholders, with the company merely a nominal party to legal proceedings without any interest in the matter, the company's money should not be expended on the dispute. (See Blackman et al *Commentary on the Companies Act* Vol. 2, 9-54-2/9-55/9-56.)

[72] The dispute arising from S's counter-application (that her name be entered in TCM's certificated securities register) is rather a dispute between the shareholders, but not the withholding of the payment of a dividend to a registered shareholder, the payment of which is due. It was the directors *qua* directors who resolved to obtain legal advice with regard to the dispute between S and D and who resolved to institute the interpleader proceedings. Furthermore, Impey and Bhula are not and have not been shareholders of TCM. Hassim, at the time when TCM's board of directors resolved not to pay the 2016 dividend to D and to institute interpleader proceedings, was no longer a director. D withdrew his claim for a costs order against Cornelli, who is a 30% shareholder in TCM and its managing director, who D in his founding papers cast as the only wrongdoer. The remaining directors are portrayed by him as puppets and lackeys. It seems to me in all the circumstances inappropriate to order Da Silva, Hassim, Impey and Bhula to pay the costs of D's application and of the interpleader proceedings.

[73] TCM, Da Silva, Impey and Bhula are represented by the same firm of attorneys and by the same senior and junior counsel. One answering affidavit, deposed to by Impey on his own and their behalf, was filed 'to avoid an adverse costs order'. The

answering affidavit essentially addresses the merits of the disputes between D and S in order to convince this court that TCM was correct in launching the interpleader proceedings. I, therefore, do not believe that any adverse costs order should be made against D because of his claim, in the alternative for costs against Da Silva, Impey and Bhula. I am fortified in this view by the fact that they and TCM persisted in their opposition to D's application despite the handing down of the s 252 judgment on 31 March 2017.

[74] The position of Hassim (the fourth respondent), however, is different. He is represented by other attorneys and counsel. A separate answering affidavit was filed on his behalf. Appearance on his behalf at the commencement of the proceedings, which ran over three days before me, was brief and essentially limited to the adverse costs order that D also seeks against him. He ceased to be a director of TCM on 1 October 2016, which was prior to the launching of D's application. As at that stage he had not participated in any decision to withhold the payment of the 2016 dividend to D. Furthermore, he has no power to procure the payment to D of the dividend declared by TCM on 14 September 2016. I am of the view, therefore, that Da Sousa should pay his costs of opposing an adverse costs order being made against him.

[75] D also seeks costs on a punitive scale. He, however, in his founding papers asserts that Cornelli is the directing and controlling mind of TCM. He attributes collusion between Cornelli and S. He does not pin collusion and impropriety on the other directors in his founding papers. He withdrew his request for a costs order against Cornelli and also all the allegations of impropriety made against him in his founding and replying affidavits. As far as D's application is concerned, I am in all the circumstances of the view that there are no special grounds present to justify deviation from the ordinary rule that the successful party is awarded costs as between party and party. However, the issuing of the interpleader notice was vexatious and an abuse of the procedures of this court, which justifies its setting aside with costs on a punitive scale.

ORDER

[76] In the result the following order is made:

(a) In the application under case number 40036/2016 between the applicant, Luis Manuel Rito Vaz D (Mr D) and the first respondent, Technology Corporate Management (Pty) Ltd (TCM), the fourth respondent, Iqbal Hassim (Mr Hassim), the eighth respondent, S Ann Vaz D (Ms D) and others:

(i) TCM is to pay the sum of R4 080 000, being the net proceeds of the dividend declared by TCM in favour of Mr D on 14 September 2016, to Mr D forthwith, together with interest thereon at the rate of 9.75% per annum on the sum of R2 040 000 from 15 October 2016 to date of payment and on the balance in the sum of R2 040 000 from 15 November 2016 to date of payment;

(ii) the interpleader proceedings under case number 36126/2016 are hereby set aside;

(iii) TCM and Ms D, jointly and severally, the one paying the other to be absolved, are to pay Mr D's costs of the application, such costs to include those incurred by the engagement of two counsel, whenever so employed;

(iv) the costs which Ms D is liable to pay shall be deducted in favour of Mr D from her half share of the residue of the joint estate; and

(v) Mr D is to pay the costs incurred by Mr Hassim in opposing the adverse costs order sought against him.

(b) In the counter-application under case number 40036/2016 launched by Ms. D against Mr D, Jose Manuel Garcia Diez (Mr Diez) and others:

(i) the counter-application is dismissed;

(ii) Ms. D is to pay the costs incurred by Mr D and any costs incurred by Mr Diez in opposing the relief sought by her in the counter-application, such costs to include those incurred by the engagement of two counsel, whenever so employed; and

(iii) the costs which Ms. D is liable to pay to Mr D are to be deducted from her half share of the residue of the joint estate.

(c) In the application under case number 35926/2016 launched by Ms D against Mr D and another:

(i) the application is dismissed;

(ii) Ms D is to pay the costs incurred by Mr D in opposing the relief sought in this application, such costs to include those incurred by the engagement of two counsel, whenever so employed; and

(iii) the costs which Ms D is liable to pay are to be deducted from her half share of the residue of the joint estate.

_____

P.A. MEYER
JUDGE OF THE HIGH COURT

Dates of hearing:	21-23 August 2017
Date of Judgment:	23 February 2018
For Mr D:	In person (heads of argument drafted by A Subel SC, assisted by BM Slon, instructed by Edward Nathan Sonnenbergs Inc., Sandton)
Counsel for Ms D:	K Bailey SC (assisted by N Riley)
Instructed by:	Michael Saltz Attorneys, Rouxville, Johannesburg
Counsel for TCM and Messrs Da Silva, Impey and Bhula:	J Suttner SC (assisted by P Cirone)
Instructed by:	Roy Stoler Attorneys, Sandton
Counsel for Mr Hassim:	WB Pye
Instructed by:	Attorney Irene Rome, Norwood, Johannesburg