REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2022/2807

Reportable: No
Of interest to other judges: No
15 February 2023
Vally J

In the matter between:

Rocky Park Farming Group (Pty) Ltd	First Applicant
Sinelizwi Fakade	Second Applicant

And

Rocky Park Holdings (Pty) Ltd (Reg No.: 2018/388603/07)	First Respondent
Foxvest Group (Pty) Ltd	Second Respondent
Warwick Marshall Blamey	Third Respondent
The Companies and Intellectual Property Commission	Fourth Respondent

In Re:

Foxvest Group (Pty) Ltd	First Applicant
Warwick Marshall Blamey	Second Applicant

and

Rocky Park Holdings (Pty) Ltd (Reg No.: 2018/388603/07)	First Respondent

Rocky Park Farming Group (Pty) Ltd	Second Respondent
Sinelizwi Fakade	Third Respondent
The Companies and Intellectual Property Commission	Fourth Respondent

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JUDGMENT: Leave to Appeal

Vally J

Introduction

[1] The applicants, Rocky Park Farming (Pty) Ltd (Rocky Park) and Mr Sinelizwi Fakade (Mr Fakade) in this application for leave to appeal were the second and third respondents respectively in the main application. They seek leave to appeal to the Supreme Court of Appeal (SCA) against an order issued on 27 January 2023. Their case is that I erred in issuing the order. Instead, according to them, I should have dismissed the application with costs. The order I issued was that 'the resolution adopted at the shareholders meeting of the first respondent on 17 November 2021 is set aside' and 'the second and third respondents are to pay the costs of the application'

[2] They contend that there is a reasonable prospect that the SCA would come to the conclusion that the resolution was properly proposed – either by a single shareholder of the first respondent or by the directors of the first respondent – and thereby would set aside my order in its entirety. Their contentions are based on two bases: (i) that there was no need for two shareholders to propose the resolution, and, (ii) in any event that the resolution was proposed by the Board of Directors and not a shareholder. In either case, the resulting order would be a dismissal of the application with costs.

[3] Section 61 of the Companies Act 71 of 2008 (Act) attends to the issue of shareholders meetings. Subsection (1) thereto allows for the board of a company to call a shareholders meeting at any time. It empowers the board with a discretion to call a shareholders meeting. However, subsection (3) compels the board to call such a meeting where it is demanded by a shareholder, who specifies the purpose of the meeting and who holds more than 10% of the voting rights.[1]

[4] The facts in this case are simple, straightforward and uncontroversial. Rocky Park called (the word used by it was 'requisitioned') a shareholders meeting of the first respondent, Rocky Park Holdings (Pty) Ltd (Holdings). The call was directed to the second applicant in the main application, Mr Blamey. The call was accompanied by a letter setting out the purpose of the meeting. The purpose it said was to discuss and pass a resolution removing Mr Blamey, as a director of Holdings. Mr Blamey, in a letter to Mr Fakade, the other director of Holdings, indicated that he consents to the meeting being called. Mr Fakade issued a notice of shareholders meeting and delivered it to Foxvest Group (Pty) Ltd (Foxvest) the first applicant in the main application and Mr Blamey.

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[1] Subsections 61(1) and (3) read:

'61 Shareholders meetings-

(1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders meeting at any time.

(2) ...

(3) Subject to subsection (5) and (6), the board of a company, or any other person specified in a company's Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written or signed demands for such a meeting are delivered to the company, and –

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.'

[5] On these facts there is no doubt that the meeting was called by Rocky Park in terms of ss 61(1) read with ss 61(3).

[6] The meeting was held with only one shareholder, Rocky Park, present. Neither of the two directors - Mr Fakade and Mr Blamey were present. The resolution was passed. On these facts it cannot under any circumstances be doubted that the resolution could only have been proposed by a single shareholder. I found that this was in contravention of ss 65(3) of the Act and therefore unlawful and invalid.

[7] Accepting the facts set out in [5] and [7] above, Mr Stevens for Rocky Park and Mr Fakade submit that the resolution was regular. This contention was not raised at the main hearing. His submission at leave to appeal stage was that as the meeting was called in terms of s 61 there was no need for the resolution to be proposed by two shareholders, i.e. that the provisions of s 65 of the Act does not apply and my finding that it applied was erroneous. There is therefore a reasonable prospect that the SCA would set aside my order. I disagree for the reasons that follow.

[8] Section 61 attends to the issue of shareholders meetings and no more. It says nothing of shareholders resolutions. The issue of shareholders resolutions is the specific focus of s 65 of the Act. Subsection 65(3) deals with the issue of resolutions proposed by shareholders. And, it lays down peremptory requirements that have to be met for the proposed resolutions to be lawful and valid.

[9] In this case, s 61 was utilised for the calling of a shareholders meeting. It had to be complied with by Rocky Park if it, as a shareholder, wanted to call a

shareholders meeting. Rocky Park could not, even if it wanted to, invoke s 61 to propose a resolution for consideration at the meeting. Section 61 is simply not amenable for that purpose. Apart from the fact that the wording of the two sections – 61 and 65 – are clear in this regard, i.e. in regard to the distinct subject matter that each of them attends to, there is the provision of ss 57(2) of the Act which concerns the governance of companies. It clarifies that s 65 thereof does not apply in a case where a profit making company has only one shareholder:[2] it specifies that where there is 'only one shareholder' in a profit making case then sections 59 to 65 do not apply. In all other circumstances, those sections apply. By specifying 'only one shareholder' the legislature reveals an intention to exclude all situations where there is more than one shareholder in a profit making company. As there are two shareholders here, by dint of application of ss 57(2), the provisions of s 65, especially ss 65(3) the resolution had to be proposed by both of them.

[10] Thus, I hold, that this novel argument, mounted at application for leave to appeal, that s 65 of the Act has no application in this matter is completely devoid of any merit.

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[2] Subsections 57(1) and (2) which are relevant here reads:

'57 Interpretation and restricted application of Part

(1) In this Part, "**shareholder**" has the meaning set out in section 1, but also includes a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached.

(2) If a profit company, other than a state-owned company, has only one shareholder-

(a) that shareholder may exercise any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the company's Memorandum of Incorporation provides otherwise; and

(b) sections 59 to 65 do not apply to the governance of that company.' (Underlining supplied.)

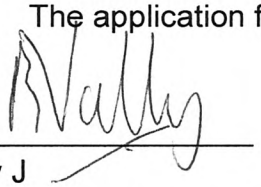
[11] Realising that s 61 of the Act is of no assistance to Rocky Park's and Mr Fakade's case, Mr Stevens then contended that the question of whether the law requires a minimum of two shareholders to propose a resolution or not is irrelevant in this case, as the impugned resolution was proposed by the directors. In support of this contention he drew attention to the notice of a meeting of Holding's shareholder issued by Mr Fakade and delivered to both Foxvest and Mr Blamey. Mr Fakade signed the notice in his capacity as director of Holdings. He was correct to issue the notice, especially since Mr Blamey – his co-director - agreed to the meeting being called. But the issuing of the notice of the meeting is not the same as proposing a resolution. It was never the case of Rocky Park and Mr Fakade that the resolution was proposed by the directors. It could never have been, for the facts against such claim are simply unassailable. The submission is factually incorrect. Why Mr Stevens made it is unclear.

[12] Finally, Mr Stevens submitted that as Foxvest and Mr Blamey also sought to have Holdings liquidated, and as this relief was not granted, Rocky Park and Mr Fakade should have been awarded costs of that part of the application. His submission in essence was that I should have dismissed the application to have Holdings liquidated and ordered Foxvest and Blamey to pay the costs. The submission is legally untenable. Foxvest and Blamey brought a single application seeking two distinct forms of relief. Both sets of relief were fundamental. They succeeded in acquiring one of them. That constitutes substantial success. On the principle of costs follow the result, they were, thus, entitled to their costs.

[13] The findings in the main application were based on uncomplicated, unassailable facts and on legal principles that allow no room for doubt or debate. Accordingly, I hold that there is no prospect that another court would come to a different conclusion.

[14] There is also no compelling reason to grant leave to appeal. The facts are plain and simple and the law leaves no room for doubt.

[15] The application for leave to appeal is dismissed with costs.



Vally J
Gauteng High Court, Johannesburg

Dates of hearing:	6 February 2023
Date of judgment:	15 February 2023
For the applicants (respondents in leave to appeal):	E L Labuschagne
Instructed by:	Megan Visser Attorneys
For the 1st - 3rd respondents (applicants in leave to appeal):	B D Stevens
Instructed by:	Morgan Law Inc