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
27 January 2023
Vally J

In the matter between:

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

Vally J

Introduction

[1] The applicants seek to set aside a resolution proposed by a single shareholder of the first respondent, Rocky Park Holdings (Pty) Ltd (Holdings) removing the second applicant, Mr Blarney, as director of Holdings. They also sought an order placing

Holdings under final winding up, but no longer do so. The matter really turns on the interpretation of a provision of the Companies Act, 71 of 2008 (Act), more particularly sub-sections 65(3) thereof.

[2] Holdings it appears was formed as part of a transaction involving the sale of a fifty-one percent share in an immovable property by the first applicant, Foxvest Group (Pty) Ltd (Foxvest) to the second respondent, Rocky Park Farming Group (Pty) Ltd (Rocky Park) for a princely sum of R21m. A Shareholders Agreement was entered into between Rocky Park and Foxvest. It was agreed that the immovable property would be transferred into the name of Holdings and the shareholding of Holdings would be divided in accordance with the respective contribution of Foxvest and Rocky Park to the value of the property. Thus, Foxvest holds a forty-nine percent shareholding in Holdings and Rocky Park holds fifty-one percent of the shares in Holdings. The two entities – Foxvest and Rocky Park – were the only shareholders of Holdings. Each of them nominated a director to attend to the running of the operations of Holdings. Foxvest appointed Mr Blarney and Rocky Park appointed the third respondent, Mr Fakade. Rocky Park and Mr Fakade are displeased with the transaction which, according to them, was marred by fraudulent conduct on the part of Foxvest and Mr Blarney. The actions and events that followed resulted in the present application.

[3] Only Rocky Park and Mr Fakade opposed the application. Thus any reference to respondents in this judgment is a reference to both of them.

Factual foundation for the relief sought

[4] On 21 October 2021 Rocky Park requisitioned a shareholders meeting of Holdings. The requisition was sent to the board of directors of Holdings, being Mr Fakade and Mr Blarney. It is signed by Mr Fakade and a Mr Sanele Cebekhulu in their capacity as directors of Rocky Park. The requisition, in relevant part, reads:

> '[Rocky Park] shareholder holding greater than 10% of the voting rights in [Holdings], in terms of Section 61(3) of the [Act] hereby requisitions the board of directors (Mr Fakade and Mr Blarney) to call the below contemplated meeting in terms of the below notice for the purpose of:
>
> - Removing [Mr Blarney] as a director of [Holdings]
> - Should the Shareholders elect to remove [Mr] Blarney as a director, then for the passing of a resolution that [Mr] Blarney no longer be entitled to as a signatory on any of the company bank accounts and that the new signatory to the company bank accounts be [Mr] Fakade ...'

[5] The requisition goes on to list the reasons for seeking the removal of Mr Blarney. They all relate to his alleged fraudulent conduct. The requisition was accompanied by a 'Notice of Meeting' of the shareholders of Holdings, which was to be held virtually on 10 November 2021. On 25 October 2021 Mr Blarney responded per email stating that he would attend the meeting together with his legal representative. On 26 October 2021 Mr Fakade wrote per email to Mr Blarney stating that he would shortly issue the notice of the meeting on behalf of the board. On 29 October 2021 Rocky Park directors (Mr Fakade and Mr Cebekhulu) met and passed a resolution to the effect that Rocky Park as shareholder of Holdings must, at the meeting of the 10 November 2021, vote for the removal of Mr Blarney as a director of Holdings. Mr Fakade was empowered to appoint a proxy to attend the meeting on behalf of Rocky Park. On 10 November 2021 the meeting was convened virtually. The attorney for the second and third respondents (Rocky Park and Mr Fakade) was the only attendee. He attended in his capacity as a proxy for Rocky Park. After waiting

for 61 minutes and after making some comments (to himself) which he minuted, he postponed the meeting to 17 November 2021. On 17 November 2021 the meeting was reconstituted virtually. Again, only the attorney for the two respondents was present. He noted that the meeting was in terms of s 64 of the Act and then said the following:

> '... There is <u>one</u> shareholder present who holds sufficient voting rights for the meeting to proceed. The time is now ripe in order for us to proceed with this meeting with those that are present in terms of Section 64 of the Act and accordingly we shall then deal with the business stipulated on the shareholders meeting notice which I would want to read into the record at this point in time.
>
> [the reason for requisitioning the meeting in the Rocky Park's requisition was read into the record]
>
> ... I hereby record that Rocky Park holds 51% of the voting rights in [Holdings] and, as such proposed motions are then passed and a resolution to that effect will be provided.' (Underlining added.)

[6] The minutes do not reflect that the resolution was proposed and seconded. However, nothing turns on this and no further factual enquiry on this issue need be undertaken. A written resolution was then transmitted to Foxvest. It records that Mr Blarney was removed as a director of Holdings and that his signing powers on the bank accounts of Holdings were terminated.

[7] The resolution was taken in terms of the Act and not in terms of the Memorandum of Incorporation or in terms of the Shareholders Agreement.

[8] It is this resolution that Foxvest and Mr Blarney seek to have set aside. Their ground for doing so is that it fails to comply with mandatory requirements of the Act. Rocky Park and Mr Fakade take a very different view.

The Shareholders Agreement

[9] The Shareholders Agreement makes provision for meetings of shareholders and for a quorum for these meetings. It entitles any shareholder to call a meeting of shareholders by notice and it prescribes that a quorum for 'any meeting shall be 75% of existing shareholders', and if the meeting is not quorate fifteen minutes after the time fixed for its commencement, 'the meeting shall be adjourned to the same venue and to a time and day determined by those present.' It is silent on whether the next meeting would be quorate regardless of whether the threshold of 75% is met or not. But as the meeting was called in terms of s 61(3) of the Act, the provision of the Shareholders Agreement regarding the calling of a shareholders meeting is of no relevance.

The relevant provisions of the Act

[10] Section 65 of the Act attends to the issue of shareholder resolutions. Sub-section (3) thereof is particularly pertinent, for it empowers shareholders to propose a resolution on any matter on which they are entitled to exercise a right. It provides:

> '(3) Any two shareholders of a company-
> (a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and,
> (b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration-
> (i) at a meeting demanded in terms of section 61(3);
> ...'

[11] Section 71 is another section that requires our attention for it deals with the issue of removal of directors.

> 'Removal of directors-
> (1) Despite anything to the contrary in a company's Memorandum of

> Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).
>
> (2) Before the shareholders of a company may consider a resolution contemplated in subsection (1)-
>
> (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and
>
> (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote'

[12] The applicants rely on sub-section 65(3) to make out their case while the respondents rely on s 71(1) and (2) to defeat the case of the applicants.

Application of the law to the facts

[13] Sub-section 65(3) of the Act is an empowering provision. It empowers 'Any two shareholders of a company' to propose a resolution on matters where they have voting rights. The provision does not say 'any shareholder' may propose a resolution. The word or number 'two' and the plural 'shareholders' have been specifically mentioned by the legislature. They cannot be ignored. They are not superfluous or insignificant. On the contrary they are most significant. The two words read together are clearly designed to ensure that at least two shareholders propose the resolution. If the legislature intended to empower a single shareholder to propose a resolution, it could have simply said so by not using the word 'two' and by referring to 'shareholder' in the singular. That if failed to do so is, in my view, deliberate. It elected not to empower a single shareholder to propose a resolution. Whether or not this is consistent with the provisions of the *Constitution of the Republic of South Africa Act, 108 or 1996* or not is not an issue before me.

[14] There is nothing in the Memorandum of Incorporation or in the Shareholders' Agreement that empowers a single shareholder to propose a resolution on a matter where the shareholders have voting rights. And, in any event, it is not the case of the respondents that the resolution was taken in terms of the Shareholders Agreement.

[15] Indisputably, the resolution to remove Mr Blarney was proposed by a single shareholder. It failed to comply with the provisions of sub-section 65(3). It is therefore unlawful, invalid and stands to be set aside.

[16] Sub-sections 71(1) and (2) of the Act, allow for the removal of a director by ordinary resolution. But this does not detract from the fact that if the resolution originates from a shareholder it has to comply with the provisions of sub-section 65(3). So while there is no dispute that the respondents complied with the mandatory requirements set out in these sub-sections for the removal of Mr Blarney, this is of no assistance to the respondents. The non-compliance with the provisions of sub-section 65(3) is fatal.

Costs

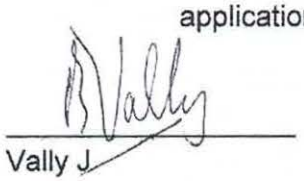
[17] These should rightfully follow the result.

Order

[18] The following order is made:

a. The resolution adopted at the shareholders meeting of the first respondent on 17 November 2021 is set aside.

b. The second and third respondents are to pay the costs of the application.



Vally J

Gauteng High Court, Johannesburg

Dates of hearing:	17 January 2023
Date of judgment:	27 January 2023
For the applicant:	E L Labuschagne
Instructed by:	Megan Visser Attorneys
For the 1st - 3rd respondents:	B D Stevens
Instructed by:	Morgan Law Inc