SUPREME COURT OF APPEAL SOUTH AFRICA

MEDIA SUMMARY - JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 26 October 2017

STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Smyth v Investec Bank Ltd (674/2016) [2017] ZASCA 147

The Supreme Court of Appeal (SCA) today dismissed an appeal brought by the appellants against a judgment of the Gauteng Division of the High Court, Pretoria (the court below) in favour of Investec Bank Ltd and Randgold & Exploration Company Ltd (the respondents).

The issue at the nub of this appeal concerned the question as to whether the remedy provided for in s 252 of the Companies Act 61 of 1973 (the Act) is available to beneficial owners of shares in a company who have elected to hold their shares through nominees. A related issue is whether beneficial owners who cannot invoke the remedy for which s 252 of the Act provides because their legal interest falls short of a right to assert a claim, may nonetheless join as co-applicants together with their relevant nominees in proceedings for relief in terms of s 252 of the Act in relation to their shares by virtue of a direct and substantial interest in such proceedings.

The dispute between the parties has its genesis in two agreements concluded during January 2010. The first agreement was between Johannesburg Consolidated Industries Limited (JCI Ltd) and Randgold. The second agreement was concluded between Randgold and Investec. The former agreement is entitled 'Revised Settlement Agreement' and the latter the 'Litigation Settlement Agreement'. Both agreements related to four claims instituted by Randgold against JCI Ltd on the one hand, and Investec and Investec Bank UK on the other, following an alleged fraudulent scheme of breathtaking proportions perpetrated by JCI Ltd against Randgold.

In the court below, the appellants sought leave to intervene in the main application as co-applicants, similarly seeking relief in terms of s 252 of the Act. The first respondent, Investec, but not the second respondent, Randgold opposed the application to intervene. Investec and Randgold both opposed the main application. In the main application Investec and Randgold challenged the locus standi of the appellants. It was not in dispute that the nominee applicants who sought to intervene in the main application did so at the behest of the beneficial shareholders and were thus carrying out their instructions in furtherance of the beneficial shareholders' interests.

The court below upheld the locus standi point taken by Investec. Consequently, it non-suited the seven main applicants and dismissed the applications for leave to intervene brought by the beneficial shareholders. It held that, on a proper construction of s 252 of the Act, the term 'member' in s 252 does not include a beneficial shareholder. It also held that the legal interest asserted by the beneficial shareholder applicants did not avail them as they could not be joined as co-applicants (with their respective nominees) because they would not be asserting a claim under s 252 nor could they competently do so.

On appeal to the SCA, the court unanimously held that it would be idle to permit the intervention of the appellants in the main application in circumstances where the remedy created by s 252 of the Act is available only to a member of the company as defined in s 103 of the Act as the legislature saw it fit.

Furthermore, the SCA stated that if the appellants wished to avail themselves of the remedy provided for in s 252 of the Act in their own names, they should have terminated the nomination of their respective nominees so as to procure the entry of their names in the register of Randgold members. Instead, they obdurately elected 'to saddle what has proven to be an unruly horse' by seeking to invoke the s 252 remedy in their own names as beneficial owners.

As a result, the appeal was accordingly dismissed with costs.