THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 674/2016

In the matter between:

DAVID JOHN SMYTH AND FORTY OTHERS **APPELLANTS**

and

INVESTEC BANK LIMITED **FIRST RESPONDENT**

RANDGOLD & EXPLORATION COMPANY LIMITED **SECOND RESPONDENT**

Neutral citation: *Smyth v Investec Bank Ltd* (674/2016) [2017] ZASCA 147 (26 October 2017)

Coram: Navsa, Lewis, Petse and Mathopo JJA and Schippers AJA

Heard: 13 September 2017

Delivered: 26 October 2017

Summary: Company: Shareholders: Oppression: Oppressive or Unfairly Prejudicial Conduct: Section 252 of the Companies Act 61 of 1973: party entitled to remedy under s 252: member is someone whose name has been entered in the company's register of members as contemplated in s 105 of the Companies Act. Locus standi: Beneficial owners of shares in a company not eligible to join as co-applicants with relevant nominees holding the shares on their behalf and subject to their instructions.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Rabie J sitting as court of first instance), reported sub nom *Smyth & others v Investec Bank Ltd & another In re: Standard Bank Nominees (TVL) (Pty) Ltd & others* 2016 (4) SA 363 (GP).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Petse JA (Navsa, Lewis and Mathopo JJA and Schippers AJA concurring):

[1] The facts in this appeal are straightforward but the pathway to the resolution of the dispute between the protagonists is fraught with pitfalls. The main issue in this case is 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.

[2] The appellants who comprised different categories of applicants were classified into three groups. The first to seventh appellants (the first category) instituted the main

application in the Gauteng Division of the High Court, Pretoria in which they sought the following relief against the respondents:

'1. Declaring that the conclusion of:

1.1 the agreement styled the "Revised Settlement Agreement" and concluded by the second respondent with JCI Ltd (JCI) on 20 January 2010 and which was ratified by a simple majority of the second respondent's holders on 20 May 2010; and

1.2 the agreement styled the "Litigation Settlement Agreement" and concluded by the second respondent with inter alia the first respondent on 22 January 2010, the conclusion and ratification of which was a condition precedent to the Revised Settlement Agreement;

constitutes or involves an act or omission which is unfairly prejudicial, unjust or inequitable as contemplated in Section 252(1) as read with Section 252(3) of the Companies Act 61 of 1973 ("the Companies Act").

2. In the light of paragraph 1 above, ordering the first respondent to purchase the applicants' shares in the second respondent in the sum of R288.56 per share (or any other sum which the above Honourable Court [may] in its discretion determine) plus the ruling Randgold price at the time of such purchase.'

[3] The eighth to thirty-fourth appellants (the second category) sought leave to intervene in the main application as co-applicants, similarly seeking relief in terms of s 252 of the Act. The third group comprised the thirty-fifth to forty-first appellants, who were, for convenience, referred to as 'own name applicants' in the court below, also sought leave to intervene in the main application for the relief sought therein. Although they were permitted to intervene, they were nevertheless ordered to pay the first respondent's costs occasioned by the latter's opposition up to 2 May 2014 when they procured registration of their shares in their own names from the relevant nominees.

[4] The first respondent, Investec Bank Limited (Investec), but not the second respondent, Randgold & Exploration Company Limited (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.

[5] The court below (Rabie J) 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. The application of the seven applicants who had sought leave to intervene, the so-called 'own-name applicants', was granted. However, as already indicated, they were ordered to pay the costs occasioned by their application to intervene until 2 May 2014, this being the date on which they procured the registration of their shares (from their relevant nominees) in their own names. Subsequently, they sought and were granted leave by the court below to appeal against the costs order. However, since these appellants are no longer pursuing their appeal in this court, nothing more need be said in relation to that issue. With the leave of the court below, the appellants who were non-suited appeal to this court against that order.

[6] The judgment of the court below is comprehensive and contains a detailed account of the circumstances giving rise to the present dispute. Not all of its factual and legal conclusions were impugned on appeal. Consequently, in what follows only such parts under attack on appeal will be discussed in this judgment.

[7] 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 what follows, I shall, when convenient to do so, refer to Investec and Randgold collectively as the respondents.

[8] As indicated above, the applicants in the main application sought a declaratory order to the effect that the two agreements are unfairly prejudicial to them as contemplated in s 252 of the Act. They also sought consequential relief that Investec be directed to purchase their shares in Randgold in order to relieve themselves of the consequences of the unfairly prejudicial conduct of which they complained. In essence, the applicants in the main application complain that both agreements are, as a direct result of Investec's machinations, calculated to benefit Investec and its United Kingdom's associated company to their financial prejudice as shareholders of Randgold.

[9] Investec raised a preliminary point contesting the legal standing of some of the applicants (both in relation to the main application and the applications to intervene), asserting that the affected applicants were not members of Randgold and therefore could not seek relief under s 252 of the Act. The appellants disputed the assertion that they were not members of Randgold. In the alternative, they sought to meet the challenge to their legal standing by contending that, as beneficial owners, they had a beneficial interest in the shares registered in the names of their respective nominees. Consequently, they asserted that it was they, as beneficial owners of the shares in Randgold, and not their respective nominees, who stand to suffer patrimonial loss flowing from the respondents' unfairly prejudicial conduct. By virtue of this interest, they contended that they have a direct and substantial interest in the relief sought in the main application, entitling them to either remain or join as co-applicants in the main application.

[10] After some negotiation, the parties ultimately agreed, pursuant to rule 33(4) of the Uniform Rules of Court, that the preliminary point relating to the applicants' legal standing be adjudicated prior to and separately from the remaining issues in the main application. In essence, what the court below was called upon to adjudicate was, first and foremost, whether the words 'any member of a company' in s 252 of the Act include a beneficial owner of shares whose shares are registered in the name of a nominee.

[11] As already mentioned, allied to the main issue was the subsidiary question, whether in the event that the beneficial owners are found not to be members of Randgold, they are nevertheless entitled to intervene in the main application as co-applicants with their respective nominees on the ground that they have a direct and substantial interest in the subject matter of the main application which might be prejudiced by any order the court may make in the main application.

[12] The court below 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.

[13] In regard to the first issue, the court below stated the following (para 67):

'. . . it is clear that the word "member" as referred to in section 252, is not capable of being read so as to include a beneficial shareholder whose shares are registered in the name of a nominee.'

[14] With respect to the second issue, the court below held (paras 70 – 71):

'A mere legal interest, which falls short of a right to assert a claim, cannot be the basis for joinder and intervention as an applicant. I cannot imagine a situation . . . where a party who cannot or will not assert a claim, can assume the role of *dominus litis*. The right to assert a claim is required by Rule 12, read with Rule 10, and is a prerequisite for joinder as an applicant. The question of whether a person has legal interest in the outcome of litigation inevitably arises in the context of joinder of or intervention by a respondent.' [Citations omitted.]

Consequently only a registered member has locus standi to approach the court in terms of s 252 and not a person who owns the ultimate economic interest in shares registered in somebody else's name. A person whose name is not registered in the register of members has no right to participate as an applicant in s 252 proceedings.'

[15] The key statutory provisions in this case are in s 252 and s 103 of the Act. The relevant portion of s 252 of the Act, headed 'Member's remedy in case of oppressive or unfairly prejudicial conduct' reads:

'(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial; unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company, may . . . make an application to the Court for an order under this section.'

[16] The relevant parts of s 103 of the Act, headed 'Who are members of a company' read:

'(1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company upon its incorporation, and shall forthwith be entered as members in its register of members.

(2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.'

Section 105(1) of the Act requires every company to keep in one of the official languages, a register of its members and to forthwith enter therein the names and addresses of the members and, in the case of a company having a share capital, a statement of the shares issued to each member, and to distinguish each share by, inter alia, its claim or kind, and the amount paid therefor or agreed to be considered as paid on the shares of each member. In respect of each member, the company shall enter the date on which the member's name was entered in the register of members and the date on which a member ceased to be such a member.

[17] Significantly, s 109 provides that the register of members is prima facie evidence of the matters entered in it in terms of the Act.

[18] Section 91A(3)*(a)*, in turn, provides that a company shall enter in its register of members in respect of every claim of securities, the total number of securities held in uncertificated form. And s 91A(4)*(b)* provides that, in the case of uncertificated shares, a transferee shall, upon entry of his name in a subregister, become a member of and be

recognised as a member by the company in respect of the uncertificated securities registered in his name. The subregister is, for all intents and purposes, part of the register of members of the company and must contain the information referred to in ss 105 and 133 of the Act.

[19] Subsections 1 and 2 of s 112 of the Act are also relevant. In essence they provide that the subscribers of a company's memorandum of incorporation are deemed to have agreed to become members of the company, and on registration become members and must be entered as such in its register of members. In addition, every other person who agrees to become a member of the company, and whose name is entered in its register of members is a member of the company. It is implicit in this that for a person to become a member, it is necessary that the name of such a person must be entered in the register of members of the company concerned.

[20] It is apposite at this stage to make some preliminary observations that will conduce to a proper consideration of the issues at stake in this appeal. First, it is necessary to be cognisant of the fact that s 252 must be given such construction as will advance the remedy rather than limit it. (See in this regard *Donaldson Investments (Pty) Ltd & others v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society & another Invervening* 1979 (3) SA 713 (WLD) at 719H which was endorsed by the full court in *Dondaldson Investments (Pty) Ltd & others v Anglo-Transvaal Collieries Ltd & others* 1980 (4) SA 204 (T) at 709B-F.)

[21] In *Sammel & others v President Brand 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 that the fact that the nominee holds the shares on behalf of another, generally known as the 'owner' or 'beneficial owner', does not appear on the company's register. This is explained with reference to the decision in *Standard Bank of South Africa 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.

[22] To conclude on this aspect, it is necessary to refer briefly also to a decision of this court in *Dadabhay v Dadabhay & another* 1981 (3) SA 1039 (A) at 1047D where Holmes AJA said:

'[T]he nominee shareholder takes his instructions from the beneficial shareholder.'

[23] Previously, in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A), Holmes JA, in explaining the concept of a 'nominee', had occasion to say the following (at 453A-B):

'A nominee is an agent with limited authority: he holds shares in name only. He does so on behalf of his nominator or principal, from whom he takes instructions; see *Sammel & others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 666. 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. . . . The practice is a convenient one and is accepted by the JSE.'

Accordingly, what requires emphasis is that when a nominee has been nominated, it is that nominee and not the beneficial owner who is eligible to have his or her or its name entered in the register of members. And only once his or her name is entered in the register of members does he or she become a member. (See in this regard *Doornkop Sugar Estates Ltd v Maxwell & others* 1926 WLD 127 at 134.)

[24] Unsurprisingly, in this court counsel for the appellants accepted that: (a) a shareholder has a right to hold shares in own name or through a nominee; (b) a

nominee acts in accordance with the instructions given by the beneficial owner; (c) a beneficial owner has the right to terminate the nomination and to hold the shares in his or her own name; and that (d) the nominees who were permitted to intervene in the main application will act in the furtherance of the interests of the beneficial owners. It is against the foregoing backdrop that I turn to deal with what is at the heart of this appeal.

[25] The appellants' primary criticism of the judgment of the court below was that it erred in holding that the remedy under s 252 of the Act is not available to a beneficial owner of shares in a company who has freely elected to hold those shares through a nominee. It was further contended that (and I quote from the appellants' heads of argument):

'The crucial question is whether, when shares are held through a nominee, s 252 should, on a proper, purposive construction, be regarded as being restricted to nominees and to exclude beneficial owners – notwithstanding the nominees being agents with no direct interest of their own, and the beneficial shareholders being the principals who have suffered the prejudice.'

[26] Furthermore, criticism was levelled against the judgment of the court below for its reliance on the decision in *Atlasview Ltd & others v Brightview Ltd & others* [2004] EWHC 1056 (Ch). It was submitted that the court below erred in finding that the interests of the nominee are co-extensive with those of the beneficial owner for purposes of invoking the remedy under s 252 of the Act. This was so, so went the argument, because the prerequisite for a successful invocation of the remedy in s 252 cannot be satisfied without imputing the prejudice suffered by the beneficial owner to a nominee to sue under s 252. And that to deny a beneficial owner relief under s 252 flies in the face of established common-law principle that an agent may not sue in his own name on behalf of the principal. In support of this proposition the appellants relied on *Sentrakoöp Handelaars Bpk v Lourens & another* 1991 (3) SA 540 (W).

[27] In my view, the appellants' argument is plainly unsustainable. In *Sentraalkoöp Handelaars Bpk* a cedent had sued in its name when the debt that it sought to enforce had earlier been ceded to a third party. Marais J held that a creditor who has divested

himself of his right to sue by way of cession could not sue in its own name as the agent of the cessionary. Thus, the appellants' argument entirely loses sight of the fact that the remedy sought to be enforced by the appellants is created by statute. The selfsame statute provides that such a remedy is available only to members of a company when the jurisdictional requirements spelt out in s 252 are satisfied. In these circumstances the common law principle upon which the appellants rely must, in the context of s 252, be taken to have been explicitly overridden by the Act. (Compare *Minister of Safety & Security v Sekhoto & another* [2010] ZASCA 141; 2011 (1) SACR 315 (SCA) para 22.)

[28] I revert to the crux of the dispute between the parties, the interpretation of s 252 of the Act. Principles of interpretation dictate that a court should pay due regard to the overall scheme of the Act. During an interpretative process, it is as well to remember that a fundamental principle of statutory interpretation is that words in a statute must be given their ordinary meaning, unless to do so would result in an absurdity. (See *South African Transport and Allied Workers Union & another v Garvas & others* [2012] ZACC 13; 2013 (1) SA 83 (CC) para 37; *S v Zuma & others* [1995] ZACC 1; 1995 (2) SA 642 (CC) paras 13-14; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD 530 at 543.) This general principle is, however, subject to three interrelated qualifications. First, the statutory provision should be interpreted purposively. (See *Department of Land Affairs & others v Goedegelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC) para 5; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining Development Company Ltd & others* [2013] ZACC 48; 2014 (5) SA 138 (CC) *paras* 84-86.) Second, the relevant statutory provision must be contextualised. (See *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76*;* 2013 (5) SA 1 (SCA) para 24; *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 SCA para 39.) Third, closely related to the purposive approach is the requirement that statutes must be interpreted consistently with the Constitution so as to preserve their constitutional validity, where it is reasonably possible to do so. As Wallis JA put it in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13*;* 2012 (4) SA 581 para 18:

'[T]he "inevitable point of departure is the language of the provision itself", read in the context and having regard to the purpose of the provision and the background to the preparation and production of the document. . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[29] Accordingly, as endorsed in a long line of cases, the logical point of departure is the language of the provision itself read in the context of the overall scheme of the Act, having regard to the purpose of the provision and against the background to the production of the relevant statute. (See in this regard *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* [2011] ZASCA 1; 2011 (3) SA 148 (SCA) paras 25-30; *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10-12; *Novartis SA v Maphil Trading* [2015] ZASCA 111; 2016 (1) SA 518 (SA) paras 24-31.)

[30] It is as well to recall that this appeal is about the question whether the appellants – whom it is common cause are beneficial shareholders – are members of Randgold as contemplated in s 252 read with s 103. The appellants criticised the reliance by the court below on foreign cases in reaching its conclusion. They contended that in none of those cases was the issue raised in this appeal, namely whether a beneficial owner who sustains the prejudice sought to be redressed by s 252, pertinently considered. Whilst accepting that a company should concern itself only with registered owners of shares, the appellants nevertheless argued that s 103 of the Act should not be regarded as a definition of the word 'member' for all the purposes of the Act. But in the context of s 252 the word 'member' should include a beneficial owner. And this could be done, so the argument continued, by reading in the words 'or to the beneficial shareowners in the case of shares registered in the name of a nominee' immediately after the words 'or to some part of the members of the company'. It was further submitted that not to do so would undermine the objective of the widespread practice of registering shares in listed companies in the names of nominees.

[31] The thrust of the appellants' argument is that because it is the beneficial shareholder who suffers the prejudice contemplated in s 252 of the Act and not the nominee although a member in terms of s 103, it is permissible to go behind the register of members for purposes of s 252. In support of this submission, the appellants relied on *Kalil v Decotex (Pty) Ltd & another* [1987] ZASCA 156; 1988 (1) SA 943 (A). There, this court had occasion to consider the meaning of 'member' in the context of s 346(1) of the Act for purposes of determining the applicant's locus standi in a winding-up application. The locus standi of the applicant, who was a registered shareholder, was disputed by one of the respondents on the ground that although the applicant was still a registered member, he had ceded his shares to a third party. Thus, he was in truth not a member of the company. This question raised a dispute of fact which could not be resolved on the papers. In upholding the appeal against the order non-suiting the applicant, Corbett JA said the following (at 970H-J):

'It is common cause that when the application was launched in the court a quo the appellant was still shown in the share register of Decotex to be the holder of the two shares held by him immediately prior to the Easter agreement. Prima facie, therefore, he remained a member of the company (s 109 of the 1973 Companies Act). The Court is however, entitled to go behind the register in order to ascertain the identity of the true owner . . .' [Citations omitted.]

[32] The other decision relied upon by the appellants is *Barnard v Carl Greaves Brokers (Pty) Ltd & others, Carl Greaves Brokers (Pty) Ltd & others v Barnard, Barnard v Bredenhann & others* [2007] ZAWCHC 2; 2008 (3) SA 663 (C) in which Barnard, who had not yet obtained registration of his membership in the respondent, had applied in the same proceedings for an order directing the respondent to enter his name in its register of members. In anticipation of such registration he also sought relief under s 252. In upholding Barnard's application, Binns-Ward AJ said the following:

'The provisions of s 252 are available to "members" – ie registered shareholders. On the particular facts of the current matter I do not consider the fact that Barnard is not yet registered as a member as an obstacle to his resort to s 252. I have already found that Barnard is a shareholder entitled as against the company to obtain the insertion of his name on the members' register. . . .

In my view it is competent for a shareholder who has not obtained registration of his membership of the company because of opposition or lack of co-operation by the company or his fellow shareholders, but is entitled to such registration, to apply in the same proceedings for an order directing his enrolment on the register of members and, in anticipation of the grant of such an order, as a member for relief in terms of s 252 . . .'
Ex parte Avondzon Trust (Edms) Bpk 1968 (1) SA 340 (T) and *Lourenco & others v Ferela (Pty) Ltd & others (No 1)* 1998 (3) SA 281 (T) are also instances, albeit in a different context, where it was held that only a member, as defined, is entitled to seek relief against oppressive conduct.

[33] To my mind neither of these decisions supports the proposition for which they were cited by the appellants. In *Kalil*, the upshot of the passage quoted above was that the applicant was 'a member' of the company in name only as he had ceded his shares. The matter was referred for oral evidence in order to determine whether or not this was in truth the position. On the other hand, the opening sentence in the passage from *Barnard*, quoted above, makes plain that had the applicant not been entitled to have his name entered in the register of members, his application for relief under s 252 would have been unsuccessful. Hence Barnard's membership in the company was considered at the outset.

[34] As already mentioned, the appellants also criticised the reliance by the court below on foreign authorities because, so they contended, none of those cases applies four-square to the central argument they advanced, namely that s 103 ought not to be regarded as constituting a definition of the word 'member' for all purposes of the Act. And that in the context of this case the word 'member' should include a beneficial shareholder. It is therefore necessary to say something in relation to some of those cases.

[35] In *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) the court was called upon to determine, amongst other things, whether Mr and Mrs Barton, who were petitioners complaining of oppressive conduct, had locus standi to invoke the remedy deriving from s 459 of the English Companies Act 1985. Section 459 of the English

Companies Act conferred a right of petition on 'a member of a company' and on someone to whom shares have been transferred by operation of law. It was common cause that both Mr and Mrs Barton were not registered shareholders of *Brightview* as contemplated in s 22 of the English Companies Act, which is in material respects the equivalent of s 103 of the Act, and that no shares had been transferred to either of them by operation of law. The court, whilst acknowledging that there might well be a basis for joining them as respondents, held that they could not be joined as petitioners. In reaching this conclusion, the court reasoned that s 459 conferred a right to petition a court only on members of the company or those to whom shares have been transferred by operation of law, and that neither Mr nor Mrs Barton fell within those categories. They were consequently non-suited.

[36] A similar conclusion was reached in *Farstadt Supply A/S v Enviroco Ltd* [2011] UKSC 16. There, the court considered the meaning and import of s 22 of the English Companies Act which is couched in identical terms to s 103 of the Act. In the course of its judgment the court said the following (paras 37-39):

'The starting point is that the definition of "member" in what is now section 112 of the 2006 Act (section 22 of the 1985 Act for the purposes of this appeal) reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified. . . .

Ever since the Companies Clauses Consolidation Act 1845 and the Companies Act 1862 membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable if that were not so. . . .

For those and other purposes the legislation makes it clear that the member is the person on the register, and where it is necessary to apply the legislation to persons who are not on the register, special provision is made . . .'

[37] *Hacquet and Two Others v McCarthy and Three Others* [2006] EWHC 832 (Ch) is another instance where the English courts were called upon to decide the preliminary issue whether petitioners under section 459 of the English Companies Act 1985 had the requisite standing to bring the petition following a dispute amongst shareholders. The

court was required to decide upfront whether the petitioners were members of the company in which they held shares. The court found that persons entitled to petition under s 459(1) were members of the company as defined in section 22(1). And that those who were not members under section 22(1) could petition only if they were either persons to whom shares have been transferred or to whom shares have been transmitted by operation of law.

[38] Reference may also be made to an Australian decision in *In Re Fernlake (Pty) Ltd* 1994 (13) ACSR 600 in which the following was stated (at 605 5-35):

'. . . it does not follow that because the respondent was entitled to dictate the manner in which the voting rights attaching to those shares were exercised, he was entitled to notice by the company of any relevant meeting. It is one thing to say that as between the vendor and the purchaser the mutual rights and obligations which they have created by their agreement affect the manner in which each are to act in respect of the subject property. It is quite another matter to suggest that those bilateral rights and obligations can somehow affect the company . . . Quite to the contrary the authorities suggest that as between the trustee/vendor on the one hand who remains the registered owner of the shares, and the company and the shareholders on the other, it is he and not the beneficial owner of the shares whose position must be considered. Indeed it would be very curious if the position were otherwise. The memorandum and articles of association of a company constitute an agreement between the company and the shareholders and between the shareholders inter se. Although a particular shareholder may hold the benefit of that agreement on trust for a third party, the registered owner of the shares is the primary party to that agreement. He is the "member" of the company, not the beneficial owner of those shares: see s 184 of the Law [statute] and *Maddocks and DJE Constructions Pty Ltd* (1982) 148 CLR 104; 40 ALR 283. Absurd results would follow if an obligation were cast on the company or the other shareholders to determine the extent to which he holds those shares on trust for another. Quite rightly, the company and shareholders are entitled to treat the registered shareholder, for all intents and purposes, as the owner of the shares and as the person entitled to exercise the rights in respect of those shares. The obligations which the shareholder chooses to create between himself and a third party cannot possibly affect that position . . . if a vendor fails to adhere to his obligations to vote in accordance with the purchaser's directions . . . the vendor would clearly leave himself open to an action for damages . . . for breach of contract . . .'

[39] Finally on this score, the decision of the New Zealand High Court in *RPB Solutions Ltd v Avoca Holdings Ltd* [2010] 2 NZLR 857 (HC) is relevant. There, the court was dealing with ss 87 and 96 of the New Zealand Companies Act 105 1993. The former section required a company to maintain a share register in which names of registered shareholders are entered (similarly to s105 of the Act) whilst the latter, like s 103 of the Act, provided that a shareholder means a person whose name is entered in the company's share register. The court held that the remedy against oppression provided for in s 174(1) of the New Zealand Act (comparable to s 252 of the Act) was available only to persons whose names are entered in the share register to the exclusion of anyone else.

[40] In their commentary on the import of s 459(2) of the English Companies Act, 1985, Blackman et al in *Commentary on the Companies Act* vol 1 (2003) at 9-5 point out that:

'In England it has been held that for the purposes of s 459 of the English 1985 Act (corresponding to our section 252(1)) a "member" is a member as defined in section 22 of the Act (corresponding to our s 103); and hence the beneficial owner of shares is not a member for this purpose . . . But because section 459(2) of that Act expressly renders the provisions of s 459 applicable also to a person "who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of the law" that conclusion is perhaps inevitable.'

[41] Thus, it can be seen from the foregoing discussion that in terms of the English, Australian and New Zealand jurisprudence the party who can legitimately complain of oppressive conduct under the statutory regimes operative in those jurisdictions is a member of the company concerned – that is someone whose name has been entered in the company's register of members.

[42] It remains to deal with the contention by the appellants that for purposes of the relief sought under s 252 of the Act, s 103 should not be taken to be a definition of who is entitled to invoke s 252. Whilst accepting that a company and its shareholders inter se are entitled to treat registered shareholders as owners of the shares – and thus

entitled to exercise the rights relating to those shares for all other purposes under the Act, the appellants nonetheless argued that an exception must be made with respect to s 252. The logic of this submission escapes me. In any event I believe that it is completely answered by the countervailing argument advanced by the respondents. And it is this. First, whilst the word 'member' is not defined in s 1 of the Act that is of no moment for s 103 does so definitively. Second, with reference to Francis Benion *Statutory Interpretation* 6 ed (2013) at 518, the respondents correctly argued that it matters not where a definition of a word in a statute is located. At 517, the learned author states that a definition is exhaustive when it provides a full statement of the meaning of the terms being defined. And as Daniel Greenberg *Craies on Legislation* 10ed (2013) at 24.1.2 crisply puts it:

'. . . the only useful rule of legislative drafting [is] that there are no useful rules of legislative drafting, the only correct approach being to consider what is best for clarity of the law or the convenience of the reader on each occasion.'

[43] Counsel for the appellants also made some play of the averment contained in the affidavit of one of the intervening applicants, Standard Bank Nominees (SBN), that:

'. . . SBN has no beneficial interest in the contested shares and . . . the registration of the contested shares in the name of SBN is a matter of form only and not substance. . . . If joined in the proceedings, SBN will not enter into any of the factual disputes that may exist. It will simply, on the instructions of the beneficial shareholders, seek the relief which they seek on the bases which they rely.'

In my view this statement contains the seeds of its destruction and cannot assist the appellants. On the contrary it underscores the trite principle that a nominee acts in the interests of and subject to the instructions of the beneficial owner.

[44] It was further contended on behalf of the appellants that this court should adopt an expansive interpretation of the word 'member' in order to avoid absurdity or to give effect to the true purpose of s 252. In support of this proposition the appellants relied on *Hanekom v Builders Market Klerksdorp (Pty) Ltd & others* [2006] ZASCA 2; 2007 (3) SA 95 (SCA) para 7. In my view, this decision does not, in the context of this case, support the proposition for which it is cited by the appellants. There, Scott JA was at pains to

point out that the courts have repeatedly cautioned against the dangers of departing too readily from the ordinary (and I venture to say clear) meaning of the words of the statute. In particular, they have stressed that the absurdity must be 'utterly glaring' for departure to be justified. In this case I cannot see how any absurdity, let alone an utterly glaring one, would ensue if the word 'member' were interpreted in the way for which the respondents contended.

[45] In my judgement, to interpret s 252 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] ZASCA 20*;* 2000 (2) SA 797 (SCA) this court, with reference to the judgment of Innes CJ in *Dadoo Ltd & others v Krugersdorp Municipal Council* 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 from 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 to 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.

[48] I turn now to consider the alternative submission advanced on behalf of the appellants. As alluded to above (para 9), the appellants contended that as beneficial shareholders they have a direct and substantial interest in the proceedings under s 252 of the Act. Accordingly, so the argument went, they are the necessary parties entitled to join as co-applicants in the main application together with the nominees in whose names their shares are registered. In elaboration it was contended that neither Uniform rule 10(1) nor 12(1) and the common law precludes the appellants' joinder in the main application as co-applicants.

[49] The implication of these contentions, if upheld, is that both the nominees – as members of Randgold – and the beneficial shareholders will together pursue a remedy such as that provided for in s 252 even though the beneficial owners are not members as contemplated in that section. Counsel for the appellants relied on the decisions such as *Henri Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151 (O) at 169-170 and *Burger v Rand Water Board & another* [2006] ZASCA 150; 2007 (1) SA 30 (SCA) para 7 in support of these contentions.

[50] Rule 10(1) provides:

'Any number of persons, each of whom has a claim, whether jointly, jointly and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs

would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiffs depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise on each action, and provided that there may be a joinder conditionally upon the claim of any other plaintiff failing.'

[51] In turn, rule 12 provides:

'Any person entitled to join as a plaintiff or liable to be joined as a defendant in any action may, on notice to all parties, at any stage of the proceedings apply for leave to intervene as a plaintiff or a defendant. The court may upon such application make such order, including any order as to costs, and give such directions as to the further procedure in the action as to it may seem meet.'

[52] In dealing with this submission, the court below stated the following (paras 69-71):

'. . . as a matter of construction section 252 allows for one entity to make application to court and that would be the registered member and no one else. The section simply does not allow for a multiplicity of applications or actions in respect of the same shares as envisaged by the applicant. Even if the beneficial holders are detrimentally affected by actions of the majority, same would not entitle them to intervene in any proceedings since the only entities which have a legal interest to act are the members mentioned in section 252 of the Act. Lastly, the Uniform Rules of Court and the principles in respect of joinder and intervention never intended to expand the class of claimants on whom a cause of action is conferred by primary legislation. See *Atlasview* (supra) paragraph 31.

A mere legal interest, which falls short of a right to assert a claim, cannot be the basis for joinder and intervention as an applicant. I cannot imagine a situation, *ceteris paribus*, where a party who cannot or will not assert a claim, can assume the role of dominus litis. The right to assert a claim is required by Rule 12, read with Rule 10, and is a prerequisite for joinder as an applicant. The question of whether a person has a legal interest in the outcome of litigation inevitably arises in the context of joinder of or intervention by a respondent. See *Vitorakis v Wolf* 1973 (3) SA 928 (W) and *Shapiro v SA Recording Rights Assoc Ltd (Galeta Intervening)* 2008(4) SA 145 (W).

Consequently only a registered member has locus standi to approach the court in terms of section 252 and not the person who owns the ultimate economic interest in shares registered

in somebody else's name. A person whose name is not registered in the register of members has no right to participate as an applicant in section 252 proceedings.'

[53] The learned authors of *Herbstein & Van Winsen – The Civil Practice of the High Courts of South Africa* 5 ed (2009) vol 1 at 225-226*,* point out that in terms of rule 12 the applicant for leave to intervene must be a person 'entitled to join as a plaintiff or a defendant'. And that joinder is competent either on the basis of convenience or on the basis that the party whose joinder is in question has a direct and substantial interest in the subject-matter of the proceedings.

[54] It is trite that a party wishing to institute legal proceedings must have a direct and substantial interest in the dispute which is the subject matter of the proceedings. (See in this regard *Jacobs en 'n ander v Waks en andere* [1991] ZASCA 152; 1992 (1) SA 521 (A) at 534A-E.) In *Sandton Civic Precinct (Pty) Ltd v City of Johannesburg & another* [2008] ZASCA 104; 2009 (1) SA 317 (SCA) para 19 Cameron JA said that legal standing means the 'sufficiency and directness of a litigant's interest in proceedings which warrants his or her title to prosecute the claim asserted'. Simply put, legal standing therefore means the right of the applicant to assert a claim. I have some difficulty in understanding how Uniform rules 10 and 12 and the common law principles relating to joinder of interested parties could avail the appellants on the facts of this case. My reservation stems from the fact that the appellants seek to be joined as co-applicants with their nominees and perforce to invoke a statutory remedy specifically catered for someone who is a member of a company in terms of the Act. In my view, to allow them to do so would fly in the face of clear provisions of s 252 of the Act, which unambiguously confine the remedy only to members, which the appellants are not. It may be useful to contrast the provisions of s 252 of the Act with those of s 163 of the current Companies Act 71 of 2008. In terms of the provisions of the latter Act, unlike those of the former, the remedy against oppressive or prejudicial conduct is available to either a shareholder or a director of a company whereas s 252 of the Act confines the remedy exclusively to a member. Accordingly, it must follow that this was the kind of interest that the beneficial shareholders were required to demonstrate in order to

establish their entitlement to the relief sought in the main application. This they failed to do. In my view the appellants' argument on this score can be disposed of on the simple basis 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 as the legislature saw it fit.

[55] It was a simple matter for the appellants, if they wished to avail themselves of the remedy provided for in s 252 of the Act in their own names, to terminate 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. They were ill-advised in doing so. As I see it, 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. (Compare *Bowring NO v Vrededorp Properties CC & another* [2007] ZASCA 80; 2007 (5) SA 391 (SCA) paras 19-20.) This is all the more so when regard is had to the fact that in any event the nominees are in truth advancing the interests of the beneficial owners. In particular, they also act subject to the latters' instructions.

[56] For all the aforegoing reasons, the appeal accordingly falls to be dismissed. However, before making the order, it is necessary to say something about the issue of costs. The costs order of the court below included the costs of three counsel. In their written heads of argument, counsel for the parties sought a similar order in this court, where three counsel were employed.

[57] Whilst the issues involved in this matter were not unattended by some difficulty, and were perhaps even of great importance to the parties, they were nonetheless not of such great complexity to warrant the employment of three counsel. Costs of two counsel therefore should suffice. (See in this regard *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 897 (CC) para 32.)

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

The appeal is dismissed with costs, including the costs of two counsel.

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X M Petse
Judge of Appeal

APPEARANCES

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