



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 01 December 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Pasiya and Others v Lithemba Mining (Pty) Ltd and Others (264/2022) [2023] ZASCA 169 (01 December 2023)

Today the SCA dismissed with costs, an appeal and cross-appeal, including costs of two counsel on both appeals, against the decision of the Eastern Cape Division of the High Court, Grahamstown (the high court).

This was an appeal against the judgment and order of the high court, where it dismissed with costs the appellants' application for declaratory relief. The relief sought included an order (a) declaring as unlawful and setting aside a loan agreement concluded between the first respondent, Lithemba Mining (Pty) Ltd (LM) and the eleventh respondent, Lithemba Investments (Pty) Ltd (LI) in 2009; (b) declaring as unlawful and setting aside the purported changes to the LM shareholding which occurred in January 2010 pursuant to the loan agreement between LM and LI; and (c) directing that any dividends to be paid by LM to its shareholders be paid in accordance with the shareholding prior to the alleged unlawful changes. This appeal was with leave of the high court. The fourth, fifth, sixth and eleventh respondents were also aggrieved that the high court had awarded them costs on a party and party scale instead of on an attorney and client scale. These respondents sought and obtained leave from the high court to cross-appeal against its cost order. They contended that the appellants' claims were vexatious and frivolous and that the high court should have, in the exercise of its discretion, ordered the appellants to pay their costs on an attorney and client scale.

Two main issues therefore arose in this appeal. The first, was whether the high court erred in dismissing the appellants' application for declaratory relief and the consequential relief. The second, was whether the high court misdirected itself by failing to dismiss the application with costs on a punitive scale.

The appellants advanced two main grounds on which they based their attack on the judgment of the high court. They submitted, first, that the high court erred in its application of the test for declaratory relief. The high court, the appellants argued, failed to deal with the first leg of the test. It dealt only with the delay, which was one factor from the second leg of the test and decided the matter on that basis without considering the merits. They submitted that the high court should have dealt with the merits and only then to have considered the question whether to exercise its discretion in favour of, or against, the grant of the order. Second, it was submitted by the appellants that the high court erred in not dealing with the merits of their claims and all of the defences raised by the respondents. Relying on the Constitutional Court judgment in *Spilhaus Property Holdings (Pty) Limited and Others v MTN and Another* [2019] ZACC 16; 2019 (6) BCLR 772 (CC); 2019 (4) SA 406 (CC), counsel for the appellants argued that the high court should have dealt with all the issues before it, especially where they had an option of appealing further.

Regarding the first point of contention raised by the appellants, the SCA held that the high court correctly applied the test applicable to declaratory orders and that the attack on its judgment based on that

ground must fail. The SCA further held that there was no basis to conclude that the high court misdirected itself on the facts or the law in the exercise of its discretion, or that it exercised its discretion injudiciously. Additionally, the SCA held that the high court had in fact considered the first leg of the test. It found that the appellant had an interest in an existing or contingent right, as they were shareholders in LM and their shareholding was diluted. That affected them not only in relation to the sharing of dividends but also in relation to the voting rights, and thus the first stage of the test was established. Thereafter the high court turned to the second leg of the inquiry. It correctly found that this was not the case where the court ought to have exercised its discretion in favour of granting the declaratory order sought. This was so, reasoned the high court, because the appellants unduly delayed in approaching the court for their relief which they sought. The appellants only sought the court's intervention in 2020 where it implored the high court to turn the wheels back to the position prevailing in 2009. It found that whilst the appellants did nothing to vindicate their rights, LM and other shareholders proceeded to organize their lives, planned, and conducted the business in accordance with the position after the dilution of the shares and the number of decisions had been made since 2009 relying upon resolutions which the appellants belatedly sought to be declared unlawful. As regards the interests of other shareholders the high court correctly found that LM and the other shareholders would suffer great inconvenience and prejudice should the status quo be changed after so many years. Furthermore, that it would be unjust to the other shareholders, who paid and met their financial obligations at the time, to accede to the relief sought by the appellants. One of the factors the high court considered in exercising its discretion against granting the declaratory relief sought, was the effect of prescription on the appellants' claims. It found that even if the declaratory order were to be made it would have no practical effect in that the appellants would not be able to claim the restoration of the shares and payment of dividends in accordance with the shareholding applicable before the changes in the shareholding as such claims would have been extinguished by prescription as a dilution of shareholding occurred in 2009. After having regard to all the relevant factors, the high court correctly found that there was no basis for it to have exercised its discretion in favour of granting the declaratory relief sought by the appellants. When it came to the second point of contention raised by the appellants, the SCA held that the relief sought by the appellants in the notice of motion was unsustainable. The undisputed facts, according to the SCA, show that the loan agreement was lawfully authorised, concluded and repaid; the changes to the shareholding were lawfully and properly authorised and effected; and dividends were declared and paid in accordance with the changed shareholding. The loan agreement and the board and shareholder authorisations which approved its conclusion and repayment complied with the 1973 Companies Act. With regards to the cross-appeal instituted by the respondents, the SCA held that it was satisfied that the high court had not misdirected itself by not awarding costs on a punitive scale against the appellants. There was no basis, according to the SCA, to have found that the proceedings brought by the appellants were frivolous and vexatious. As shareholders of LM, they had a right to bring the proceedings to challenge LM's decisions which gave rise to the reduction of their shareholding in LM. The SCA also held that the high court exercised its discretion judicially and that there was no basis to interfere with the high court's cost order. Therefore, the cross-appeal must fail.

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