



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2025: No. 102

IN THE MATTER OF ASA GOLD AND PRECIOUS METALS LIMITED

BETWEEN:

PAUL KAZARIAN

Petitioner

-AND-

(1) ASA GOLD AND PRECIOUS METALS LIMITED

(2) MARY JOAN HOENE

(3) WILLIAM DONOVAN

Respondents

RULING

(In Chambers)

Application for interim injunctions (ex parte on notice)

Date of Hearing: 7 May 2025

Date of Ruling: 8 May 2025

Appearances: Sam Stevens and Matthew Summers, of Carey Olsen Bermuda Limited, for the petitioner

Company unrepresented

No appearances for the second and third respondents (Conyers Dill & Pearman in attendance on a watching brief)

RULING of Martin J *ex tempore*

Introduction

1. The substantive proceeding in this case concerns an application for directions under sections 76 of the Companies Act 1981 in relation to the conduct of two special general meetings (SGMs) of a Bermuda exempted company called ASA Gold and Precious Metals Limited (referred to as “ASA” or “the Company”). The first SGM has been requisitioned under section 74 of the Companies Act 1981 by Saba Capital Management LP and its affiliates (referred to as “Saba”) which are (or were at the relevant time) registered as shareholders on the Company’s register of members together holding more than 10% of the Company’s common voting shares (the “Saba Requisition”).
2. The purpose of the special general meeting convened by the Saba Requisition is to put two resolutions to the members in general meeting (a) to increase the size of the board from four members to five and (b) to propose for election an additional director. It is scheduled to occur on 13 June 2025.
3. A second SGM is proposed by way of a requisition made by a group of individuals who hold beneficial interests in shares in the Company which seeks to put forward an alternative slate of directors for election to the board. No date has yet been set for this second SGM.
4. A dispute has arisen as to the legality of the steps taken by the second and third respondents in their capacities as members of the Litigation Committee of the Board in opposing the Saba Requisition and promoting the requisition of the second SGM (referred to as the MJH Requisition).
5. The petitioner has issued the petition seeking relief under the Companies Act 1981 and in support of those proceedings has issued an application for interim relief by way of *ex parte* injunction. This is the Court’s ruling on the *ex parte* application.

Disposition

6. For the reasons given below, the Court has acceded to the application, and has granted preliminary interim relief by way of injunction to restrain the second and third respondents from taking steps to communicate on behalf of the Litigation Committee to the shareholders and beneficial owners of shares in the Company pending the determination of an *inter partes* hearing to be held on 21 and 22 May 2025.

Background summary

7. Mr. Paul Kazarian is the petitioner. He is one of the directors of ASA and a principal of Saba Capital Management LP which is the largest single investor in ASA (through several related investment vehicles under Saba's control and referred to collectively as "Saba") who was elected to the board at the last AGM in September 2024. Mr. Ketu Desai was also newly elected, and his company has a separate and independent investment in ASA, and is not related to Mr. Kazarian's companies.
8. The circumstances which have given rise to the application for directions under section 76 are set out in detail in the three affidavits of Mr. Kazarian and the first affidavit of Mr. Michael D' Angelo which each exhibit documentary materials in support of the averments they have each made in their affidavits. It is not necessary to set out the whole extensive background in detail, but a brief explanation is sufficient to explain the context of the dispute and the nature of the application being made.
9. The essence of what he said in those affidavits is that the board of ASA is in a state of deadlock and has been unable to conduct ordinary business since about September 2024. The new board members were appointed on the basis of a proxy statement which promised a new investment strategy, to which the prior members of the board were opposed.
10. It is said by Mr. Kazarian that immediately prior to the 2024 AGM the prior board took steps to reduce the number of directors to four, which he has assumed was a deliberate step to produce the situation that the continuing directors (referred to as the "legacy" directors) could effectively block the new directors from implementing any new investment strategy.

Mr. Kazarian describes in his affidavits that this is in effect what has happened, and the “legacy” directors have themselves acknowledged this in the documents¹. It is said that the two “legacy” directors (the second and third respondents to the proceedings) have misused their powers as directors to frustrate the conduct of the Company’s ordinary business.

11. It is also said that the prior board appointed a Litigation Committee to exercise the powers of the board in relation to certain litigation with Saba over the adoption of a defensive poison pill and rights offering². The composition of the Litigation Committee did not include Mr. Kazarian or Mr. Desai as incoming directors.
12. As a result of various issues that have been the subject of deadlocked voting on the board, in April 2025 the petitioner (Mr.. Kazarian) caused several Saba related entities (holding 13.73% of the voting shares) to lodge a requisition notice³ with the Company requiring the board to convene a special general meeting to increase the size of the board from four members to five and to appoint an additional director (the “Saba Requisition”). The intention behind the Saba Requisition is said to be to break the deadlock by creating an uneven number of directors allowing for a majority to control the board when necessary. The board was deadlocked in relation to the action to be taken in relation to the Saba Requisition and failed to convene the SGM requisitioned and so Saba proceeded to convene the SGM as provided by the default provisions under section 74 of the Companies Act. The Saba Requisition meeting is scheduled for Friday 13 June 2025.
13. It is alleged by the petitioner that the second and third respondents have taken steps to frustrate the conduct of the Saba Requisition meeting and that they have misused their fiduciary powers as directors of the Company to promote an alternative requisition for a special general meeting to appoint a different slate of directors⁴ (including themselves).

¹ For example the letter from the Litigation Committee signed by the second and third respondents dated 23 April 2025 at p 406-7 of PK 1.

² Kazarian 1 paragraphs 30-94

³ Kazarian 1 paragraph 185

⁴ Kazarian 1 paragraphs 178-84

14. It is alleged by the petitioner that the alternative requisition promoted by the second and third respondents is invalid because it has not been served by registered members of the Company but has been put forward on behalf of a group which hold indirect beneficial ownership of less than 5.23 % of the voting shares of the Company (referred to as “the MJH Requisition”) and has been put forward as if it has the approval of the board, when it has not had the approval of the board and fails to follow the procedure provided for in the bye-laws for the nomination of new directors through the nomination committee⁵.
15. It is said that the second and third respondents have misrepresented MJH Requisition as being adopted by the board and have misused their authority as members of the Litigation Committee of the Board (which has excluded the petitioner and Mr. Desai from its deliberations) to appear to shareholders as if the MJH Requisition has the board’s approval.
16. Objection is taken to the validity of the MJH Requisition on the grounds that it is not made by registered members (as required under the terms of sections 19 and 74 of the Act) and it falls below the 10% threshold required for a valid requisition under section 74 of the Companies Act, and although they do represent more than 5% of the beneficial interests in the shares, they do not qualify as members for the purposes of seeking the board to put resolutions to the members at a meeting under section 79 of the Companies Act.
17. It is also said that the second and third respondents have engaged in a proxy solicitation under the aegis of the Litigation Committee to contact beneficial owners of the shares using confidential information belonging to the company to persuade the shareholders to vote down the Saba Requisition resolutions⁶. It is said that this step was taken after the petitioner’s attorneys had informed the respondents’ attorneys of the relief they intended to seek in this application⁷.

⁵ Kazarian 1 paragraphs 174-5

⁶ Kazarian 1 paragraphs 216-30

⁷ Kazarian 3 paragraphs 10 to 16.

Interim Injunctive relief sought

18. As a result of the allegations made, the petitioner now seeks an interim injunction to restrain the second and third respondents from (i) contacting the shareholders or the beneficial owners of the shares of the Company in relation to the Saba Requisition Meeting in order to ensure that there is no confusion created between the two competing requisitions or otherwise interfering with the orderly conduct of the Saba Requisition meeting unless expressly authorized to do so by the board or (ii) from promoting the MJH Requisition by contacting beneficial owners or registered shareholders or purporting to represent the Company or the board or a committee of the board in relation to any requisition unless expressly authorized to do so by the board. The petitioner also seeks a mandatory injunction requiring the second and third respondents to cause the Litigation Committee (of which they are members) to withdraw the proxy solicitation that they filed after they were given notice of the application for relief made in the summons now before the Court.
19. The injunctions are expressed to be for the period until the *inter partes* hearing of this application, after which time the Court will be able to consider what relief will be necessary pending the determination of the issues at the hearing of the petition.
20. The Court is not here examining the merits of the legal arguments or making any assessment of the factual averments made in support of the application for injunctive relief. That will be the subject of further directions for the trial of the disputed issues with disclosure and witness evidence and after cross-examination at a full hearing. The Court is now concerned only with considering whether the Court has jurisdiction over the matters raised by the pleaded claims, and if so whether the interests of justice require the grant of interim injunctive relief pending the final determination of the claims that have been made.
21. The Court is acutely aware that the facts asserted in the affidavits in support of the application may be the subject of challenge or disputed interpretation, and the expression of any views as to the merits of the claims are for the limited purposes of establishing jurisdiction and whether the interests of justice require interim relief to be granted and if so on what terms.

Jurisdiction

22. As to basic jurisdiction, it is apparent that this Court has jurisdiction over an application by a registered shareholder of a Bermuda exempted company (which is administered in Bermuda) for relief in relation to a meeting that has been requisitioned under section 74 of the Companies Act and which is to be conducted in accordance with the bye laws of the Company which are governed by Bermuda law, and/or to enforce the provisions of the bye laws as to the convening and conduct of such a meeting, and/or make declarations as to the validity or invalidity of meetings called or purportedly called by requisition. This applies to both the Saba Requisition and the MJH Requisition.

23. However, the Court notes that the present application is framed as an application by a director under section 76 of the Companies Act. This provision gives the Court the power to give directions for the conduct of a meeting of a Bermuda company in any case where it is “impracticable” to convene the meeting or the meeting cannot be convened or conducted in accordance with the Company’s bye-laws and the Companies Act⁸. The section expressly grants the right to a director to make an application for relief under the section.

24. But this power is limited in scope. It seems to the Court that the terms of this section are not designed to bear the load that the petitioner seeks to place on it. The words “...*in the manner prescribed by the bye-laws or this Act..*” are not broad enough to encompass the relief sought. This is because the case law makes it clear that the Court’s powers under this section are not unfettered: the section does not give the Court power to do anything more than give directions for the the convening and conduct of a meeting which cannot otherwise be called without the assistance of the Court⁹. Here, the Saba Requisition meeting has been validly convened.

⁸ See **Lung v CY Foundation Group et al** [2011] Bda LR 12 and **Uprise Corp Ltd et al v Mingyuan Medicare Development Co Ltd** [2016] Bda LR 33.

⁹ See **Lung** supra at paragraph 28 per Kawaley CJ.

25. In particular, the section cannot be construed to confer jurisdiction on the Court to grant relief against the alleged abuses about which complaint has been made, irrespective of their potential merits. These complaints relate to matters outside the conduct of the Saba Requisition meeting itself but relate to the alleged misuse of corporate information and resources and alleged improper solicitation of votes and misrepresentation of authority by the second and third respondents and the Litigation Committee.
26. The prayers for declarations in the petition expressly seek the determination of the questions (i) whether the Saba Requisition is valid under Bermuda law¹⁰, and if so to seek ancillary relief to protect the requisitioned meeting from being undermined by allegedly unlawful interference from the second and third respondents in their capacities as members of the Litigation Committee¹¹ and (ii) whether the MJH Requisition is invalid for failure to comply with the requirements of the Act to qualify as a valid requisition¹².
27. These prayers for relief are independent applications which might (without expressing any concluded view on the merits) be sufficient to ground jurisdiction for the Court to make declarations of right under RSC Order 15 rule 16 if it were ultimately to be satisfied that the declarations were justified. But those applications are not presently brought before the Court by parties who have the relevant authority to make them.
28. Although the petition makes it clear that the petitioner is seeking declaratory relief as to these matters, the petitioner is not standing before the Court wearing the shoes of the Saba requisitionists, and he cannot make these claims solely in his capacity as a director to ensure the Company's compliance with the Companies Act and bye-laws. Therefore, the Court is not satisfied that the Court has jurisdiction to determine the questions raised by the petitioner under section 74 of the Companies Act 1981, and must therefore decline to grant the relief sought under that section.

¹⁰ Paragraph 91 a of the Petition

¹¹ Paragraphs 1 a i and ii and b of the *ex parte* summons.

¹² Paragraph 92 a of the Petition

29. However, the Court considers that it is arguable that the petitioner has standing in his capacity as a director to seek a declaration that the second and third respondents have misrepresented their authority as members of the Litigation Committee in their communications to the shareholders and the beneficial owners of the shares. This claim arises out of the delegation of the Board's power to the Litigation Committee by a resolution dated 26 April 2024¹³ which provides:

“..the Litigation Committee is authorized and empowered on behalf of the board to review, consider, make determination and approve or otherwise cause the company to take actions with respect to any matters relating to the Saba litigation or any other litigation relating to the Rights Plan or any other plan adopted by the Company...and with respect to any disputes, disagreements or other litigation with Saba or its representatives including (i) authorizing, managing and overseeing any matters relating to the litigation (ii) authorizing or approving any settlement of the litigation (iii) taking such actions in connection with the litigation...(iv) resolving, negotiating or taking action with respect to any dispute, disagreement or other litigation with Saba or its representatives...”

30. The petitioner alleges that the second and third respondents acting as the board members on the Litigation Committee have exceeded their authority by representing to the shareholders and beneficial owners of the shares in the information posted on the Company's SEC portal and circulated to shareholders that the Litigation Committee has the authority to propose an alternative slate of directors on behalf of the Company.

31. In this case, the board of the Company is in a state of deadlock and so a majority of the board is incapable of passing a resolution either to confirm or to revoke the delegation of its power. In those circumstances it seems to the Court that where the board itself cannot act it is at least arguable that a director has standing to seek relief from the Court to determine whether the members of the Litigation Committee have in effect usurped the authority of the board.

¹³ Page 174 of Exhibit PK 1 to the first affidavit of P Kazarian.

32. If the Court finds that the Litigation Committee has exceeded the true scope of its delegated powers, then it is open to the Court to grant the petitioner a declaration to that effect and, if necessary, to supplement the declaration by granting injunctive relief to restrain an improper use of the delegated power by the Litigation Committee.

Do the declaration claims in the petition raise serious issues to be tried?

33. The facts alleged by the petitioner give rise to a sufficient factual basis for the petitioner to seek the declaratory relief that second and third respondents acting as members of the Litigation Committee have exceeded the scope of their authority in making representations to the shareholders that the Litigation Committee has the delegated authority to propose an alternative slate of directors or that the Litigation Committee has the delegated authority of the board to support a purported requisition a meeting of the members to consider that alternative slate of directors.

34. The Court is satisfied that the matters raised by the petitioner are matters which are seriously arguable on the merits in the sense that the claims have a realistic prospect of success or the requisite degree of conviction¹⁴. The Court re-iterates that the Court is not now expressing any view on the ultimate merits of these claims.

The balance of justice

35. The Court is required to consider the balance of justice¹⁵ (otherwise referred to as the balance of convenience) when considering whether to grant interim injunctive relief.

36. The Court is satisfied that the balance of justice requires interim injunctive relief to be granted to prevent the second and third respondents (and their agents) from acting in breach of their duties as directors in relation to the Saba Requisition by purporting to represent the Litigation Committee of the board and using confidential information to influence the outcome of the vote at the Saba Requisition meeting and/or to promote the success of the

¹⁴ See *Athene Holding Ltd v Siddiqui et al* [2019] 3 at para 46 per Hargun CJ.

¹⁵ *Francome v Mirror Group Newspapers Ltd* [1984] 1 WLR 892 per Sir John Donaldson MR..

MJH Requisition pending a determination of the merits of the claims made by the petitioner for the following reasons:

- (i) If it is correct that section 74 limits the right of communication to the shareholders to the board, any communication by the Litigation Committee without express authorization of the board would be in breach of the terms of the section.
- (ii) If it is correct that on its true construction the delegation of authority to the Litigation Committee does not include the authority to make representations to the shareholders as to the merits of the resolutions proposed by the Saba requisitionists, then the Litigation Committee does not have the authority of the board. If so, the second and third respondents are wrongly holding themselves out as acting as duly authorized by the board to make representations to the shareholders under their mandate as members of the Litigation Committee when (if it is established otherwise) their delegated authority does not permit them to do so.
- (iii) The impact of the unauthorized communications by the Litigation Committee with the shareholders and/or beneficial owners of the shares in advance of the Saba Requisition meeting is likely to produce irreparable harm in terms of influence over how the shareholders may vote at the Saba Requisition meeting.
- (iv) If the second and third respondents are not restrained, the Litigation Committee are likely (on the basis of Mr. Kazarian's evidence) to confuse the shareholders as to what has or has not been authorized by the board. The potential consequences to the Company and/or its shareholders cannot be compensated by an award of damages¹⁶.
- (v) If it is correct that on their true construction the terms of the delegated authority to the Litigation Committee do not expressly or by implication authorize the Litigation Committee to promote or support the MJH Requisition, any representations that are

¹⁶ See **American Cyanamid v Ethicon Ltd** [1975] AC 396

made by the Litigation Committee in relation to the MJH Requisition would be without lawful authority, and would likewise be likely to produce an irreparable harm in terms of influence over how the shareholders may vote at the MJH Requisition meeting.

37. It is therefore appropriate and in the interests of justice for the second and third respondents in their capacities as the only board members on the Litigation Committee to be restrained from making further communications to the shareholders concerning the Saba Requisition meeting and the MJH Requisition meeting pending the determination of the *inter partes* hearing. In addition, the second and third respondents are ordered and directed to ensure that the other members of the Litigation Committee do not act in such a way as to breach the terms of the restraint set out above.

38. The Court is also satisfied that the steps taken by the Litigation Committee to make a filing of a proxy statement on the Company's SEC portal on 2 May 2025¹⁷ were inappropriate and pending the determination of this Court as to whether the Litigation Committee is properly authorized to make such a filing on behalf of itself or the board, the second and third respondents are ordered to cause that filing to be withdrawn by within two business days of the making of this Order¹⁸.

39. The Court takes into account in making these orders that the second and third respondents were unwilling to offer the Court any undertakings not to take such actions pending the *inter partes* hearing of the petitioner's application for injunctive relief, and considers that interim relief is therefore warranted in the meantime until that hearing can take place.

Procedural matters

40. RSC 102 rule 2 requires all applications for relief under the Companies Act 1981 (except for specific exceptions) to be made by way of Originating Summons and limits the matters where a petition is to be used to applications under sections 12, 47, 99, 261 (6) and 281 (2)

¹⁷ The documents referred to are exhibited to Kazarian 3 at PK3 pages 8 to 23.

¹⁸ See **Daniel v Ferguson** [1891] 2 Ch 27 and *dictum* of Lord McNaughten in **Colls v Home and Colonial Stores Ltd** [1904] AC 179, 193 cited in *Gee on Injunctions*.

apart from applications made in the winding up jurisdiction. Therefore, for the sake of conformity, the Court directs that the petition in this matter shall be conducted as if it had been issued as an Originating Summons and the relevant procedural rules that apply to Originating Summons procedure shall be followed hereafter (subject to the directions later given in relation to the determination of the *inter partes* application).

Service of the proceedings outside the jurisdiction

41. Although it is likely from the correspondence the Court has been provided with that the second and third respondents will instruct their Bermuda attorneys to enter an appearance and participate in these proceedings, for completeness it is appropriate for the Court also to deal with the formality of granting leave to serve the proceedings outside the jurisdiction on the second and third respondents (if need be) because no formal appearance has yet been entered.
42. The Court is satisfied that the Court has power to grant permission to serve the proceedings outside the jurisdiction on the second and third respondents under RSC Order 11 rule 1 (1) (d) (iii) and (ff) namely the claims relate to the interpretation of the bye laws of the Company which bind the Company, its shareholders and govern the exercise of the directors' powers and the claims are brought against persons who are directors of a company registered in Bermuda¹⁹.
43. For the reasons already summarized above under the heading of "serious issue to be tried", the Court is satisfied that the evidence discloses that there is a good cause of action in relation to the matters pleaded, again without expressing any view on the ultimate merits of the claims that have been asserted, and that this complies with the requirements of RSC Order 11 rule 4. Further, it is also plain for the reasons given above that Bermuda is clearly the most appropriate jurisdiction for the determination of the issues in this case.

¹⁹ See **Athene Holding Ltd v Central Laborers Pension Fund** [2019] Bda LR 48 at paragraphs 17-29 per Hargun CJ.

44. For the avoidance of any doubt, and in case the second and third respondents do not enter appearances, the Court hereby grants leave to the petitioner to serve the proceedings outside the jurisdiction upon the second and third respondents by any means that would constitute proper service under the laws of their respective places of residence, and to provide to them a period of 14 days from the date of service in which to enter an appearance to the proceedings in Bermuda.

***Ex parte* on notice**

45. The Court is also satisfied that reasonable steps have been taken to provide notice of the interim injunction application to the second and third respondents and to the Company in accordance with the practice direction and judicial guidance as to service of *ex parte* applications²⁰.

46. The Court is also satisfied that the circumstances warranted the application to be made as a matter of urgency in the light of the evidence that the Litigation Committee (of which the second and third respondents are members) filed solicitation materials in the US following the petitioner's attorneys giving notice of the application for interim relief to the respondents' attorneys in Bermuda²¹.

Conclusions

47. The terms of the preliminary interim relief are summarized below:

- (1) The Court grants the relief sought in the *ex parte* summons on a preliminary basis in the terms set out in paragraphs 1 and 2 of the *ex parte* summons pending an *inter partes* hearing of the application on the terms set out in (2) to (6) below.
- (2) The interim injunction Order shall be subject to the petitioner giving the Court the usual cross-undertaking in damages which is to be recorded in the recitals to the preliminary interim Order.

²⁰ PD No 6 of 2011 and **National Commercial Bank Jamaica Ltd v Olint Capital Corp** [2009] 1 WLR 1405

²¹ See paragraph 37 above.

- (3) The petitioner's application for an interim injunction pending the final hearing of the matter shall be adjourned to an *inter partes* hearing on Wednesday 21 May at 9.30 am and Thursday 22 May at 11.00 am for a one and a half day hearing.
- (4) The second and third respondents are ordered to withdraw the Schedule 14A information filing that was made on 2 May 2025 within two business days of the making of this Order pending the outcome of the *inter partes* hearing.
- (5) The second and third respondents are to file and serve any affidavits in response to the petitioner's application by close of business in Bermuda on Monday 12 May 2025. The petitioner is given leave to serve any evidence in reply (limited to responding to new issues raised by the respondents) by close of business in Bermuda on Thursday 15 May 2025. Skeletons to be filed and exchanged by close of business on Monday 19 May 2025.
- (6) The costs of the *ex parte* application are reserved.

Dated this 8 May 2025



THE HON. MR ANDREW MARTIN

PUISNE JUDGE