

RocaJunyent Informs

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**Judgement analysis: Court orders
to pay dividends to minority
shareholder**

Judgement of the Civil Chamber of the Supreme Court of 11 January 2023

This recent ruling was handed down in the context of a legal proceeding to claim the distribution of profits, brought by a minority shareholder. The Court recalls the requirements for challenging corporate resolutions that have been imposed abusively by the majority, and affirms that **the shareholder's right of separation in the event of non-distribution of dividends** recognised in Art. 348 bis of the Capital Companies Act (LSC) is **optional and compatible with other actions, such as challenging the resolution adopted with abuse of the majority**, so that the minority shareholder can opt for the legal action that best satisfies their claims.

The main interest of the Judgement lies in the full confirmation of the Provincial Court's decision to order the company to pay dividends at a certain percentage.

We shall see in detail:

In the words of the Supreme Court, **“when the court upholds the challenge to the company’s resolutions, leaving the shareholders’ meeting with no margin of discretion to adopt the appropriate resolution, there is no objection for the court declaring it, and it takes effect from then on”**.

- ❖ **The case examined by the Court:** The minority shareholder (49%) claims the nullity of the corporate resolutions on the allocation to voluntary reserves of all the positive results of two consecutive financial years, and requests that the profits be ordered to be distributed in full among the shareholders. The claim was dismissed at first instance, but **the Provincial Court of A Coruña partially upheld the appeal**, annulled the resolutions to apply the results of the two financial years and **ordered the company to distribute at least three quarters (75%) of the profits of each of the two financial years among the shareholders**.
- ❖ **The particularities of the case:** The plaintiff is a 49% shareholder who, in addition, had been a joint director with a monthly remuneration, until he was dismissed. The remaining share capital (51%) is held by the parent company of the corporate group to which the defendant company belongs. The parent company is indirectly controlled by the other joint director (and his son), who, as a member of the board of directors of the parent company, receives substantial annual remuneration. Furthermore, between the parent company and the subsidiary (the defendant) there were service and financing relationships which had led to an accumulated balance on the credit account in favour of the subsidiary against the parent company of more than EUR 2 million.
- ❖ **The Provincial Court’s arguments for upholding the appeal:** It considers that **the contested resolutions are abusive** because, although they do not cause any damage to the company, they are adopted for the benefit of the majority shareholder, to whom the reserves that the defendant company accumulates flow by way of financing, without guarantees or any pressure to return them, all to the detriment of the minority shareholder. At the same time, it takes into account that the majority shareholder knows that the termination of the minority shareholder as director places him in a completely different situation as he loses the monthly remuneration he has been receiving, **so that the duty of loyalty of the majority shareholder towards the minority shareholder is activated and takes on special significance**, and that **the continuation of the same policy of not distributing dividends that had been followed until now** (except in one financial year) **only benefits the dominant company and harms the minority shareholder, who is trapped in a closed company that does not distribute dividends and which uses its profits to finance the dominant company, in other words, the majority shareholder himself**. In short, it annuls the two company agreements to transfer all profits to voluntary reserves, on the grounds that they are abusively imposed by the majority shareholder, that they do not respond to a reasonable need of the company, and that they unjustifiably harm the minority shareholder.

❖ **The novelty of the Provincial Court's ruling ratified by the Supreme Court:**

In declaring the two corporate resolutions null and void, **the Provincial Court orders that the company's profits be distributed among the shareholders in a percentage of no less than 75%**, given that such a percentage criterion is the one that the shareholders' meeting had applied in a distribution of results in a previous financial year. In examining this legal issue—which is specifically contested in the appeal brought by the company—the Supreme Court takes as its starting point that the company's accumulated reserves more than guaranteed compliance with the obligations assumed in the refinancing agreement and that it was not necessary to further increase the reserves. It then recalls that for the **successful challenge of a corporate resolution imposed in an abusive manner by the majority, Art. 204.1 LSC requires the cumulative concurrence of three requirements:**

- a) The resolution does not meet a reasonable need of the company.
- b) The resolution has been adopted by the majority in its own interest.
- c) It causes unjustified prejudice to the other shareholders.

The reasonableness of the agreement, according to the Court, is justified in that it is necessary from the perspective of the company's collective interests, and it states that the **minority shareholder cannot be deprived of the logical return derived from the profits obtained by the company without there being a reasonable need to justify it.**

The novelty of the Supreme Court's Sentence lies in how it resolves the **inexcusable intervention of the general shareholders' meeting in order for the right of credit to the dividend to arise in favour of the shareholders against the company, without this implying that the court has supplanted the sovereign will of the shareholders' meeting.**

The Supreme Court interprets that the **Court understands that the right to receive the dividend has been established because, in the case in question, the nullity of the agreement to allocate all the profits obtained by the company to reserves means that the only legal alternative regarding the application of results, i.e. the distribution of dividends, is understood to have been approved.** In other words, since the alternative of applying all profits to reserves is null and void and ineffective, the only option left is to distribute dividends. The Supreme Court argues that the LSC conceives the approval of the annual accounts and the distribution of profits as a joint activity, in which the latter is a consequence of the former, as can be deduced from the fact (i) that the approval of the accounts and the distribution of profits are compulsorily part of the content of the ordinary shareholders' meeting; (ii) that the directors are obliged to draw up the annual accounts together with the proposed appropriation of profits, which must be resolved in accordance with the approved balance sheet; and (iii) that both the accounts and the resolution on the appropriation of profits must be filed with the Commercial Register (Articles 164, 253.1, 273.1 and 279.1 LSC).

In short, according to the Supreme Court, in cases such as the one under examination, the **effective judicial protection of the minority shareholder would be negatively affected if the court's ruling were limited to upholding the challenge to the resolution and rendering it ineffective, insofar as the legitimate satisfaction of the minority shareholder's rights recognised by the ruling would depend on the shareholders' meeting, controlled by the majority shareholder.**

It seems that, in certain cases, a new way has been opened to ask the courts to order the company to pay dividends, when the agreement not to distribute them is declared null and void, as it has been adopted in an abusive manner by the majority shareholders to the detriment of the minority shareholders. We shall see if this criterion of the Supreme Court is consolidated.