

SOUTH AFRICA / JUDGMENT

Langeni and Another v South African Women In Mining Association and Others (27669/2022) [2023] ZAGPJHC 1309 (10 November 2023)

[2023] ZAGPJHC 1309**COURT**

South Gauteng High Court, Johannesburg

BEFORE

ML Senyatsi

CASE / FILE NUMBER

27669/2022

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Source record**FLYNOTES:**

COMPANY – Director – Removal –
Conflict
arising with provincial branch and applicants accused of taking
sides – Summarily removed as directors at board
meeting –
Removal related to infighting and animosity within board –
Not dereliction of duty, incapacity or serious
misconduct against
company – Such removal not what legislature envisaged in
section 71(3) of Companies Act –
No prejudice to SAMIWA has
been established on papers because of alleged conduct of
applicants – Removal was unlawful
and invalid –
Decision of board purporting to remove applicants set aside –
Applicants reinstated with immediate
effect – Companies Act
71 of 2008, s 71.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, JOHANNESBURG
Case Number: 27669/2022
In

the matter between:

NOLUTHANDO
LANGENI
First Applicant
KATLEGO
RATHEBE-MATHOLE
Second Applicant
and
SOUTH
AFRICAN WOMEN IN MINING
ASSOCIATION
Respondent
VICTORIA
SEHAKE
Second Respondent
MASIKINI
SITHOLE
Third Respondent
PATRICIA
MAHIWA
Fourth Respondent
FEZEKA
MAVUSO
Fifth Respondent
MABEL
PHOOKO
Sixth Respondent
INNOCENT
MATHONSI
Seventh Respondent
FASKEN
ATTORNEYS
Eighth Respondent

JUDGMENT

Senyatsi J:

Introduction

- [1] This is an opposed application in terms of which the applicants pray for the intervention of this Court to set aside their removal as the directors of the first respondent by its board of directors, which allegedly took place on 2 December 2022. The applicants also seek reinstatement as directors of the first respondent with immediate effect. The applicants also seek other ancillary relief. The first applicant has been a board member of the first respondent since 1999 and represents the Kwa-Zulu Natal structure of the first respondent. She was the chairperson of the board of SAMIWA at the time of removal.

Background

- [2] The South African Women in Mining Association NPC (SAMIWA), cited herein as the first respondent, consists of nine provincial branches, and has a national structure which is run by a board of directors of which the applicants are the erstwhile members. SAMIWA also has provincial board of directors' structure. It has investments in the mining sector and promotes women with investment in mining related businesses. It is an exclusively women non-profit company focused on previously disadvantaged women. The second to seventh respondents are the current directors of SAMIWA.
- [3] The events leading to the removal of the applicants as board members are as follows. The conflict started at the Eastern Cape Branch of SAMIWA when it sought to hold the board accountable on certain things the branch was not satisfied with during April 2022. This led to tensions within SAMIWA. On 3 November 2023 the Eastern Cape Branch was prevented from attending the Annual General Meeting (the AGM) of SAMIWA. A court order interdicting SAMIWA from preventing the Eastern Cape Branch from attending the AGM was served by the Sheriff of Court. The first applicant accepted the service and this acceptance, together with the fact that she had attended the AGM of the Eastern Cape Branch as well as the alleged failure to carry out a board instruction for not availing herself to complete the verification of SAMIWA members attending the AGM, seems to be the beginning of the efforts to have the applicants removed as directors.
- [4] On 15 November 2022, the board of SAMIWA convened a special board meeting to discuss various issues including the briefing following the annual general management meeting (GGM) in Johannesburg. Amongst the issues on the agenda was the dispute between the SAMIWA, the other respondents and SAMIWA's provincial executive committee of Eastern Cape. The applicants were accused of taking sides with the provincial executive committee of the Eastern Cape with the intent to destabilise the meeting as well as failing to fulfil their fiduciary duties to assist the board to process credentials of members in the AGM. The applicants were summarily removed as directors at the board meeting of 15 November 2022.
- [5] On 22 November 2022 the applicants were served with notices of removal in terms of section 71(4)(b) of the Companies Act, 71 of 2008 (the Companies Act). The notice set out the sections upon which the applicants were sought to be removed by the SAMIWA board and afforded the applicants an opportunity to make representations before the board on 2 December 2022.

Contentions

- [6] The applicants contend that their removal as board members of SAMIWA was substantially and procedurally unlawful due to the following reasons —
- a. The allegations against them had nothing to do with the alleged breach of their fiduciary duties as directors of SAMIWA.

- b. They complied with the instructions of the board of SAMIWA to assist with the verification of members of SAMIWA's credentials at the AGM.
- c. The notices do not comply with section 71(4)(b) of the Companies Act.
- f. Whether the court can review the decision of the board to remove the applicants directors under the circumstances where the applicants did not attend the meeting on 2 December 2022 and failed to provide the board with any response to the section 71(4) notice.

Legal Framework

[9] Sections 71(1) and 71(2) of the Act read as follows —

"71. Removal of Directors

- (1) Despite anything to the contrary in the company's Memorandum of Incorporation of rules, or any agreement between a company and a director, or between any shareholder and a director, a director may be removed by an ordinary resolution adopted at a shareholder meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).
- (2) Before a shareholder of a company may consider a resolution contemplated in subsection (1)
 - (a) The director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and
 - (b) The director must be afforded a reasonable opportunity to make a presentation in person, or through a representative, to the meeting, before the resolution is put to a vote.
- (3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company—
 - (a) has become—
 - (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or
 - (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or
 - (b) has neglected, or been derelict in the performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.
- (4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given—

- (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with

sufficient specificity to reasonably permit the director to prepare and present a response; and

- (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote."

- [10] The fiduciary duty which a director owes to his company is the cornerstone of our company law[1]. In *W E Deane SA (Pty) Ltd v Alborough and Others*[2] it was held as follows—

"The allegations of breach of fiduciary duties are serious, but one must remember that, at an exception stage, a court is bound by the factual allegations contained in the pleading excepted against. A court must then consider whether, on the facts pleaded, a course of action had been made out. See Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd 1990

- (4) SA 749 (N)."

- [11] It is a well-established rule of company law that directors have a fiduciary duty to exercise their powers in good faith and in the best interests of the company.[3] They may not make a secret profit or otherwise place themselves in a position where their fiduciary duties conflict with their personal interests.[4] A consequence of the rule is that a director is in certain circumstances obliged to acquire an economic opportunity for the company, if it is acquired at all.[5]

- [12] The director's duty is to observe the utmost good faith towards the company, and in discharging that duty she is required to that end and judgement to take decisions according to the best interests of the company as his/her principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but in carrying out his duties and functions as a director, he is in law, obliged to serve the interests of the company to the exclusion of any such nominator, employer or principal.[6]

- [13] Consequently, the allegation that a director has breached his fiduciary duties duty must be founded on the correct facts. The breach of fiduciary duty normally involves a director seeking to personally benefit at the detriment of the company. The present case does not involve any of the usual allegations substantiated by the facts to support them.

- [14] In *Breetzke NO and Others v Alexander and Others*[7] in restating the principles pertaining to a liability for breach of fiduciary duty the court held that —

"Our law has always imposed fiduciary duties on certain persons requiring them to act in good faith when dealing with the affairs of other people that have been entrusted to them. Examples are a trustee, executor, guardian or director of a company. The principle is discussed earlier in para 10 of this judgment. The fiduciary must place the interests of the other party to whom the duty is owed before their own. While many breaches of fiduciary duty involve dishonesty, that is not always the case. Nonetheless, any departure from the path of rectitude that such a duty imposes will be visited with

personal liability. The importance of such duties is emphasised by the fact that several statutes concerned with financial issues impose duties of good faith”.[8]

- [15] The pleaded facts by the respondents as the grounds for removing the applicants as directors of SAMIWA have not, in my view, made out a case for either breach of fiduciary duty, incapacity or related misdemeanours contemplated by section 71 of the Companies Act, by the applicants. Holding a meeting as a national chairperson of SAMIWA with the Eastern Cape branch of SAMIWA cannot, in my view, amount to an infraction serious enough to warrant removal. I am alive to the fact that the first applicant resisted, as she was entitled to, the advice by SAMIWA’s legal representative not to attend the meeting. As a national chairperson, the first respondent was entitled to attend.

Whether the decision of the board to remove the applicants was based on malice

- [16] Section 76(3) (a) of the Companies Act does not only state that the directors must act in good faith, but also that they must exercise their powers and perform their functions for a proper purpose. This duty is also a common law duty. “Proper purpose” has not been defined in the Act but at common law, it is taken to mean that directors must exercise their powers for the objective purpose for which the power was given to them, and not for a collateral or ulterior purpose. While the duty of good faith is subjective, the test for proper objective is objective. [9]

- [17] The purpose of the power given to directors under section 71(3) of the Companies Act to remove a director from office is to empower the board of directors to remove from office a director whom it has determined to be negligent or derelict. A director must vote for or against the removal of a director for this purpose only and not for an ulterior purpose. In voting on a removal resolution a director must consider whether, objectively, the impugned director has contravened any of the grounds mentioned in section 7(3) of the Companies Act.

Whether failure to approach the Court in terms of sections 71(5) of the Companies Act is fatal to the applicants’ case

- [19] Section 71 deals with the removal of a director. Section 71(5) of the Companies Act provides as follows—

“If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board ”

It is evident from the language of the section that the applicant needs to approach court within 20 days of the determination that the director is ineligible or disqualified from his or her office of directorship.

- [20] In *Wait v Marais*[10], the Court held as follows regarding the provisions of section 71—

“According to the respondents it is not clear what would constitute sufficient specificity as envisaged in section 71(4)(a) of the Act. They submitted, relying heavily on the decision of the Western Cape High Court in Pretorius v PB Meat (Pty) Ltd [2013] ZAWCHC 89, that a director is only entitled to “limited information”.

They expressed the tentative view that the review of the board’s decision provided for in section 71(5) which is at issue in this matter, is limited to “enquiring into the procedural correctness of the decision and not the substance of the decision”. They concede, however, in the same breath that “an argument may be made that a court reviewing the decision of the board of directors under section 71(5) of the Companies Act would ... be empowered to consider both the merits and the procedural aspects of the decision”.

The wording of some of the parts of section 71 gives rise to a measure of confusion. This is particularly so in respect of the use of the terms ‘neglect’ and ‘negligence’ in subsection (3). The offending conduct set out in subsection (3) is that the affected director allegedly “has neglected ... the functions of a director”. At the same time a determination that the director was “negligent” is required for his or her removal. The latter is confirmed by subsections (5) and (6). The terms ‘neglect’ and ‘negligence’ are not synonymous. In the context of subsection (3) the word ‘neglect’ is used as a verb. Negligence on the other hand is an element of fault. It is not immediately apparent whether the term ‘negligence’ imports

a further jurisdictional fact for removal into section 71 thus requiring the board to determine firstly, whether or not the director neglected his or her functions and secondly, whether or not this was due to negligence on his or her part. The alternative is that these two terms refer to the same state of affairs in that neglect incorporates an element of negligence and that the board is only required to undertake one determination to ascertain whether the director’s neglect was blameworthy.

Similar conundrums arise with regard to the requirement that the director should have “been derelict in the performance of the functions of director”. The term “derelict” is not defined in the Act. It is also not immediately apparent in this regard what degree of fault is required in order for conduct to amount to being ‘derelict’ in this context. Is negligent conduct sufficient or is a higher degree of fault required such as intent or recklessness. Some authors suggest that if negligence would suffice it is superfluous to refer to both negligence and dereliction of duties in section 71. This implies that a higher form of fault than negligence is required in respect of dereliction of duties (cf Henochsberg on the Companies Act 71 of 2008 General note on s71).”

[21] Section 186 of the old Companies Act 61 of 1973 provides thus—

“186 Notice of meetings and resolutions

(1)

- (a) Unless the articles of a company provide for a longer period of notice, the annual general meeting or a general meeting called for the purpose of passing a special resolution may be called by not less than twenty-one clear days' notice in writing and any other general meeting may be called by not less than fourteen clear days' notice in writing. (b) Any provision in the articles of a company providing for a shorter period of notice, not being of an adjourned meeting, shall be void.
- (2) Notwithstanding the provisions of subsection (1), a meeting of a company shall be deemed to have been duly called- (a) in the case of a meeting which is called on a shorter period of notice than is prescribed in that subsection or provided for in the company's

articles, if it is so agreed, before or at the meeting, by a majority in number of the members having a right to attend and vote at the meeting who hold not less than ninety five per cent of the total voting rights of all the members of the company; or (b) in the case of a meeting in respect of which notice as contemplated in subsection

- (1) (a) has not been given, if it is so agreed in writing, before or at the meeting, by all the members of the company.
- (3) No resolution of which special notice is required to be given in terms of any provision of this Act shall have effect unless notice of the intention to move it has been given to the company not less than twenty-eight days before the meeting at which it is moved, and the company shall give its members notice of any such resolution at the same time, and in the same manner as it gives notice of such meeting, or, if that is not practicable, either by advertisement in a newspaper having an appropriate circulation or in any other manner allowed by the articles of the company, not less than twenty-one days before the meeting: Provided that if a meeting of the company is called for a date twenty-eight days or less after notice of the intention to move such a resolution has been given to the company, the notice, though not given within the time required by this subsection, shall be deemed to have been properly given for the purposes thereof.”

[22] The current articles of SAMIWA do not provide for any longer period and therefore the provisions of section 186 of the Old Companies Act apply.

[23] The animosity that persisted within the board as a result of the issues related to the Eastern Cape Branch are evident and, in my view, the decision to remove the applicant had little to do with dereliction of duty, incapacity or for that matter any serious misconduct against the company but was related to the infighting. This is not what the legislature envisaged in section 71(3) of the Companies Act. Further, no prejudice to SAMIWA has been established on the papers because of the alleged conduct of the applicants. Accordingly, I am of the view that the removal was unlawful and therefore invalid.

[24] When the resolution was passed on 15 November 2022, there was no notice given to the applicants for their removal as directors. This is so because when the special meeting of SAMIWA board was called on that day, the applicants were accused of taking sides with the

Eastern Cape members of SAMIWA. The notices were belatedly served on them on 22 November 2022 as a way of circumventing the non-compliance with section 71 as well as the notice period required by section 186 of the Old Companies Act concerning special resolutions. I hold the view that failure to comply with the requirements of the section renders the notice invalid.

- [25] I also need to consider whether a chairperson needs the board's authority to communicate with other members of SAMIWA. This is in the context of the office the first applicant held as a national chairperson of SAMIWA prior to stepping down. Put differently, does a board chairperson require a resolution permitting her to communicate with the structures of the company she represents. In my considered view, the answer to the question should be an emphatic not/no. It cannot be expected of a chairperson of a board to seek a board resolution allowing that chairperson to engage the structures of the company she presides over as a chairperson. Removing a director from the board on that ground is grossly improper. It cannot be denied that removal on such flimsy a ground has an adverse impact on the integrity and future directorship of the person affected by such removal.
- [26] It is evident from the language used in section 71 of the companies Act that what should trigger the board to remove a director must be something serious enough to warrant such removal such as dishonesty, criminal behaviour, breach of fiduciary duty of the director to the company. If regard is had to the grounds set out in the notice for their removal, neither of the reasons set out in the notice related to the functions of a director and as already alluded to before, no prejudice suffered by SAMIWA has been established. Unlike the removal from the board at the behest of the shareholder whom the director represents at the board which requires no reasons, removal from the board by fellow directors have to be on justifiable grounds.[11] The director, if removed by the board, must be provided with reasons for the removal and be afforded an opportunity to do state why she/he should not be removed.[12]

Are the applicants entitled to have the matter reviewed outside of the 20 days' notice required by section 71?

- [27] The respondent contended that the application for review should not be entertained because it was launched after the 20-day period as prescribed by section 71 of the Companies Act. They contend that the application for review of the determination could not have been launched prior to 2 December 2022 which was the actual date of removal and not 15 November 2022 as contended by the applicant. The latter date, so the argument continues, was a date of resolution to commence the steps to remove them and that the removal took place after an urgent court application was launched by the applicants.
- [28] The defence as raised by the respondents is of a technical nature and in exercise of the court's discretion, it will not be in the interest of justice not to entertain the merits of the application simply because the filing of the application was out of time. In any event, the litigation that has been pursued by the applicants had started way before the removal.

Reviewability of the board's decision to remove the director.

- [29] The respondents in the instant case contend that the board's decision to remove the applicants cannot be reviewed.
- [30] It is simply not enough to accuse a sitting director of not manning a station at an annual general meeting of the company. In fact, and in practice, such mundane functions are reserved to the staff of the secretariate of any company. It would be an unfortunate era in our company law if our courts were to turn a blind eye at the removal of a director based on pleaded facts which do not support removal as envisaged in section 71(3) of the Companies Act and not allow the merits of removal to be debated simply because, as contended by SAMIWA, there was nothing fundamentally and procedurally wrong with the removal.
- [31] In my view, there is more to the removal than the reasons set out in the notice to the applicants. It is evident that there are disagreements within SAMIWA based on the corporate governance issues related to financial accountability within the board members. This can be discerned from the papers filed of record. Accordingly, I hold the view that the applicants have made out a case.

Order

[32] I accordingly make the following order:

- (a) The decision of the board of directors of the first respondent taken, at the meeting of the board, on 2nd December 2022 purporting to remove the applicants as directors of the first Respondent is set aside.
- (b) The applicants are reinstated as Directors of first respondent with immediate effect.
- (c) The first to seventh respondents are ordered to disclose, to the applicants, information in respect of all financial activities related to the accounts held by, for or on behalf of the first respondent or in relation to any financial activities purportedly carried for or in relation to the funds of the first respondent.
- (d) The first to seventh respondents are directed to commission an independent forensic investigation into all financial activities related to the accounts held by, for or on behalf of the first respondent or in relation to any financial activities purportedly carried for or in relation to the funds of the first respondent.
- (e) The second to seventh respondents are ordered to reimburse all the monies which were illegally paid from the first respondent's budget by the respondents to any other party and/or company or persons or entity outside the ordinary business of the first respondent.
- (f) The first to seventh respondent are ordered to pay the costs of this application.

ML SENYATSI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Appearances:

For the applicant:

Adv T Ngcukaitobi SC and Adv P Managa

Instructed by Mabuza Attorneys

For the first respondents: Adv H Smith SC and Adv L Nyangiwe

Instructed by Rams Attorneys

[1] Section 76 of the Companies Act which provides that the director must act in the best interest of the company.

[2]

[2022] ZAGPPHC 531 (20 July 2022)

[3] Da Silva and Others v C H Chemicals (Pty) Ltd (304/2007) [2008] ZASCA 110; 2008 (6) SA 620 (SCA) [2009] 1 All SA 216 (SCA) (23 September 2008) para 18.

[4] Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 177).

[5] Da Silva footnote 3 above.

[6] Fisheries Development Corporation of SA Ltd and Another v AWJ Investments Pty Ltd 1980(4) SA 156 (WLD) at 163E

[7] [2020] ZASCA 97 (2 September 2020) at para 36.

[8] Companies Act 71 of 2008, sections 75000000">-77; Financial Institutions (Protection of Funds) Act 28 of 2001, section 2.

[9] Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others 2014(5) SA (WCC) at para 80

[10] [2022] ZAECOBHC at para 41 (1 November 2022)

[11] Section 71(1) of the Companies Act which requires removal by shareholders through an ordinary resolution.

[12] Pretorius and Another v Timcke and Others (15479/14) [2015] ZAWCHC 215 (2 June 2015).

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