

SOUTH AFRICA / JUDGMENT

Mawerco (Pty) Ltd v Sithole and Others (322/2023) [2024] ZASCA 91 (10 June 2024)

[2024] ZASCA 91

COURT

Supreme Court of Appeal

BEFORE

Ponnan, Matojane, Kgoele, Dawood, Baartman

CASE / FILE NUMBER

322/2023

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 322/2023

In the matter between:

MAWECRO (PTY) LTD

APPELLANT

and

JABULANI LIGHTER SITHOLE

FIRST RESPONDENT

ISAAC MYOMO NITWANE SECOND RESPONDENT

ETIENNE JACQUES NAUDE THIRD RESPONDENT

JOHANNES PETRUS KOEKEMOER

FOURTH RESPONDENT

JOHANNES LODEWYK BOUWER

FIFTH RESPONDENT

MAWEWE COMMUNAL PROPERTY ASSOCIATION SIXTH RESPONDENT

Neutral citation: Mawecro (Pty) Ltd v Sithole and Others (322/2023)

[2024] ZASCA 91 (10 June 2024)

Coram: PONNAN, MATOJANE and KGOELE JJA and DAWOOD and BAARTMAN AJJA

Heard: 22 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 10 June 2024.

Summary: Challenge to decision to remove directors – on the facts declaratory relief without review not competent.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Roelofse AJ sitting as court of first instance).

1 The appeal is upheld with costs such costs to include those of two counsel, where so employed.

2 The order of the court below is set aside and replaced with the following:

'The application is dismissed with costs, including those of two counsel where so employed.'

Baartman AJA (Ponnan, Matojane and Kgoele JJA and Dawood AJA concurring):

[1] The appellant, Mawecro (Pty) Ltd (the company) is a joint venture. It has two shareholders, the sixth

respondent, Mawewe Communal Property Association (the Association) and Crooks Brothers Limited. The latter holds a 49% share in the company while the Association holds 51% of the shares. Their relationship is governed by a Shareholders' Agreement which, in clause 10.1.1,[1] provides that each shareholder may appoint three directors to the company's board as representatives of the respective shareholder, while clause 10.1.2 provides for the removal of said directors.[2]

[2] Acting in terms of the Shareholders' Agreement, the Association appointed Mr Sithole (the first respondent) and Mr Nitwane (the second respondent) as directors of the company. The Association subsequently resolved that they be removed as directors of the company. Both Messrs Sithole and Nitwane thereafter approached the high court seeking declaratory relief, under case numbers 714/2021 and 715/2021 respectively. The applications were heard together and succeeded before Roelofse AJ in the Mpumalanga Division of the High Court, Mbombela (the high court), which granted the following order:

'1. The removal of Mr. Jabulani Lighter Sithole ("Mr. Sithole) as Director and Chairperson of Mawecro (Pty) Ltd ("the company") is hereby set aside;

2. The removal of Mr Isaac Myomo Nitwane (“Mr Nitwane”) as Director of the company is hereby set aside;
3. The company is ordered to pay the directors’ fees of Mr Sithole and Mr Nitwane from March 2020 to date of this judgment, such payment to be effected to Mr. Sithole and Mr. Nitwane within 30 days of this order;
4. All meetings of the reconstituted Board from March 2020 to date of this judgment are declared unlawful;
5. The company is ordered to pay the applicants’ costs.’

The appeal by the company against that order is with leave of the high court.

- [3] The application to the high court arose against the following backdrop: Infighting in the Association led to an urgent application by the chieftainess, Ms Mkhathswa and the Mawewe Tribal Authority and followed by the grant of an Anton Piller Order, dated 4 February 2020, in the following terms:

‘Interim Interdict

28. Pending the further proceedings to be instituted by the applicants not more than 180 days from the execution of this order, which further proceedings are foreshadowed in this application, it is ordered that:

28.1. the current committee of the Mawewe Communal Association is dissolved with immediate effect;

28.2 no person other than the persons appointed in prayer 28.3 below, may conduct the affairs of the Mawewe Communal Property Association, or hold themselves out as being authorised to conduct the affairs of the Mawewe Communal Property Association.

28.3. that the following persons are appointed to take control of all affairs of the Mawewe Communal Property Association, and to report back to this Court on the affairs of the Mawewe Communal Property association within 180 days of the date of the execution of this order:

28.3.1. Mr Johannes Lodewyk Bouwer

28.3.2. Mr Johannes Petrus Koekemoer

28.3.3. Mr Etienne Jacques Naude. . .’

- [4] On 10 March 2020, the high court confirmed the Anton Piller order and granted the following additional relief:

‘3. Pending the further proceedings to be instituted by the applicants not more than 120 days from the execution of the order. . .it is ordered that:

3.1. the current committee of the Mawewe Communal Property Association (eighth respondent) has dissolved on 4 February 2020;

3.2. no person other than the persons appointed in prayer 3.3 below, may conduct the affairs of the Mawewe Communal Property Association, or hold themselves out as being authorised to conduct the affairs of the Mawewe Communal Property Association;

3.3. that the following persons are appointed to take control of all the affairs of the Mawewe Communal Property Association and to report back to this court. . .within 90 days of the date of execution of this order;

3.3.1 Mr Johannes Lodewyk Bouwer [the fifth respondent];

3.3.2 Mr Johannes Petrus Koekemoer [the fourth respondent];

3.3.3 Mr Etienne Jacques Naudè [the third respondent] who shall at all relevant times and in conjunction with and in agreement with Mr Justus van Wyk.'

[5] On 13 March 2020, three days after the grant of the order, the Association's management, represented by Messrs Naudè, Bouwer and Koekemoer, who had been appointed in terms of the court order dated 10 March 2020, resolved as follows:

'1. That [first respondent] and [second respondent] be removed as Directors of Mawecro Farming (Pty) Ltd. with immediate effect.

2. That Etienne Jacques Naudè, Johannes Lodewyk Bouwer and Justus van Wyk be appointed as Directors to represent Mawewe Communal Property Association as Directors to represent Mawecro Farming (Pty) Ltd.'

[6] The first and second respondents, aggrieved by their removal, approached the high court seeking the following declaratory relief:

'1. Setting aside the suspension of the Applicant as director and Chairperson of Mawecro (Pty) Ltd;

2. Re-appointing the Applicant director and chairperson of the Fifth Respondent with immediate effect;

3. The Fifth Respondent to pay all director fees due to the Applicant for the period dating from March 2020, to date within 30 days;

4. The meetings that were held before, during and after the removal of the Applicant were not properly constituted and are declared unlawful. . . '

[7] The respondents did not seek to review or the setting aside of the decision to remove them, nor did they specify precisely which of the decisions they sought to impugn. In *Oudekraal Estates (Pty) Ltd v City of Cape Town*,^[3] this Court confirmed that a decision stands until reviewed and set aside. Without reviewing and setting aside the impugned decision(s),

in particular that of the Association removing them as directors, for which no proper case had been made out, the application had to fail. On appeal, it was suggested, on the respondents' behalf, that it was unclear to the respondents when the application had been launched, which decisions were susceptible to review, including the dates when those decisions had been taken, and by whom. Rule 53 of the Uniform Rules of Court caters for precisely such a situation; however instead of employing rule 53, the respondents confined themselves to declaratory relief.

[8] The high court approached the matter on the basis that s 71 of the Companies Act 71 of 2008 provides for the removal of directors and since that process was not followed, the respondents were entitled to declaratory relief. However, that misconceived the enquiry. The respondents served as directors of the company – as the representatives of the Association. The resolution of the Association had not been challenged. The adoption of the resolution had the effect that the respondents could no longer serve as directors of the company. It follows that the relief granted by the high court cannot stand and falls to be set aside on appeal.

In the result:

1 The appeal is upheld with costs such costs to include those of two counsel, where so employed.

2 The order of the court below is set aside and replaced with:

E BAARTMAN

ACTING JUDGE OF APPEAL

Appearances

For the appellant: J de Beer SC with A Van Dyk Instructed by: WDT Attorneys, Mbombela Honey Attorneys, Bloemfontein. For the first and second respondents: S Van Rensburg SC Instructed by: S Tsotetsi Attorneys, Middleburg Mavuya Attorneys Inc, Bloemfontein.

[1] Clause 10.1.1 of the Shareholders' Agreement states as follows: 'each SHAREHOLDER holding more than 45% (forty-five percent) of the voting rights of the COMPANY shall have the right to appoint 3 (three) DIRECTORS to the BOARD. . . '.

[1] Clause 10.1.1 of the Shareholders' Agreement states as follows:

'each SHAREHOLDER holding more than 45% (forty-five percent) of the voting rights of the COMPANY shall have the right to appoint 3 (three) DIRECTORS to the BOARD. . . '.

[2] Clause 10.1.2 of the Shareholders' Agreement provides as follows: 'the SHAREHOLDERS will be entitled to remove any of their representative appointees to the BOARD and to replace any such DIRECTOR who is removed or who ceases for any other reason to be a DIRECTOR. . . '.

[2] Clause 10.1.2 of the Shareholders' Agreement provides as follows:

‘the SHAREHOLDERS will be entitled to remove any of their representative appointees to the BOARD and to replace any such DIRECTOR who is removed or who ceases for any other reason to be a DIRECTOR. . .’.

[3] Oudekraal Estates (Pty) Ltd v City of Cape Town and Others

[2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) para 26.

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