

SOUTH AFRICA / JUDGMENT

Pityana v ABSA Group Limited and Others [2023] ZAGPPHC 342; 2024 (1) SA 491 (GP) (10 May 2023)

[2023] ZAGPPHC 342

COURT

North Gauteng High Court, Pretoria

BEFORE

M Snyman, AJ

CASE / FILE NUMBER

64258 / 2021

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FLYNOTES:

CIVIL PROCEDURE – Review – Record – Uniform Rule
53(4) – Removal as director – Applicant
seeking to
review removal in terms of section 71(5) of the Companies Act 71
of 2008 – Argued that utilising Rule 53 to review a decision
of the board an irregular step – Rule 53 is available to an
applicant for review under section 71(3) as read with section
71(5) of the Companies Act.
GAUTENG DIVISION,
PRETORIA
CASE NUMBER: 64258 / 2021
1)
REPORTABLE: YES/NO
2)
OF INTEREST TO OTHER JUDGES: YES/NO
3)
REVISED: YES/NO
DATE: 10 May 2023

In the matter between : SIPHO MILA PITYANA
Applicant
And
ABSA GROUP
LIMITED
First Respondent
ABSA BANK
LIMITED
Second Respondent
PRUDENTIAL
AUTHORITY
Third Respondent
This
Judgment was handed down electronically by
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The date and time for the hand down is deemed to be 10 May 2023

JUDGMENT

M Snyman, AJ

Introduction

- [1] This application is related to and was argued together with the matter under case number 53829/2021. However, I will deal with the matters separately in handing down judgment. I shall term this application the “Rule 30 application”. The first and second respondents, (which I shall refer to collectively as “ABSA Bank”) brought an interlocutory application, generally, to declare that utilising rule 53 to review a decision of the board of ABSA Bank, an irregular step and set it aside.
- [2] In the main application that I do not need to consider, Mr Pityana seeks to review and set aside the decision of the board of ABSA Bank to remove him as a non – executive director. The main application is pursued in terms of section 71(5) of the Companies Act 71 of 2008 (“the Companies Act”).
- [3] In the Notice of Motion to the main application, Mr Pityana calls upon ABSA Bank to dispatch the record of decision in terms of Uniform Rule 53(4). It is not disputed that Mr Pityana made use of the provisions of Rule 53 and the procedures provided by it in the main application which will result in ABSA Bank being obliged to deliver the record of the proceedings and reasons for the decision to Mr Pityana.
- [4] In his heads of argument, Mr Loxton SC with Me Milovanovic-Bitter, appearing for ABSA Bank, summarised ABSA Bank’s approach as follows:

“Absa contends that Mr Pityana’s approach is irregular and that Rule 53 does not apply to an application in terms of section 71(5) of the Companies Act. On the proper interpretation of section 71(5), the review of the Board’s decision is limited to compliance with the provisions of section 71 of the Companies Act, because a Court will not interfere in the business judgment by a board of directors of a company – unless, of course, it finds that the board failed to act in the best interests of a company, or that the directors’ conduct falls short of the standards set out in section 76 of the Companies Act, or the common law.”

[5] Mr Subel SC with Me N Stein, who appeared for Mr Pityana argued in general that rule 53 is applicable due to the matter being a review.

[6] The relevant part of the reasons why ABSA Bank claims that utilising Rule 53 constitutes an irregularity are contained in the Rule 30 notice, which reads as follows:

“2. In the applicant's Rule 53 review application, the applicant seeks to review the decision of the boards of the first and second respondents to remove him as a director in terms of section 71(5) of the Companies Act, 2008.

3. However, the decision by the boards of the first and second respondents to remove the applicant as a director does not constitute

the performing of a judicial, quasi-judicial or administrative function. Consequently, Rule 53 does not apply.

4. The applicant's Rule 53 review application is therefore an irregular step, alternatively is non-compliant with the Rules.”

[Emphasis added]

[7] In the notice of motion, the relevant relief sought is set out as follows:

“1. Declaring that the respondent's review application dated 21 December 2021("the review application") constitutes an irregular step, alternatively is not in compliance with the Rules insofar as it invokes the provisions of Uniform rule 53 of the Uniform Rules of Court;

2. Setting aside, alternatively striking out that portion of the Notice of Motion in the review application which invokes the provisions of Uniform rule 53;

3. Ordering the respondent to pay the costs of this application, including the costs of two counsel;”

[8] The first question raised is whether Rule 53 of the Uniform Rules of Court applies to review proceedings as contemplated in the section 71(5) Companies Act.

[10] Before dealing with the interpretation of the provisions of the Companies Act and the purpose of providing a record in general, I need to deal with some of the arguments raised by the parties which will place the matter into perspective. I will deal with the issues raised, but not necessarily under a separate heading.

[11] Mr Pityana in the answering affidavit to the Rule 30 inter alia claims that the decision is administrative action as contemplated in the Promotion of Administrative Justice Act 2 of 2000 (“PAJA”),

and the application is subject to the provisions thereof. I need to address this issue first.

Administrative action or not

[12] First of all, for the decision by a board or shareholders to remove a director to be administrative action the definition of the PAJA needs be investigated. The definition reads as follows:

“any decision taken, or any failure to take a decision, by—(a) an organ of state, when-

- (i) exercising a power in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ or state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights

of any person and which has a direct, external effect. . . .”

[Emphasis added]

[13] In *Minister of Defence and Military Veterans v Motau and Others*[1] the Constitutional Court identified seven requirements of the definition of an administrative action as set out in PAJA:

“there must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions’.

[14] For the purposes of the current matter I will accept that the decision adversely affects the rights of any person and has a direct, external effect. It is also clearly a decision by a juristic person and does not fall under any of the exclusions listed in the definition in PAJA.

[15] Furthermore, the power of the board of directors flow directly from the provisions of section 71 of the Companies Act.

- (a) whether is of administrative nature; and
- (b) whether it is done in the exercise of a public power or public function.

[17] In the matter of *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another*[2] the Supreme Court of Appeal at paragraph 14 summarised how the court is required to approach the matter to determine whether a decision is of administrative nature.

“[14] When regard is had to the structure of the definition of an administrative action, the requirement that the decision be of an administrative nature, is a gate-way to determining whether a particular decision constitutes administrative action. As Wallis J explained in Sokhela and Others v MEC for Agriculture and Environmental Affairs, this requirement demands that a detailed

analysis

be undertaken of the nature of the public power or public function in question, ‘to determine its true character’. Thus, the determination of what constitutes administrative action does not occur by default, and [t]he court is required to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character. . . .”

[Emphasis added – footnotes omitted]

[18] Simply put, if conduct is not of an administrative nature, it cannot constitute administrative action envisaged in PAJA. At this stage it needs be pointed out that PAJA provided for the applicability of rule 53 in the interim and since 2019, when the rules relating to PAJA were amended, the applicable rules provide therefore. If the decision is of administrative nature, the rule may be applied at the choice of the applicant.

[19] In the matter of Legacy Body Corporate[3] the court, with reference to the decision of Chirwa v Transnet Limited

[4] decided that the: - “The fact that bodies corporate derive their powers from statute, does not, without more, translate their decisions into the exercise of any public power or performance of a public function”.

[20] In Grey’s Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others[5] it was pointed out that conduct of an administrative nature is generally understood as the “. . . the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the

state which necessarily involves the application of policy, usually after its translation into law...”. In the present case, there is nothing bureaucratic about the Boards’ decision, nor does it involve ‘application of policy’. Instead, the decision seems more commercial or managerial in nature, rather than administrative. The boards’ decision was made in the course of running and managing ABSA Bank, both Public Companies. The nature of the power is thus business-related. The decision is in nature no different to a decision of a meeting of shareholders of a company.[6]

[21] The boards’ decision was clearly not of an administrative nature.

[22] The first hurdle having been failed, it should be the end of this enquiry.

[23] I however share the view of Makgoka JA who found in the matter of Legacy Body Corporate in respect of bodies corporate that:

“..., given the interrelatedness of the requirements, and the far-reaching implications the judgment of the high court holds for bodies

corporate generally, I will consider the other two requirements.”[7]

[24] I am of the view that the same should apply in this matter where no authority is to be found directly in point relating to companies and the decisions of its board of directors in respect of section 71.

[25] The question whether private entities are capable of exercising public powers or performing public functions is vexed.

[26] In Chirwa[8] it was held that determining whether a power or function is ‘public’ has to be determined with regard to all the relevant factors including: (a) the relationship of coercion or power that the actor has in its capacity as a public institution;

(b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context’.

[27] In the matter of Legacy Body Corporate[9], the court applied the test as set out in Calibre Clinical Consultants

[10] where the Supreme Court of Appeal cited with approval the following remarks by in YL v Birmingham City Council:[11]

“[T]he role and responsibility of the state in relation to the subject matter in question . . . the nature and extent of any statutory power or duty in relation to the function in question . . . the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated

standards in performing it . . . whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. . . .”

[28] The Supreme Court of Appeal in Calibre Clinical Consultants[12] went on to observe that “courts have consistently looked at the presence or absence of features of the conduct concerned that is ‘governmental’ in nature”. Relevant considerations in this regard include:

“[a] the extent to which the functions concerned are “woven into a system of governmental control”, or [b] “integrated

into a system of statutory regulation”, or [c] [that] the government “regulates, supervises and inspects the performance of the function”, or [d] it is “a task for which the public, in the shape of the state, have assumed

responsibility”, or [e] it is “linked to the functions and powers of government”, or it [f] constitutes “a

privatisation of the business of government itself”, or [g] it is publicly funded, or [h] there is “potentially a governmental interest in the decision-making power in question”, or [i] the body concerned is “taking the place of central government or local authorities”. . . .”

[29] On the facts and having regard to the purpose and content of the relevant section of the Companies Act with which I will deal more fully below, I find none of these considerations to be present or applicable.

[30] The decision of ABSA Bank’s board to remove Mr Pityana, is also clearly not administrative action even in terms of the definition thereof in section 33 of the Constitution.

[31] The decision of a Board to remove a director in terms of section 71(3), as read with section 71(5) of the Companies Act, is therefore not an administrative decision or administrative action, either as defined in the Constitution or PAJA.

[32] The question as to the applicability of rule 53 however still remains unanswered.

Rule 53

[33] The argument on behalf of ABSA Bank relies on a strict interpretation of the wording of Rule 53.

[34] The relevant part of Rule 53 reads as follows:

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other

parties affected...”

[35] It is clear that the Companies Act does not prescribe whether the provisions of rule 53 apply, nor does it exclude it.

[36] The purpose of rule 53 is to facilitate and regulate review applications. Rule 53 imposes on the decision-maker an obligation to deliver the full record of proceedings sought to be corrected or set aside. That is trite.

[37] As indicated above, the decision to remove a director is clearly not administrative action. However, such decision is not the only type of decision that can be reviewed and set aside. There exist also legality reviews and the common-law or contractual reviews, referred to in the matter of Legacy Body Corporate[13] as well as statutory reviews.

[38] It would be shortsighted to think that rule 53 automatically apply to all these types of review.

- [39] The Constitutional Court in the matter of President of the Republic of South Africa v Democratic Alliance and Others^[14] indicated that it did not have to find whether Rule 53 applied to the review of executive decisions. The reason being that the matter had become moot. The court a quo in that matter however found the rule to be applicable to executive decisions. I need luckily not venture into that terrain. The Constitutional Court however stated: - “without deciding whether the principle applies to this matter, that executive decisions are generally reviewable under the principle of legality or rule 53”.
- [40] Firstly, the current decision in this matter is also not an executive decision or a legality review. In a legality review, as in this matter, the argument is that the applicant is or should be in possession of the record and therefore does not have to make use of the procedural advantage of obtaining a record.
- [41] The statement in the matter of President of the Republic of South Africa v Democratic Alliance and Others that executive decisions “generally reviewable under the principle of legality or rule 53”, is clearly obiter and made without proper consideration. Rule 53 provides for a procedure and does not grant any party or person a right to review. Simply put, rule 53 is not a basis for review.
- [42] That being said, the mere fact that a decision is sought to be set aside or reviewed does not automatically entitle an applicant to the procedural advantages of the rule as indicated above. The ratio behind the findings that the record is to be provided seemingly lies in the concept of “Access to Court”.
- [43] The wording “all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions...”, according to the argument does not apply to the current matter, as the decision was not “judicial, quasi-judicial or administrative functions”.
- [44] Despite the wording of the rule and the fact that the impugned decision is clearly not that of any inferior court or tribunal, board or officer performing judicial, quasi-judicial or administrative functions, it is not determinative of whether the rule finds application. To argue that the rule is not applicable does not take into consideration that over a long period of time and even before the advent of the Constitutional era, the rule provided for and was used in proceedings for review for instance of the decisions of the Jockey Club. Those decisions are what is currently termed common law reviews. Currently those review applications more often than not involve decisions of voluntary associations, home owners’ associations where the relationship is based on contracts. Simply put those decisions are not Administrative actions, cannot be set aside in terms of PAJA and are not legality reviews.
- [45] Furthermore, it is clear that the rule being only procedural in nature, does not grant a party any right in respect of the review, except some procedural advantage and convenience. Saying this I do not ignore the advantages for court of having the record available at the hearing.

[46] This is however in my view not a reason why rule 53 should be applicable.

[47] I now turn to the provisions of the Companies Act and the interpretation thereof, which in my view will be determinative of the issue.

Companies Act

[2] 2022 (1) SA 424 (SCA)

[3] 2022 (1) SA 424 (SCA) at [16]

[4]

[2007] ZACC 23; 2008

(4) SA 367 (CC) at [183]

[5] Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others [2005] ZASCA 43; 2005

(6) SA 313 (SCA) at [24]

[6] Pennington v Friedgood 2002 (1) SA 251 (C) where it was held that decisions taken at the annual meeting of a medical aid scheme were not in the exercise of a public power

[7] Above at para [19]

[8] Above

[9] 2022 (1) SA 424 (SCA) at [21]

[10] Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another 2010 (5) SA 457 (SCA) at [31]

[11] YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Others

[2007] 3 All ER (HL)

[12] Above at [38]

[13] 2022 (1) SA 424 (SCA)

[14] 2020 (1) SA 428 (CC) at [26]

[15] African Christian Democratic Party v Electoral Commission and Others

[2006] ZACC 1; 2006 (3) SA 305 (CC) at paras 21, 25, 28 and 31; Daniels v Campbell NO and Others

[2004] ZACC 14; 2004 (5) SA 331 (CC) at paras 22-3; Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others 2000

(1) SA 113

[16]

[2004] ZACC 15; 2004

(4) SA 490 (CC)

[17] University of Cape Town v Cape Bar Council and Another 1986 (4) SA 903 (AD); Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662-3

[18] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville

[19] 1950

(4) SA 653 (A)

[20] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)

[21] Jaga v Dönges above at 662G-H

[22] 1993 (1) SA 649 (A)

[23]

Tikly v Johannes NO 1963

(2) SA 588 (T) at 591

[24] Contesting the Removal of a Director by the Board of Directors Under the Companies Act, Rehana Cassim, Senior Lecturer, UNISA, SALJ 2016, p 133 at 153

[25] Thuketana v Health Professions Council of South Africa 2003 (2) SA 628 (T) at 634 – 5

[25] Thuketana v Health Professions Council of South Africa 2003 (2) SA 628 (T) at 634 – 5

[26] Tikly, above at 590 – 591

[27] Tikly v Johannes NO 1963 (2) SA 588 (T) at 591

[28] 2018 (4) SA 1 (CC) at [14] to [16]

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