

SOUTH AFRICA / JUDGMENT

Qabaka and Others v South African Women In Mining Association and Others (37505/2019) [2023] ZAGPJHC 1105 (6 April 2023)

[2023] ZAGPJHC 1105**COURT**

South Gauteng High Court, Johannesburg

BEFORE

A Friedman

CASE / FILE NUMBER

37505/2019

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**IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG
Case no: 37505/2019
In**

the matter between:

NOMACI
QABAKA
First
Applicant
LUCY
NGWABENI
Second
Applicant
VUYISWA
NDZAKANA
Third
Applicant
And
SOUTH
AFRICAN WOMEN IN MINING
ASSOCIATION
First
Respondent
NOMAKHWEZI
MZAMBO
Second
Respondent

NOLUTHANDO
LANGENI
Third
Respondent
MASIKINI
SITHOLE
Fourth
Respondent
DIKELEDI
MOTSUMI
Fifth
Respondent
MIRRIAM
MOETLO
Sixth
Respondent
SIMANGELE
MNGOMEZULU
Seventh
Respondent
NEDBANK
GROUP LIMITED
Eighth
Respondent

JUDGMENT

FRIEDMAN AJ:

1 On 18 October 2021, this Court (Malindi J), made an order in the following terms:

“1. The Application for postponement instituted by the First, Third, Fourth and Sixth Respondents on 15 October 2021 has become moot and will accordingly not be adjudicated upon;

2. The First and Second Applicants to be reinstated as directors of the First Respondent with immediate effect;
3. The First and Second Applicants are to become members of the Executive Committee of the First Respondent with immediate effect;
4. The First Applicant to be paid R1,000,000.00 (one million rand) by the First, Third, Fourth and Sixth Respondents within 10 (ten) days of this order;
5. The Second Applicant to be paid R1,000,000.00 (one million rand) by the First, Third, Fourth and Sixth Respondents within 10 (ten) days of this order;
6. The Third Applicant to be paid R100,000.00 (one hundred thousand Rand) by the First, Third, Fourth and Sixth Respondents within 10 (ten) days of this order;

7. Costs of suit including the costs occasioned by the employment of Counsel are to be paid by the First, Third, Fourth and Sixth Respondents.”

2 This order was made by agreement between the applicants and the first, third, fourth and sixth respondents in the present matter. In the proceedings before me, only the first, third and fourth respondents oppose the relief sought. For convenience, I shall describe them simply as “the respondents” below.

3 Despite the fact that the third applicant is described as such in the founding affidavit, the founding affidavit also says that “she is not part of this application” and that she was “merely cited because she was a party in the proceedings when the matter was served before Malindi J”. Of course, if that is the case, she ought to have been cited as a respondent, and not an applicant. Be that as it may, I shall describe the first and second applicants below as “the applicants”, but will make sure to be precise in my description of them in my order, to avoid any inadvertent involvement of the “third applicant” in these proceedings.

4 This application began its life as an urgent application launched by the applicants in March 2022. That application was struck off the urgent roll and the applicants persist with it in the ordinary course. In the notice of motion, the applicants seek relief in two parts.

5 In Part A, the proceedings before me, the applicants seek the following relief (although prayer 1.1 has obviously fallen away):

“1.1 The forms and services provided for in the Rules of this Court are dispensed with where necessary, and this application is heard on an urgent basis in terms of Rule 6(12)(a) of the Rules of this Court.

1.2. The First, Third, Fourth and Sixth Respondents are declared to be in contempt of paragraphs 2 and 3 of the order of the Honourable Malindi J dated 22 October 2021.

1.3. The First, Third, Fourth and Sixth Respondents are directed to comply with paragraphs 2 and 3 of the Court order of the Honourable Malindi J within 5 court days from date of this order.

1.4. Only in the event, First, Third, Fourth and Sixth Respondents fail to comply with paragraph 1.3 above, they are required to file affidavit(s) in this honourable court and furnish reasons why they should not be sentenced to 30 days imprisonment without an option of a fine, which will be determined in part B of this application.

1.5. The First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents are interdicted from implementing the purported resolution passed on 28 February 2022 which was for the removal of the First and Second Applicants as directors of the First Respondent pending the determination of Part B of this application.

1.6. The First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents are interdicted from holding the Annual General Meeting on 06 April 2022 pending the finalization of Part B of this application.

1.7. That the First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondents are to pay costs of this application on an attorney and client scale, including costs incurred as a result of the employment of two Counsels.”

6 In Part B, they seek the following:

“2.1 Only in the event, the First, Third, Fourth and Sixth Respondents fail to comply with paragraph 1.3 in part A, it is declared that they are sentenced to 30 days imprisonment without an option of a fine, for the contempt of the court order of Malindi J.

2.2. Declaring that the purported resolution taken on 28 February 2022 to remove the First and Second Applicants as directors of the First Respondent, while they were not, is void ab initio, unlawful, invalid and is hereby set aside.

2.3 Declaring that the Annual General Meeting to be held on 06 April 2022 is void ab initio, unlawful, invalid and is hereby set aside.

2.4. Declaring that the Second to the Seventh Respondent(s) have failed to uphold their fiduciary duty, such as duty of care, skill and diligence in the managing of the First Respondent in terms of section 76(3)(c) of the Companies Act.

2.5. Declaring that the Second to the Seventh Respondent(s) have grossly abused their respective positions of directorship in the managing of the First Respondent.

2.6. Declaring that the Second to the Seventh Respondent(s) are delinquent directors in terms of section 162(5) of the Companies Act 72 of 2008.

2.7. Directing that the declaration of delinquency is to subsist for the remainder of the Second to the Seventh Respondent(s) lifetime, subject to the provisions of section 162(11) and (12) of the Companies Act 72 of 2008.

2.8 The Respondents, save for the Eighth Respondent, are directed to pay the costs of this application on a scale as between attorney and client, including costs for two Counsels.”

7 There was some confusion relating to precisely what relief the applicants now seek. They filed a document styled “joint practice note”, which turned out not to have had the substantive input of the respondents, even though it was sent to them. In that practice note, the applicants seem to suggest that they press for some of the relief in Part A, as well as prayer 2.2 of the notice of motion in Part B.

8 If I understood Mr Smith, who appeared for the respondents, correctly, his argument was that the applicants should be bound by the joint practice note and I should determine Part B – or, at least, paragraph 2.2 of the notice of motion in Part B. Mr Vobi, who appeared for the applicants, said that they persisted with some of the relief sought in Part A (some, as I show below, has fallen away) but that it may be appropriate for me to determine the issue arising from prayer 2.2 of Part B, if I do not find the respondents in contempt of Malindi J’s order.

9 This matter has resulted in several opposed applications, including interlocutory fights. It would have been ideal if I could have disposed of the entire matter now. But there are prayers in the Part B notice of motion which relate to issues entirely unrelated to the prayers in Part A, and which were not argued before me at all. For this obvious reason, I do not consider myself at large to dispose of the whole of Part B now. On the basis of the consent of the parties, I could theoretically deal with prayer 2.2 of the notice of motion in Part B, but it does not seem to me to be appropriate (especially because this consent was not entirely unqualified on the part of the applicants) to carve up Part B in this way. This judgment therefore relates to the relief sought in Part A only. Because of the way in which the case has been framed, it is unavoidable for me to say things relevant to prayer 2.2 in the Part B notice of motion.

10 By the time that the matter came before me in November 2022, the prayer sought in paragraph 1.6 of the notice of motion in Part A had clearly become moot. Mr Vobi confirmed that the applicants no longer press for that relief. It goes without saying (although this is admittedly now the second time that I have said it) that paragraph 1.1 of the notice of motion in Part A has also fallen away. Mr Vobi therefore confirmed that the applicants press for orders in terms of paragraphs 1.2, 1.3, 1.4, 1.5 and 1.7 of the notice of motion in Part A.

THE FACTS AND THE ISSUE

11 There is lots of paper in the Caselines folder in this matter, and it is obvious that this case arises in the context of a turf war over control of the affairs of the South African Women in Mining Association Non-Profit Company (“SAWIMA”), the first respondent.

12 I do not intend to try to capture all of the issues ventilated on the papers. The papers are not always a model of clarity, and it has been challenging to extract the main issues arising in Part A. I shall attempt here to keep the discussion of the issues and the background facts as short as possible, and I do not pretend to have covered everything addressed in the many affidavits and heads of argument filed in this matter.

13 The founding affidavit explains that SAWIMA was incorporated as a non-profit organisation in December 2003 (although it was founded in 1999), to encourage the participation of women in mining. A dispute arose in 2019, after the National General Meeting of SAWIMA, which took place on 17 December 2018. The applicants say that they were unlawfully removed as directors of SAWIMA at that meeting, and this is what caused the institution of the proceedings which ultimately led to the order made by Malindi J on 18 October 2021.

14 So, by agreement between the parties, the dispute surrounding the National General Meeting of 2018 was resolved by the order granted by Malindi J. The reason why prayer 2.2 of the Part B notice of motion is of some importance to the proceedings before me, is that, on 28 February 2022, the board of directors of SAWIMA resolved to remove the applicants as directors again, on the basis of alleged breaches by them of their fiduciary duties to the company. I shall describe the resolution passed on 28 February 2022 as “the February 2022 resolution” below.

15 On the one hand, the applicants seek an order in Part B that the 28 February 2022 resolution was unlawful and is void. Tied to that, they seek an order in Part A, preventing the respondents from implementing the resolution until the finalisation of Part B. But, at the same time, they take the stance that the resolution is meaningless because they were never reinstated after Malindi J made his order.

16 There was a debate in argument about whether prayer 1.5 of Part A (which is the prayer which seeks to interdict the implementation of the February 2022 resolution) was sought in the alternative to prayers 1.2 to 1.4 (the contempt prayers). After some vacillation, Mr Vobi ultimately took the position that they were not sought in the alternative. Nothing much turns on this ultimately. Although the

premises of prayers 1.3 and 1.5 appear to be factually inconsistent, they can both in principle be granted without causing any conceptual, or even practical, difficulties.

17 The main stance of the applicants is that the respondents are in contempt of Malindi J's order because they were never reinstated pursuant to his order. They say that the respondents had purported to reinstate them as directors, and produced letterheads which reflected them as directors. They say that this does not change the fact that they were never formally reinstated as reflected in an amendment to the company's Companies and Intellectual Property Commission ("CIPC") records. They therefore say that the February 2022 resolution was "unlawful and an academic process".

18 Although the main focus of the founding affidavit is on the arguments summarised above, there is a suggestion in the founding affidavit that the February 2022 resolution was invalid because there was not a 75% quorum for a special resolution (ie, at the meeting removing them). It is not entirely clear to me whether this argument has some independent basis or whether it is essentially a different way of saying that the board is not properly constituted (ie, because the applicants were never reinstated and other, illegitimate, appointees purport to serve on the board). When the case is viewed as a whole, it would seem to be the latter. This is because, all of the allegations relating to the alleged invalidity of the February 2022 resolution are based on the notion that the board was improperly constituted because there was non-compliance with Malindi J's order. In other words, the arguments about contempt of Malindi J's order and the validity of the resolution appear to be inextricably linked. In any event, although the respondents annexed an extract from the minutes of the 28 February board meeting showing that the resolutions to remove the applicants were passed, I have no meaningful evidence before me about issues relating to the quorum. If it was the intention of the applicants to make something of the quorum, then they were obliged to make out a clear case in this regard. Since they did not, I do not consider that issue any further.

19 The founding affidavit is very lengthy, and at times repetitive, and there are various allegations of misconduct levelled at the respondents. Their relevance is not always made entirely clear, but some of the allegations seem to relate to the balance of convenience and irreparable harm. For reasons which will become clearer below, these two requirements of an interim interdict do not arise for determination in this case.

20 In their answering affidavit and in argument, the respondents say the following in response to the applicants' contentions:

20.1 First, they say that the applicants were reinstated by operation of law in terms of Malindi J's order. On this basis alone, there can be no contempt.

20.2 Secondly, they say that, at a meeting of the board held on 3 November 2021, the applicants were reinstated by resolution passed by the board. They annex the attendance register and minutes as evidence of this. So, even if the proposition summarised in paragraph 20.1 above is wrong, the applicants were reinstated as of 3 November 2021.

20.3 Thirdly, they say that the applicants then attended three subsequent meetings of the board in their capacity as directors. The minutes of those meetings are also attached to the answering affidavit.

20.4 Fourthly, they rely on section 66(7) of the Companies Act 71 of 2008. They say that, in terms of that provision, the applicants became entitled to be directors as soon as Malindi J made his order. However, to perfect their appointment, they had to furnish written consents to SAWIMA (as envisaged by section 66(7)(b)). They were requested to do so on 2 December 2021, but only furnished the consents on 16 February 2022. Therefore, even if the applicants were somehow correct that they were not automatically reinstated on the making of Malindi J's order, their reinstatement was clearly perfected on 16 February 2022 when they furnished their consents.

20.5 Fifthly, the applicants' reference to the CIPC records takes the matter no further because appearance in the CIPC database is not a substantive requirement to be recognised as a director. This argument has particular force, according to the respondents, because the CIPC issued a Practice Notice on 19 July 2021 making it clear that CIPC records will not be updated to reflect a person's appointment as a director, without provision of the signed consent. Therefore, the earliest that application to the CIPC to update SAWIMA's records could be made was after 16 February 2022 when the applicants finally furnished their consents.

20.6 Sixthly, and lastly, the respondents say that they gave the applicants notice of the proposed meeting to remove them as directors (ie, the meeting which ultimately took place on 28 February 2022). The notice was accompanied by a section 71(4)(a) statement,^[1] which set out the detailed allegations against the applicants. It concluded, as it was required to do, with an invitation to each of the applicants to make representations at the meeting as to the allegations against them before their future as directors was put to a vote. The respondents point out that the applicants declined to take up this opportunity and say, therefore, that they cannot now complain about the fact that the resolution was passed.

21 The applicants filed a replying affidavit, but did not deal clearly with the bulk of the allegations and submissions mentioned above. On the issue of the failure to provide consents until 16 February 2022, for example, the applicants say that it “boggles the mind how we could be regarded as directors in the absence of the signed consent at a meeting held on 3 November 2021, which directorship would be effective after having filed with the CIPC within 10 days computed from 16 February 2022, which process wasn’t done by the Respondents”. It is frankly somewhat difficult to discern what this means. What is clear, though, is that it does not constitute a succinct explanation of why the applicants took so long to provide the consents.

22 The essence of the response in the reply appears to be the following:

22.1 First, the resolution purporting to reinstate the applicants was only passed on 3 November 2021 and so, even if it was valid (which is not accepted by the applicants), the respondents were in contempt of Malindi J’s order until that date.

22.2 Secondly, the applicants had to be reinstated to the exact positions which they held before they were removed in 2018. Since they were not, there was non-compliance with Malindi J’s order.

23 Based on what I have said above, the following issues arise for determination:

23.1 First, were the applicants reinstated as directors of SAWIMA pursuant to Malindi J’s order? If the answer is yes, it follows that they cannot succeed in their contempt claim or their related claim to enforce Malindi J’s order.

23.2 Secondly, if the applicants were not reinstated, did the respondents deliberately refuse to comply with Malindi J’s order? If the answer is no, then they cannot be held in contempt but the applicants may be entitled to some relief designed to ensure compliance with Malindi J’s order.

23.3 Thirdly, have the applicants made out a case to interdict the implementation of the February 2022 resolution pending the finalisation of Part B?

24 I address these issues, but not necessarily in this precise sequence, below.

THE AUTHORITY POINT

25 Before proceeding to deal with the merits, there is a procedural issue which I must address. The applicants appear to take an authority point of some sort, but its precise nature is not entirely clear from the papers or the heads of argument. It is styled as a “locus standi” point in the heads of argument, but appears to relate to the authority of the fourth respondent, the deponent to the respondents’ answering affidavit, to represent SAMIWA in these proceedings. If I understand the complaint correctly, it is that the fourth respondent is not a legitimate director of the company and therefore has no standing to represent it. However the applicants may have framed this point, it was clearly an authority point and not a locus standi point. It was the applicants who cited the relevant respondents and made them party to these proceedings, and so the issue of locus standi does not arise. Despite the heading in the applicants’ heads of argument, it is quite clear that the nub of the point is that the fourth respondent lacks authority to represent

SAWIMA.

26 Mr Vobi did not press this point at all in oral argument. He was correct not to do so. There is a rule 7 notice in the Caselines file, which is dated 18 October 2021 (ie, the same date as Malindi J's order) but it relates to the second, fifth and seventh respondents, none of whom opposes this application. There is no rule 7 notice in respect of the respondents opposing this application now. I very recently handed down judgment in a matter in which I dealt with a similar challenge to authority – ie, a challenge which was mounted without a rule 7 notice being filed. I explained there that our courts, including the SCA, have made clear that the only mechanism available to a party to challenge the authority of another party to represent a company is through the vehicle of rule 7.[2] If rule 7 is not used, then no challenge to authority can be made. For the purposes of this application, that is the end of the matter.

THE MERITS

27 The relief sought in prayers 1.2, 1.3 and 1.4 of the notice of motion is not interim relief. It is final relief relating to the alleged contempt of Malindi J's order, and orders designed to give effect to it. If one reads the notice of motion as a whole, it would appear that the Part A relief and the Part B relief relating to the contempt issue are effectively part of one continuum, with the Part B relief in para 2.1 of the notice of motion meant to apply in the event of the respondents failing to comply with any order made in Part A. Prayer 1.5 of the Part A notice of motion, on the other hand, is couched as a prayer for interim relief, and is apparently designed to apply pending a final determination in Part B that the February 2022 resolution is unlawful.

28 It is convenient for me, in the discussion below, to deal, first, with the contempt application and then, secondly, with the remainder of the prayers in the Part A notice of motion.

Has contempt been established?

29 The evidence, adduced by both parties, reveals the following:

29.1 The applicants attended a board meeting on 3 November 2021. The minutes of the meeting describe them as “directors” and they appear on the list of directors on the letterhead on which the minutes appear.

29.2 At the meeting, it was recorded that the applicants were reinstated as directors in terms of Malindi J's order, and it was recorded further that the matter would be discussed in more detail at a board meeting to be held on 10 December 2021. The language used in the minutes of the meeting suggest that a resolution was passed reinstating the applicants.

29.3 Although neither party appears to have annexed this document to their papers, and so I have not seen it, it seems that the applicants wrote to the respondents on 23 November 2021 to take issue with aspects of their appointment as directors. It would appear that the applicants raised the issue of contempt in the letter of 23 November 2021, because the respondents' reply (discussed next) refers to that allegation.

29.4 On 2 December 2021, the respondents responded (via their attorneys) to this letter by denying that they were in contempt and calling on the applicants to provide them with the signed consents necessary to enable the applicants to be recorded as directors of SAWIMA in the CIPC database.

29.5 On 16 February 2022, the applicants finally responded (via their attorneys) to furnish the consent letters. They requested that the respondents “proceed with reinstating our clients as directors of the First Respondent with the Companies and Intellectual Property Commission without any further delay and to ensure compliance with the court order of his Lordship Malindi J”.

29.6 On 22 February 2022, notice was given of the board meeting which I described above, at which the allegations against the applicants were to be discussed.

29.7 On 27 February 2022, the applicants (via their attorneys) wrote to the respondents and accused them of being in contempt of Malindi J’s order. Their complaint appears, at least in part, to have related to the fact that they were not reinstated to their former positions on the board (ie Chairperson and Secretary-General, respectively).

29.8 On 28 February 2022, the February 2022 resolution removing the applicants as directors of SAWIMA was passed.

29.9 On 17 March 2022, this application was launched. As noted above, initially as an urgent application.

30 In fairness to the applicants, they appear to have raised the issue of contempt for the first time on 23 November 2021. The significance of this is that this was after the introductory meeting held on 3 November, but before the next meeting scheduled for 10 December 2021. The impression which the respondents seek to create in their answering affidavit is that the applicants initially acquiesced in their reinstatement (valid, or otherwise) as directors, and only changed tack once the intention to remove them again (ie, in February 2022) was made clear. But this does not seem to be the case.

31 The difficulty for the applicants is that they have not explained clearly what happened between November 2021 and February

2022. The following questions occur to me:

31.1 What was said in the 23 November 2021 letter and what was the applicants’ position regarding the legality, or otherwise, of the 3 November 2021 meeting?

31.2 Why did the applicants take more than 2 months to reply to the letter of 2 December 2021 calling on them to furnish their written consents?

31.3 Why did the applicants furnish the written consents in February 2022, when their view was that the respondents were not complying with Malindi J’s order because they had not been reinstated into the same positions they held before they were removed the first time? In other

words, why were the applicants seemingly willing to go along with their appointment as directors (by furnishing the consents on 16 February 2022), when they had (a) taken the view that proper compliance with Malindi J's order required them to be reinstated to the same positions they had held before they were initially removed and (b) the respondents had already made clear that they were not willing to restore them to those positions?

32 Although these questions mainly relate to the mindset of the applicants, and not the respondents (whose mindset, after all, is relevant to the issue of contempt), they are relevant to the question of how the parties contemporaneously understood the position. Certainly, the respondents say that the applicants are being opportunistic, and were very happy to agree, initially, that they had been reinstated by operation of law as soon as Malindi J gave his order.

33 In fairness to the applicants, their conduct, viewed as a whole, is not necessarily inconsistent. It seems to be the case – and again, the applicants have not helped their cause by failing to explain this clearly – that the applicants consistently complained about contempt from late November (at the latest). If one looks at all the correspondence, it could reasonably be suggested by them that they took the view throughout this period that they had not been validly reinstated, and that the correspondence was aimed at encouraging the respondents to comply with the order. In other words, it could be read as meaning that the applicants were willing to try to ensure that the order was carried out, and then when they were issued with the section 71(4)(a) notice it finally became clear to them that the respondents were hell-bent on getting rid of them through any mechanism available. Once that became clear to them, they decided to litigate over the issue.

34 This is certainly a plausible explanation of what happened. Since the applicants do not seek the committal of the third and fourth respondents (at least at this stage),^[3] they need to show civil contempt on a balance of probabilities, rather than beyond a reasonable doubt.^[4] And so one must look to the attitude of the respondents to determine whether they intended to disregard Malindi J's order; and, to find for the applicants, one would have to find, on a balance of probabilities (taking the Plascon-Evans^[5] test into account), that this was their attitude. Of course, the premise of all of this is that there was non-compliance with the order in the first place.

35 The position adopted by the respondents between November 2021 and February 2022 was that the applicants had been reinstated by operation of law (ie, via the mechanism of Malindi J's order) and that only the procedural step of submitting written consents to the CIPC had yet to be taken. The respondents asked the applicants to furnish the written consents, but they took two months to do so. In the intervening period of time, various allegations of misconduct against the applicants arose. If one reads the section 71(4)(a) statement, there is a detailed narrative of what the applicants are said to have done wrong. I cannot, sitting here now, dismiss those allegations as baseless. So, on the respondents' version they did all that they could do to comply with Malindi J's order, were obstructed for two months by the failure of the applicants to furnish written consents, and then were forced to change tack and remove the applicants in a new process

arising from the allegations of misconduct against them.

36 There is nothing inherently implausible about either side's version. If one considers the allegations of misconduct levelled against the applicants, it would appear that the applicants' alleged conduct forms part of the larger turf war, which has been waged since at least 2019, over control of SAWIMA. It is impossible for me to tell who are the villains and who are the heroes of this story. It is not necessary for me to do so. Since these are motion proceedings, and since there is nothing inherently implausible about the respondents' version, I cannot conclude that the respondents intended to disregard Malindi J's order. It follows that contempt of court has not been established. Prayer 1.2 of the Part A notice of motion cannot be granted.

The remaining relief

37 Although prayer 1.3 was clearly designed to supplement the main contempt prayer (ie, prayer 1.2), it would notionally be possible to grant the order even in the absence of a finding of contempt. This is because it could be objectively true that there was non-compliance with Malindi J's order even though this non-compliance was not contemptuous (ie, because the respondents genuinely believed that they had complied, or were in the process of complying with, the order).

38 As a matter of logic, prayers 1.3 and 1.5 fit neatly together. Prayer 1.3 seeks compliance with the parts of Malindi J's order which ordered the reinstatement of the applicants. Prayer 1.5 seeks an interdict preventing the respondents from implementing the February 2022 resolution. For the applicants to get the substantive relief they seek in Part A, both orders need to be granted. Put differently, it is not appropriate for prayer 1.3 to be granted while the February 2022 resolution remains in force because the February 2022 resolution renders Malindi J's order academic.

39 But, in my view, the applicants have not made out a case for the relief in prayers 1.3 or 1.5. I explain why, below.

40 The respondents take the view that the applicants were reinstated, by operation of law, when Malindi J's order was handed down. They point out that the first applicant appears to have shared their view. This is because, when she finally submitted her written consent on 16 February 2022, she recorded on the form that she had been "reinstated" on 18 October 2021 – ie, the date of Malindi J's order.

41 I have no doubt that a court order could have the effect of reinstating a director immediately. But it is not entirely clear to me that this was the effect of the order relevant here. Paragraphs 2 and 3 of the order, which are the crucial ones for present purposes provide, as I have already shown at the beginning of this judgment, that:

41.1 First, the applicants are "to be reinstated as directors of [SAWIMA] with immediate effect". (My emphasis.)

41.2 Secondly, the applicants "are to become members of the Executive Committee of [SAWIMA] with immediate effect". (My emphasis.)

42 It seems to me that, if the intention of the order was for the applicants to be appointed by operation of law, the order would have said (to take paragraph 2 as an example): “the applicants are reinstated as directors of SAWIMA with immediate effect”. The use of the phrases “to be” and “to become” implies that a separate act was necessary on the part of the board, to give effect to the order.

43 The respondents point out that, at the meeting of 3 November 2021, the board passed a resolution to reappoint the applicants as directors. It is recorded in paragraph 2.3 of the minutes of that meeting. Although no special formalities appear to have accompanied that decision, I have been provided with no information on this issue and I have no reason to doubt, on the evidence before me, that the resolution was valid. Item 5 of Schedule 1 to the Companies Act, which deals with non-profit companies, deals with the appointment of directors of non-profit companies which have members, on the one hand, and those which do not, on the other. In both cases, the procedures for the appointment of directors are largely left to the Memorandum of Incorporation of the company. In this case, the respondents have attached the original Constitution of SAWIMA to the answering affidavit, but the Memorandum of Incorporation does not form part of the papers. If the applicants wished to make out a case that they were not validly reappointed at the meeting on 3 November 2021, then they ought to have referred me to the Memorandum of Incorporation and set out some basis for saying that the resolution was somehow invalid. They have not done so.

44 Importantly, in this regard, the applicants themselves do not ever suggest that the resolution of 3 November 2021 was not validly passed. In the founding affidavit, the complaint is made, on more than one occasion, that the respondents are in contempt because they failed to register the applicants as directors with the CIPC. I deal with that next, but at this stage, I simply make the point that no party to these proceedings appears to dispute the validity of the 3 November 2021 resolution.

45 There is then the question of the CIPC. Section 66(7) of the Companies Act envisages two conditions for a person to become entitled to serve as a director:

45.1 First, the person must have been “appointed or elected in accordance with this Part” or hold “an office, title, designation or similar status entitling that person to be an ex officio director of the company, subject to subsection

(5) (a)” (which deals with disqualification to serve as a director and is not relevant here).

45.2 Secondly, that person must have “delivered to the company a written consent to serve as its director.”

46 On 2 December 2021, the respondents called on the applicants to furnish their written consents to be appointed as directors. This implies that, at that stage, they considered the applicants to have been validly reappointed. In other words, they considered the first of these two requirements, summarised in paragraph 45.1 above, to have been met. As I have explained, I proceed in this judgment from the premise that this was indeed the case because no-one has suggested that the 3 November 2021 resolution was invalid.

47 Had the applicants promptly responded to this request and furnished their consents shortly thereafter, SAWIMA would have been obliged, in terms of section 70(9), to file a notice confirming their appointment within ten days. In the event, they only supplied the written consents on 16 February

2022. Whatever the explanation for this delay may be, the fact of the matter is that the respondents could not take steps to amend the CIPC database until the written consents were furnished.

48 There is nothing, in my view, about Malindi J's order which prevented a separate resolution being passed to remove the applicants, so long as the resolution was lawful. If one has regard to section 66(7) of the Companies Act, it seems clear that the applicants were lawfully entitled to serve as directors from 16 February 2022 onwards. In other words, section 66(7) determines when a director's appointment is effective[6] – ie, the date on which the consents are issued – and registration with the CIPC, while necessary, is a formality rather

than a substantive requirement for the validity of their appointment. Therefore, from 16 February 2022 at the latest, the applicants were subject to all of the ordinary rules applicable to directors. That means that they could, in appropriate circumstances, be removed.

49 As I have noted when explaining the facts above, the notice envisaged by section 71(4) of the Companies Act was sent to the applicants on 22 February

2022. At that stage, they were directors of the company. The board of SAWIMA was perfectly entitled, therefore, to subject them to all of the disciplinary strictures of the Companies Act. The applicants chose to treat the removal process as unlawful, and so did not take up the opportunity to attend the board meeting scheduled for 28 February 2022 and make the representations envisaged by section 71(4)(b) of the Companies Act. They were then lawfully removed as directors in terms of a resolution of the board.

50 None of what I have said above means that the applicants would not have been entitled to challenge the legality of their removal on any recognised ground. But in these proceedings they have taken the stance that the resolution to remove them could never have been validly taken, because they were never reinstated as directors in the first place. They have no fallback position based on the assumption that the court is not with them in this regard. Put differently, other than taking that point, they have provided no independent basis to impugn their removal. That being the case, I cannot reach any conclusion other than that they were validly removed.

51 As I have mentioned, the applicants also take the stance that they ought to have been reinstated to the same positions which they held before their removal, which was Chairperson and Secretary-General. However, paragraph 3 of Malindi J's order provides that they are to become members of the "Executive Committee" with immediate effect and does not mention any positions to be occupied. As I have noted, the Memorandum of Incorporation of SAWIMA is not before me. However, the "Executive Committee" is addressed in the Constitution annexed to the respondents' papers. There appears to be a National Executive Committee, which is elected by the National General Meeting (this is addressed in clause 6.2.2 of the Constitution). The respondents, in their papers, take the view that the applicants were reinstated to the Executive Committee by operation of law (ie, as soon as Malindi J's order was made). For the reasons given above, I do not agree with this contention. But, if I understood Mr Smith in oral argument correctly, he made the point that only the National General Meeting could elect members of the National Executive Committee. That being so, compliance with Malindi J's order could only have been tested after the April 2022 AGM (which, if I understand correctly, is the equivalent of the National General Meeting). In other words, had the applicants not been removed as directors in February 2022, they would have had an expectation to be reinstated to the National Executive Committee at the April 2022 AGM. As I noted above, the initial prayer (1.6 of Part A) related to the AGM was abandoned by the applicants because, by the time they appeared before me, the AGM had long-since taken place. In Part B, the applicants seek an order setting aside the AGM. I do not comment here on the prospects of them achieving that order in Part B. For the purposes of Part A, I simply note that the applicants have not made out a case that there was non-compliance with paragraph 3 of Malindi J's order.

52 The discussion above demonstrates that neither prayer 1.3 nor 1.5 of the notice of motion in Part A may be granted. Prayer 1.3 has the premise that there was non-compliance with Malindi J's order. But, as I have shown above, this premise is flawed. Prayer 1.5 seeks to interdict the implementation of the February 2022 resolution. For the reasons given above, the applicants have provided no legal basis for such an order.

53 There is a further reason why prayer 1.5 cannot be granted. An interdict is forward looking -ie, it is designed to prevent conduct before it has begun or while it is still happening.[7] The February 2022 resolution had been implemented almost 9 months before this matter came before me, in November 2022. In fact, the resolution had already been implemented at the time when this application was initially launched as an urgent application in March 2022. So, the horse has long-since bolted, and prayer 1.5 cannot be granted in the terms that it is framed.

54 As I noted above, Mr Vobi made clear that, for obvious reasons, the applicants do not persist in prayer 1.6. It follows that the applicants cannot be granted any of the substantive relief which they seek in Part A.

THE APPLICATION TO COMPEL

55 Before concluding, it is necessary for me to mention that, on 24 May 2022, the applicants brought an application to compel the respondents to file their practice note in this matter. It seems that the respondents filed their heads of argument on 30 March 2022, but failed to file their practice note at the same time. After the matter was struck from the urgent roll, the applicants wanted to set it down on the ordinary roll. Because the Practice Manual requires the heads of argument and practice note of both parties to be filed before a hearing may be allocated, the applicants understandably considered themselves obliged to bring the application to compel as a pre-condition to obtaining a hearing on the merits.

56 The founding affidavit in the application to compel sets out the steps which the applicants took before launching it. Mr Vobi made clear that the applicants seek the costs of the application to compel.

57 No answering affidavit was filed in the application to compel and it would appear that it had the desired effect of smoking out the coveted practice note. There is nothing in the Caselines file to explain what, at the level of formality, became of that application. It was not technically set down on my opposed roll. But I am not a slave to technicalities and it strikes me as unjust for the applicants to be out of pocket in an application which was clearly well-made (as implicitly recognised by the respondents in their failure to oppose it). It therefore strikes me as appropriate for me to make a costs order in favour of the applicants in that application. There is no reason for the costs of two counsel to be allowed in that application and I do not understand Mr Vobi to have suggested otherwise.

CONCLUSION AND ORDER

58 In prayer 1.7 of the notice of motion, the applicants seek a punitive costs order. The applicants made clear in argument that they seek this order on the basis of what they describe as the vexatious and unreasonable way in which the respondents have conducted themselves in this matter. For their part, the respondents filed heads of argument in which they sought an ordinary costs order. However, Mr Smith argued that I should dismiss the application with a punitive costs order, to mark my displeasure at the applicants' opportunism.

59 The applicants have been unsuccessful in Part A of their application. Each side takes the stance that the other side has behaved reprehensibly from beginning to end. There may be one true hero and one true villain in this fight, but I have no idea which is which from the evidence before me. I have to say that there were various respects in which the way in which the applicants formulated their case was unhelpful and, simply, procedurally flawed. However, since this was not the basis on which the respondents contended for a punitive costs order, I shall leave that issue there. In my view, there is nothing noteworthy about the conduct of the litigation which warrants a punitive costs order against either party. I have some discomfort about some hard-hitting allegations made by the applicants against the respondents in their papers, including allegations of perjury. But, again, this does not appear to have been the basis on which the respondents contended for a punitive costs order at the hearing. In the circumstances, I intend to make an ordinary costs order in dismissing this application. I cannot see any basis to make a

punitive costs order in respect of the application to compel either and so the same will apply there.

60 I therefore make the following order:

1. Part A of the application brought by the first and second applicants on 17 March 2022 under case number 37505/2019 is dismissed.
2. Save as provided in paragraph 3 below, the first and second applicants are to pay the first, third and fourth respondents' costs of this application.
3. The first, third and fourth respondents are to pay the first and second applicants' costs in the application to compel delivery of a practice note launched on 24 May 2022 under the same case number mentioned in paragraph 1 of this order.

ADRIAN FRIEDMAN

ACTING JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected above and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand down is deemed to be 6 April 2023.

APPEARANCES:

Attorney for the first and second applicants:

Mudenda Inc

Counsel for the first and second applicants:

S Vobi, with A Nase

Attorney for the first, third and fourth respondents:

Rams Attorneys

Counsel for the first, third, and fourth respondents:

R Smith

Date of hearing: 21 November 2022

Date of judgment: 6 April 2023

- [1] Section 71 of the Companies Act deals with the removal of directors. Section 71(4)(a) requires the board to give a director who the board intends to remove a written notice of the meeting with a statement setting out the reasons for the proposed resolution. The notice is designed to allow the director to make representations at the meeting before the resolution is put to a vote (see section 71(4)(b)).

[2] See *Engen Petroleum Limited v Scheepers and others*, GLD Case no 2020/708, 3 April 2023, unreported (available at <http://www.saflii.org/za/cases/ZAGPJHC/2023/291.html>)

at paras 13 to 19.

[3] In their heads of argument, the respondents take the position that the applicants do indeed seek committal. It is true that, in Part B, they seek orders designed to facilitate committal to prison, in the event of non-compliance with the orders in Part A. But, this necessarily implies that, if there is compliance with the orders sought in Part A, there would be no basis for committal. It is appropriate, in those circumstances, for Part A to proceed from the premise that no committal is sought. Since I find for the respondents, even on the balance of probabilities, nothing turns on this.

[4] See *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) at paras 46 to 67 and in particular para 67

[5] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634-5

[6] Although I could find no case directly on this point, a footnote in *Griesel v Lizemore* 2016 (6) SA 236 (GJ) at para 26n2 appears to support this proposition.

[7] See *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para 20

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Prepared on 11 October 2026 · Esheria