

SOUTH AFRICA / JUDGMENT

Sithole v Naude and Others; Ntiwane v Naude and Others (714/2021; 715/2021) [2021] ZAMPMBHC 58 (29 November 2021)

[2021] ZAMPMBHC 58

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse

CASE / FILE NUMBER

714/2021; 715/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA

DIVISION (MAIN SEAT)

Case

Number: 714/2021

REPORTABLE:

YES/ NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED.

In

the matter between:

JABULANI

LIGHTER SITHOLE

APPLICANT

and

ETIENNE

JACQUES NAUDE

FIRST RESPONDENT

JOHANNES

PETRUS KOEKERMOER

SECOND RESPONDENT

JOHANNES

LOWEDWYK BOUWER

THIRD RESPONDENT

MAWEWE

COMMUNIAL PROPERTY ASSOCIATION

FOURTH RESPONDENT

MAWECRO

(PTY)

LTD

FIFTH RESPONDENT

AND

Case

Number: 715/2021

ISSAC

MYOMO

NTIWANE

APPLICANT

ETIENNE

JACQUES NAUDE

FIRST RESPONDENT

This

judgment will be handed down over the Zoom platform on 29 November 2021 and an electronic copy thereof shall be furnished to the parties. A signed copy of the judgment shall be filed on the court file.

JUDGMENT

Roelofse AJ:

INTRODUCTION

- [1] In this judgment, I deal with both case numbers 714/2021 and 715/2021. I do so because respondents are the same in both applications, both applications traverse the same factual material and requires the same determination. In addition, the applications were heard together and the parties were represented by the same legal practitioners.
- [2] The applicant in case number 714/2021 is Mr. Jabulani Lighter Sithole (“Mr. Sithole”). The applicant in case number 715/2021 is Mr. Moyo Ntiwane (“Mr. Ntiwane”). I shall refer to the applicants in both the applications as “the applicants” herein after.
- [3] The first to third respondents were appointed to take control of all the affairs of the Mawewe Communal Property Association (“the association”) by virtue of a court order granted by this court on 10 March 2020 (“the order”). I shall visit the order later in this judgment.
- [4] The association is the fourth respondent in the applications. Mawecro (Pty) Ltd (“the company”) is the fifth respondent in the applications.

- [5] Only the company opposes the applications and filed and delivered answering affidavits in both applications. The company's answering affidavits were deposed to by Mr. Johan Bredenkamp, the company's Managing Director.

Relevant

background

- [6] I commence by setting out only the relevant background that led to the dispute before this court.
- [7] The applicants were directors of the company. Mr. Sithole was the Chairperson of the Board. They were appointed as such by the association.
- [8] The company is a joint venture between the association and CROOKS BROTHERS LIMITED ("Crooks"). Crooks and the association are the only shareholders in the company. The association holds 51% and Crooks holds 49% of the shares in the company. The relationship between the association and Crooks is governed by a Shareholders' Agreement to which the company, the association and Crooks are parties.
- [9] The order was granted in litigation between the Mawewe Tribal Authority and the Senior Traditional Leader of the tribe against the then executive committee of the association. The litigation ended up in the Constitutional Court.[1] The order remained intact. The full details of that litigation are not important for purposes of this judgment. The order however is for the reliance placed thereon by the company for the removal of the applicants as directors of the company..
- [10] Paragraphs 3.1 to 3.3 of the order reads as follows:

"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, my conduct the affairs of the Mawewe Communal Property Association, or hold themselves out as being authorized 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 report back to this court on the affairs of the Mawewe Communal Property Association and further execution of the Anton Piller order, within 90 days after date of execution of this order:

3.3.1 Mr Johannes Lodewyk Bouwer;

3.3.2 Mr Johannes Petrus Koekemoer;

3.3.3 Mr Etienne Jaquess Naudé who shall at all relevant times and in conjunction with and in agreement with Mr Justice van Wyk."

- [11] The order was an interim order pending further proceedings that had to be instituted by the applicants in that application not more than 120 days from the execution of the order.
- [12] On 17 March 2020, the first respondent notified the applicants in a letter that they were suspended as directors of the company. The first respondent relied upon the dissolution of the association's committee and paragraph 3.3 of the order for the applicants' suspension.[2]

THE APPLICANTS' CASE

- [13] Mr. Sithole, sets out the nature of the application as follows:[3]

"This application in main, concerns my unlawful suspension and removal as non- executive director and Chairperson of Mawecro (Pty) Ltd by the First Respondent and the Fifth Respondent. I wish to indicate from the onset that my purported suspension and removal was and continues to be unlawful, devoid of any merit, a violation of the Companies Act, of 2008, as amended, a further violation of the Code of good corporate governance KING IV, and the shareholding agreement entered into between the MCPA and Crookes Brothers limited and the memorandum of incorporation."

- [14] Mr. Ntiwane repeats what Mr. Sithole alleges in paragraph 4 of his founding affidavit.[4]In addition, he describes the application more concisely as follows:[5]

"In this application I invite the Honorable court to decide on a crisp issue relating to the lawfulness of my removal as director of Mawerco (Pty) Ltd."

- [15] Having regard to the papers before me, I agree with Mr. Ntiwane's description of the application. I shall accept his invitation.

Relief sought by the applicants

- [16] The applicants approach the court on notice of motion for the setting aside of the suspension of the applicants as directors (and in the case of Mr. Sithole, also as the Chairperson) of the company. The applicants, in addition, apply for relief consequent to the setting aside of their suspension, including: the reappointment of the applicants as directors of the company; payment to them of all director fees for the period from March 2020 and an order the meetings that were after their removal as directors were not properly constituted and are declared unlawful.

- [17] Mr. Sithole sets out as follows in his founding affidavit:[6]

"I wish to submit that the letter sent to me does not constitute a proper notice as envisaged by the Companies Act, as will be clear from below. The MCPA administrators [the first to third respondents] failed to appreciate the distinct nature of the company from its shareholders. I submit that Mawecro (Pty) Ltd is an independent company from its shareholders. And their conduct herein constitutes a violation of the Companies Act, code of good corporate governance, the shareholding agreement and MOI."

[18] Mr. Sithole in effect says the same thing as Mr. Ntini in his founding affidavit. He alleges that the letters of suspension (i.e the letters of 17 March 2020), “.....by law does not constitute a legal notice for removal by a shareholder....”.[7]

[19] A second letter was sent by the first respondent to the applicants. It read as follows:

“1. We refer to our letter dated 17 March 2020.

2. You are hereby given an opportunity to reply to the above letter within 20 days of date of this letter, to inform the current committee of the MCPA [the association] why you should not be permanently removed as a director of Mawecro Farming.”

[20] The applicants rely on section 71 of the Companies Act 71 of 2008 (“the Companies Act”) and the failure of the company to comply with same as well as the provisions of the shareholders’ agreement in order to substantiate their allegation that their removal as directors of the company had been unlawful.

THE COMPANY’S CASE

[21] The company alleges that the applicants were removed as directors of the company by way of a “RESOLUTION OF A MEETING HELD BY MANAGEMENT OF THE CPA AS DETERMINED BY A COURT ORDER”. The meeting was held on 13 March

2020. The resolution reads as follows:

“1. That Siphwe Happy Mkhatswa/Sithole , Jabulani Sithole and Isaac Ntiwane be removed as directors of MAWECRO farming (Pty) Ltd with immediate effect.

2. That Etienne Jacque Naude, Johannes Lowedwyk Boucher and Justice Van Wyk be appointed as Directors to represent Mawewe Communal Property Association as Directors to represent Mawecro farming (Pty) Ltd.

3. That Etienne Jacque Naude be appointed as chairperson to represent the directors of Mawewe communal property association.”

[22] The company sets out in paragraphs 6.4 and 6.5 of its answering affidavit[8] as follows:

“6.4 The applicant was not listed in prayer 3.3 of the 10 March 2020 order and could accordingly not conduct the affairs of the CPA which affairs include serving as a director representing the CPI on the board of the Fifth Respondent. We were informed of the 10 March order which in effect interdicted the applicant to serve as director. This formed the basis of the Applicant’s removal as director of the fifth respondent by the CPA.

“6.5 It follows that applicant was not removed by the directors of the Fifth Respondent. The Applicant was removed by the CPA (a shareholder of the first respondent) as their representative terms of the order. I am therefore advised (that although sections 71(1) and

- [2] may be applicable) that section 71(3) and (4) of the Companies Act, 71 of 2008 (“the Act”) are not applicable.”
- [23] The company’s case is therefore that the directors of the company did not remove the applicants. The applicants were removed as directors by the association because of the order. In the company’s heads of argument, the company confirms that the removal of the applicants was effected in terms of the provisions of the Shareholders’ Agreement.[9] Therefore, so the company alleges and argues, the applicants cannot seek relief against the company and must be non-suited.
- [24] In addition, the company alleges that the applicants are not entitled to review the decision to remove them (to the extent that they seek a review of the decision) because section 71(5) afforded them 20 days to apply to court for the review the determination of the Board.[10]

DISCUSSION

- [25] This court must decide whether the suspension and removal of the applicants by the company was lawful. Only if this court finds that same was not, the consequential relief that is sought by the applicants can be considered. I therefore commence to decide on that crucial question. In order to do so, I have regard to the company’s Memorandum of Incorporation, the Shareholders’ Agreement and the provisions of the Companies Act with reference to the appointment and removal of directors by a company’s shareholders.

The company’s Memorandum of Incorporation

- [26] Article 27.2 of the company’s Memorandum of Incorporation provides that all directors shall be elected by the shareholders in accordance with the provisions of the shareholders’ agreement. The Shareholders’ Agreement therefore gives guidance to the appointment and removal of the directors of the company.
- [27] The Shareholders’ Agreement
- [28] Clause 10 of the Shareholders’ Agreement sets out provisions relating to directors. The relevant provisions of the clause read as follows:

“10.1. The following provisions were applied to the appointment of DIRECTORS:-

10.1.1. 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;

10.1.2. 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;”

- [29] From the afore-going provisions of the Shareholders' Agreement, the association, as 51% shareholder in the company had the right to appoint the applicants as directors and also the authority to remove them. The authority of the shareholders to appoint and remove directors of the company therefore lies in the Memorandum of Incorporation and the Shareholders' Agreement.
- [30] The association's resolution of 13 March 2020 did exactly that. The resolution was a resolution by the association (as shareholder) to remove the applicants as directors of the company and to appoint the first and second respondents and Mr. Justice van Wyk as directors of the company.
- [31] Besides the company's Memorandum of Incorporation and the Shareholders' Agreement, the Companies Act ultimately regulates the removal of directors of a company despite any provision of a company's Memorandum of Incorporation or Shareholders Agreement. I next turn to the provisions of the Companies Act.

“(1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders

meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).

- (2) Before the shareholders 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.
- [33] The wording of section 71(1) is clear. It dominates a company's Memorandum of Incorporation and any other agreement between a company and a director or between a shareholder and a director. In my view, section 71(1) also dominates the company's Shareholders' Agreement. Section 71(1) of the Companies Act empowers the shareholders of a company to remove a director. Section 71(2) provides for the procedure to exercise that power. The procedure in section 71(2)(a) prescribes notice to be given of the meeting and resolution to remove a director and section 71(2)(b) prescribes that a director be given an opportunity to make a representation to the meeting before the resolution is put to vote.
- [34] In *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18, at paragraph 72, the following is said over section 71(2):

“Section 71(1) and (2) [of the Companies Act] is the mechanism under the Companies Act through which shareholders may dismiss a director whom they have elected. Importantly, section 71(2) requires that a shareholder must give a director notice and a chance to make representations before a resolution is adopted to dismiss him or her.”

- [35] With regards to the power of a shareholder to appoint or remove a Chairperson and Deputy Chairperson of the Board, Minister of Defence and Military Veterans, *supra*, sets out as follows at paragraph 73:

“Second, the Minister is, for the purpose of section 71(1) and (2), the shareholder of Armscor. The Minister appoints the Chairperson and the Deputy Chairperson of the Board and is thus empowered through those provisions to terminate their services. She is thus required to comply with the prescripts of the section in dismissing them.”

- [36] Section 71(1) does not relate to the removal of a director by the Board of a company. It relates to the removal of a director by a shareholder or shareholders. Section 71(3) provides for the removal of a director by the Board of a company while section 71(4) provides for the procedure where a Board of a company removes a director. It also provides for notice and representations by directors.
- [37] Upon the company’s own version, the procedure prescribed by section 71(2) was not followed. I therefore find that the removal of the applicants was unlawful for want of compliance with the prescripts of section 71(2).

CONSEQUENTIAL RELIEF

- [38] In light of the finding that the removal of the applicants as directors of the company was unlawful, there is no reason why certain of the consequential relief sought in the notice of motion should not be granted. As the removal of the applicant is set aside, there is no need for them to be re-appointed. The order has the effect that their removal constitutes a nullity. The applicants are entitled to their directors’ fees from March 2020 to the date of this judgment.
- [39] In terms of the provisions of section 66 of the Companies Act, the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company. The board consists of a director or directors, as the case may be.
- [40] In terms of clause 9.1 of the company’s Shareholders’ Agreement, the board would be responsible for the overall direction of the company and the formulation of policies applied to the business of the company.

[41] In light of the finding that the applicants' removal as directors was unlawful, it must follow that the appointment of the first and second respondents and Mr. Van Wyk in the applicants' stead was also unlawful. In turn, the board of the company, who comprises of its directors were also not properly constituted during the applicants' absence. Therefore, any and all decisions taken from the applicant's removal as directors to the date of this judgment are unlawful and stand to be set aside.

COSTS

[42] Costs should follow the result for there is no circumstance that dictates otherwise.

In the premises, the following order is made:

1. The removal of Mr. Jabulani Lighter Sithole ("Mr. Sithole") as Director and Chairperson of Mawerco (Pty) Ltd ("the company") is hereby set aside.
2. The removal of Mr. Isaac Myomo Ntiwane ("Mr. Ntiwane") as Director of company is hereby set aside;
3. The company is ordered to pay the directors' fees of Mr. Sithole and Mr. Ntiwane from March 2020 to the date of this judgment, such payment to be effected to Mr. Sithole and Mr. Ntiwane within 30 days of this order;
4. All meetings of the reconstituted Board from March 2020 to the date of this judgment are declared unlawful.
5. The company is ordered to pay the applicants' costs.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 28 November 2021

DATE OF JUDGMENT: 24 November 2021

APPEARANCES

FOR THE APPLICANT: Adv SJ Van Rensburg SC

Adv M Mathaaphuna

Adv Pumla Tinda

INSTRUCTED BY:

S Tsotseti Attorneys

FOR THE RESPONDENTS: Adv J De Beer

Adv ACJ Van Dyk

INSTRUCTED BY:

WDT Attorneys

- [1] Mkhathswa and Others v Mkhathswa and Others 2021 (5) SA 447 (CC).
- [2] The letter of 17 March 2020 (annexure “IS2” to Mr. Ntiwane’s affidavit refers to paragraph 3.3.1 of the order. I accept that the intention was to refer to paragraph 3.3 of the order.
- [3] Paragraph 4 of Mr. Sithole’s founding affidavit at page 9.
- [4] At page 9.
- [5] Paragraph 12 of Mr. Ntiwane’s founding affidavit.
- [6] Paragraph 25 at page 15.
- [7] Paragraph 34 at page 18.
- [8] In Mr. Ntiwane’s application.
- [9] Paragraph 4.4.3 of the Fifth Respondent’s heads of argument at page 13 thereof.
- [10] Paragraph 7.4 of the Fifth Respondent’s answering affidavit.

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