

SOUTH AFRICA / JUDGMENT

Theart v Theart and Others (9381/2022)

[2023] ZAWCHC 130 (1 June 2023)

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COURT

Western Cape High Court, Cape Town

BEFORE

Le Roux

CASE / FILE NUMBER

9381/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO.: 9381/2022

TIRON THEART Applicant v RENE THEART 1st Respondent NONGENZENI EUNICE MBENA 2nd Respondent LORCOM THIRTEEN (PTY) LTD 3rd Respondent FREDERICK WOEST EDWARDS N.O. 4th Respondent COMPANIES AND INTELLECTUAL PROPERTY COMMISSION 5th Respondent

JUDGMENT DELIVERED ON 1 JUNE 2023

LE ROUX, AJ:

- [1] In this matter applicant brought an application in which he seeks relief declaring a resolution purporting to appoint first respondent as a director of third respondent to be null and void and of no force and effect, and declaring that a resolution taken by first respondent and second respondent to remove applicant as a director of third respondent to be null and void and of no force and effect, together with certain other relief. Alternatively, and only if the Court should find that the first respondent was validly appointed as a director of third respondent, reviewing and setting aside the 6 May 2022 resolution, and the decision made pursuant thereto, as contemplated in section 71(5) of the Companies Act No 71 of 2008 ('the Companies Act'). First, second and third respondents opposed the application.
- [2] First, second and third respondent brought a counter-application in which they seek relief in terms of section 162 of the Companies Act, declaring the applicant to be a delinquent director, alternatively placing him under probation. The relief sought in the counter-application is conditional upon the Court finding that the decision to remove the applicant as a director of third respondent taken on 6 May 2022 should be set aside on any basis. Applicant opposed this application.

- [3] I shall henceforth refer to first, second and third respondents collectively as respondents and where necessary, specifically refer to a particular respondent.
- [4] The shareholding in third respondent is as follows:
- i. 71% of the shares are held by the Ukuloba Trust;
 - ii. 12% of the shares are held by first respondent;
 - iii. 4% of the shares are held by second respondent;
 - iv. 13% of the shares are held by Millivent 24CC, a close corporation controlled by the late Dirk Theart (father of first respondent).
- [5] The importance of setting out the aforesaid shareholding will become eminent further on herein. At the outset it is important to have regard to the fact that Millivent 24CC ('Millivent') is a close corporation and as such a separate juristic legal entity.
- [6] This is clear, having regard to the provisions of section 2(2) of the Close Corporations Act 69 of 1984 ('the Close Corporation Act') which reads as follows:
- "A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes to its membership until it is in terms of this Act deregistered or dissolved."*
- [7] One Dirk Jacobus Theart ('Dirk Theart'), the father of applicant, fiancé and life partner of first respondent, was the sole member of Millivent. He however passed away on 21 September 2021. An executor was appointed, and Dirk Theart's estate became the sole member of Millivent.
- [8] It is common cause that a shareholders' meeting (of third respondent) was held on 28 October 2021 ('the 28 October meeting'), at which meeting it was resolved that first respondent be appointed as director of third respondent, with immediate effect and which appointment first respondent accepted. Although respondents disputed that it was in fact a shareholders meeting, they themselves in their opposing papers refer to the meeting as a shareholders meeting. In addition, the resolutions taken at the 28 October meeting were shareholders resolutions and not directors' resolutions. This must be the case because they were resolutions taken in the context of what is plainly and unequivocally described as a shareholders meeting.
- [9] However all shareholders were not invited to attend the 28 October meeting and more specifically Millivent and/or its executor were not invited to attend the meeting.

[10] Applicant contends that due to the aforesaid failure to notify and invite all shareholders of third respondent to the 28 October meeting, the appointment of first respondent as director of third respondent is null and void and of no force and effect due to the fact that it was irregular, and they were in fact incapable of passing the resolution that was purportedly passed thereat.

[11] At this juncture I pause to mention that applicant in his founding papers also alleged that both himself and second respondent were at the time not shareholders of third respondent, which issue respondents disputed and placed further facts in front of this Court in their answering affidavits. Upon reading applicant's replying affidavit, it does not seem as if applicant takes further issue with respondents in this regard. Accordingly, I will not have regard to this issue in considering this judgment and accept that the shareholding is as set out by respondents and as reflected herein above.

[12] Coming back to the issue of the validity of the resolution taken at the 28 October meeting I must have regard to the provisions of the Companies Act and more specifically section 62 thereof. The relevant part of section 62 of the Companies Act reads as follows:

"62. Notice of meetings

(1) The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least –

(a) 15 business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or.

(b) 10 business days before the meeting is to begin, in any other case.

(2) ...

(2A) A company may call a meeting with less notice than required by subsection (1) or by its Memorandum of Incorporation, but such a meeting may proceed only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda-

(a) Is present at the meeting; and

(b) votes to waive the required minimum notice of the meeting.

(3) ...

(4) If there was a material defect in the giving of the notice of a shareholders meeting, the meeting may proceed, subject to subsection

(5), only if every person who is entitled to exercise voting rights in respect of any item on the meeting agenda is present at the meeting and votes to approve the ratification of the defective notice.

- (5) If a material defect in the form or manner of giving notice of a meeting relates only to one or more particular matters on the agenda for the meeting-

...

- (6) ...

- (7) ...”

- [13] It is clear from the provisions of section 62 that it is peremptory insofar as notice of any shareholders meeting must be given to all shareholders within a stipulated period before the meeting. The remainder of section 62 deals with those cases where notice have in fact been given albeit defective and in what manner, situations where such a defective notice have been given, can be dealt with.
- [14] It is common cause that no notice was given to Millivent, as a shareholder of the 28 October meeting and neither was such notice given to executor of the estate of Dirk Theart. In fact no attempt to give any notice to Millivent was made.
- [15] Having regard to the fact that Millivent is a close corporation and as such a separate juristic legal entity, I have no doubt that Millivent, as shareholder had to have been given proper notice of the 28 October meeting. Respondents however alleged that due to Dirk Theart’s passing away and him being the sole member of Millivent there was no one to give notice to. I cannot accept this argument as a valid defence as Millivent remained a separate juristic legal entity and as such should have been given notice of the 28 October meeting. The question then arises as to the effect of such failure to give notice to Millivent on the resolution taken at the meeting and the validity thereof.
- [16] In this regard respondents in argument purported to rely on the provisions of section 60(1) of the Companies Act. Section 60(1) however does not assist respondents given that it can never be said that Millivent is not a shareholder entitled to exercise voting rights as contemplated in that section. In any event, in terms of the provisions of section 60, notice would still have been required to be given to Millivent.
- [17] Accordingly, I find that the failures to comply with the peremptory requirements of section 62 of the Companies Act are not saved by the invocation of section 60.
- [18] Respondents further proceeded during argument to rely on the provisions of sections 61(14) and 62(6) of the Companies Act. I shall simultaneously deal with both these additional defences. I fail to see the relevance of section 61(14) as it clearly has no relevance in this matter. Section 61(14) merely means that if the company fails to call a meeting as required in that section, then such failure is not a basis to suggest that the company no longer exists in consequence of its aforesaid failure. Equally section 62(6) cannot be used as to excuse non-compliance with the peremptory requirements of section 62. Section 62(6) deals with the situation where notice was in fact given albeit a defective notice or an inadvertent failure in the delivery of the notice. In the matter no notice was given to Millivent at all and neither

was there any attempt to give any notice to Millivent. Therefore, it cannot be said that the notice was defective or that there was an inadvertent failure in the delivery of the notice.

- [19] In commenting on section 62, the authors of Commentary on the Companies Act of 2008 (at 2-1274/1275) refer to the decision in *Van Zyl v Nuco Chrome Boputataswana (Pty) Ltd* 2013 JDR 0452 (GSJ) where the Court said the following:

“[U]nless a shareholders meeting is properly convened, in the absence of waiver and ratification by all the shareholders, the notices are a nullity. This is especially so because the general rule is that an irregularity in regard to the convening of or proceedings at a general meeting will render invalid resolutions passed at the meeting.”

- [20] In commenting on section 62 (3) (e) the authors in Henochsberg on the Companies Act, 71 of 2008 say the following at 238:

“In the light of this, it is submitted that the intention is further that a consequence of a contravention of the subsection is that no business may validly be transacted at the ensuing meeting unless the shareholders or members entitled to vote are in fact present in person or in proxy.”

(my emphasis)

- [21] In *Louw V SA Mohair Brokers Ltd* [2011] 1 All SA 328 (ECP) the Court said the following in the context of resolutions passed at a meeting in which certain proxy members had been denied the right to be present:

“As a registered shareholder, the first applicant was entitled to be present at the AGM and to participate fully in its proceedings.

He was denied this right when his proxy was evicted and it constituted a violation of his rights. He had not sold his shares in the company and the ruling to eject shareholders, who had sold their shares, from the AGM should not have been applied against

him. The first applicant’s right to speak on and debate any matter on the agenda, more particularly the special resolution,

prior to the members being required to vote was denied him and violated the audi alteram partem rule. In the circumstances,

the exclusion of the first applicant from the AGM was manifestly unlawful.”

- [22] Accordingly I find that first respondent was not properly appointed as a director of third respondent, and it follows that any decisions purportedly taken in her capacity as director, which will in essence then also include the resolution of 6 May 2022, are null and void and of no force and effect.

- [23] This, despite what I have already set out above, brings me to the resolution taken by first respondent and second respondent taken on 6 May 2022 (the 6 May resolution) to remove applicant as a director of third respondent.

[24] On 28 April 2022, seven days before the proposed meeting of 6 May 2022, applicant received notice of the meeting and a document setting out the reasons why it was proposed to remove him as a director of third respondent. The latter document sets out eight such reasons.

[25] The day before the meeting applicant via his attorneys caused a letter to be send to third respondent's attorneys informing them that due to the serious nature of the allegations contained in the notice and the extreme consequences to applicant, applicant would need time and is willing to respond properly to the allegations with 10 (ten) days and that he is not in a position to put the supporting documentation together prior to the meeting the following day. In the same letter applicant's attorneys request inter alia confirmation that the meeting will not proceed.

[26] The following day, the day of the meeting, applicant's attorney once again addressed a letter to third respondent's attorneys on behalf of applicant, inter alia, informing them that:

"We confirm that the notice given to our client is insufficient given the extent and severity of all the allegations levelled at our client. Our client is still in the process of preparing a full and proper response to the allegations and, as indicated in our letter of 5 May 2022 will be able to present a full written response to the board of directors of Lorcom within 10 (ten) days.

Our client's preliminary response is set out in the attached documentation, together with annexures. However, the attached response must in no way be regarded as our client's final version as our client requires additional time to finalise the response and to present same to the board in person.

In addition to the attached response, our client is also currently investigating certain irregularities relating to your client's conduct. As an example, we attach hereto a copy of a document, which purports to be a resolution signed by our client at Velddrif on 22 April 2021. This document was sent to the company auditors by your client. According to our client, he never signed such a resolution and certainly wasn't in Velddrif on 22 April 2021. A handwriting expert has already prepared a report confirming that the signature is not that of our client.

..."

[27] It is common cause that despite the aforesaid first respondent and second respondent proceeded with the meeting on 6 May 2022 in the absence of applicant. It is alleged that they did discussed the applicant's request to postpone the meeting between them and that first and second respondent decided to proceed with meeting in applicant's absence. It is common cause that first respondent and second respondent did not advise applicant of this decision and chose to proceed with the meeting in applicant's absence without his knowledge.

[28] This brings me to the provisions of section 71 (4) of the Companies Act, the relevant part, that reads as follows: "Before the board of a company may consider a resolution contemplated in section 71 (3), the director concerned must be given –

- (a) notice of the meeting, including a copy of the proposed resolution, and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present and response; and
- (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

(my emphasis)

- [29] It thus follows that first respondent and second respondent was in breach of the provisions of section 71(4) of the Companies Act. This is allied to the fact that the respondents contend that the applicant's submissions were canvassed at the meeting.
- [30] It is not sufficient for the first respondent, in her answering affidavit, to effectively tell this Court what she and the second respondent thought of the applicant's submissions, and what they (apparently) discussed at the 6 May meeting.
- [31] The point of section 71 (4) requiring the director to be present is so that he or she may put forward the arguments they may have in support of their contentions – discussions in a vacuum, is not what the legislature contemplated.
- [32] In *Steenkamp and Another v Central Energy Fund SOC Ltd and others* 2018 (1) SA 311 (WCC) the applicants sought to review the decision of the CEF to remove them as directors. While this removal occurred in the context of a shareholders meeting, I am of the view that the principles are, nonetheless applicable.
- [33] Paragraphs 16 and 17 of the judgement record the following:
- “[16] In response to the invitation to make representations PetroSA's board instructed legal representatives who duly prepared written representations in the form of a 150-page presentation, comprising 78 pages of closely typed text plus annexures.*
- [17] PetroSA's board originally scheduled a shareholders' meeting for 2 June 2017, being more than two months after receipt of the original request from the CEF to hold a shareholders' meeting. This was unacceptable to the CEF board and eventually a compromise was reached whereby the meeting commenced on 22 May 2017.”
- [34] Paragraph 19 of the judgment, in its relevant part, records the following:
- “At the general shareholders' meeting on 22 May 2017 and through its counsel, the PetroSA board partly presented its oral representations whereupon the meeting was postponed to 6 June 2017 but was not completed on that date.”*
- [35] What seems apparent from this is that the directors concerned were given an adequate opportunity to provide representations, did indeed do so, and were represented at the meeting that followed. Indeed, at paragraph 33 of the judgment Bozalek J went on to say the following:

“However, even if this assumption is made, as well as the further assumption that the applicants were entitled to the procedural rights referred to in s 71 (4)(a) mutatis mutandis, no case has been made out by them that they were not afforded these rights and protections. The applicants were given detailed reasons why the shareholder was of the preliminary view that they should be removed as directors. They had a more than reasonably opportunity to make representations both in writing and an oral presentation to the shareholders meeting, which they did through their legal representatives, before the resolution for their removal as directors was put to the vote.

[36] However that this can hardly be said to be the case in the present matter. Not only was the applicant afforded insufficient time to make his representations, but he was not given the opportunity to appear at the meeting itself (his request for a postponement having been rejected, and not having been advised that it had been so rejected).

[37] In describing the audi alteram partem principle, the Supreme Court of Appeal said the following in *Chairman, Board on Tariffs and Trade, and others v Brenco Inc and others* 2001 (4) SA 511 (SCA) at paragraph 14:

“There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts. As Sachs LJ pointed out in Re Pergamon Press:

‘In the application of the context of fair play, there must be real flexibility, so that very different situations may be met without

producing procedures unsuitable to the object in hand ...

It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate ... the activities of those engaged in the investigation or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceedings, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective.”

[38] And in the common law context, the Court in *Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture* 1980 (3) SA 476 (T) said the following at 486 F – G:

“firstly, that the person concerned must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations; secondly, he must be put in possession of such information as will render his right to make representations a real, and not an illusory one.”

[39] In applying the aforesaid principles to the present matter I find that there can be no doubt that the applicant was afforded a woefully inadequate opportunity to deal with the various serious allegations made against him by the respondents.

[40] The respondents, moreover, have not dealt, meaningfully or at all, in their affidavits with the following:

- i. the applicant's complaint that he was given insufficient time to deal with the allegations made against him;
- ii. the applicant's complaint that he was not provided with a copy of the minutes of the meeting;
- iii. the applicant's complaint that the notice lacks specificity; and
- iv. the applicant's complaint that he has not been provided with a determination as contemplated in section 71 (5) of the 2008 Companies Act.>

[41] The aforesaid in addition to my finding that the 28 October resolution is invalid leaves me with the finding that applicant should be successful in his relief sought in this regard.

[42] Accordingly there is no need for me to consider the alternative relief sought by applicant. I do however have to consider respondents' defence of estoppel in respect of the resolution taken at the 28 October meeting.

[43] From the minute of the meeting appointing first respondent as director it can be gleaned that applicant agreed to that decision and signed the minute and took the necessary steps to be done to reflect first respondent as a director in the CIPC documentation.

[44] I have already found that the failure to give Millivent notice of the 28 October meeting rendered the resolution taken at the meeting appointing first respondent as director of third respondent, invalid.

[45] Respondents allege that applicant would be estopped from raising the objection of failure to give notice to Millivent or the executor of Dirk Theart's estate, inter alia due to the fact that applicant was fully aware of the decision taken at the 28 October meeting, supported the decision, was aware that his father had instructed first respondent to be appointed as director but yet failed to raise any objection. Applicant thus, so the argument went, thus clearly represented that he had no objection to the vote on the appointment of first respondent as director and accordingly applicant is estopped by his conduct at and prior to that meeting.

[46] The position regarding the estoppel doctrine in relation to a situation where there was non-compliance with prescribed law, in other words in an attempt to make legal what would otherwise have been illegal, was authoritatively stated by Marais JA in a unanimous decision in *Eastern Cape Provincial Government v Contractprops 25 (Pty) Ltd* 2001 (4) SA 142 (SCA) at 148F:

"It is settled law that a state of affairs prohibited by law in the public interest cannot be perpetuated by reliance upon the doctrine

of estoppel. (See *Trust bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A) at 411H-412B.)

[47] I now turn to deal with respondents' counter-application. Respondents brought their application conditional upon applicant's application being granted. Respondents brought their counter-application to have applicant declared to be a delinquent director, in terms of section 162(5) of the Companies Act. Section 162(5) of the Companies Act in dealing with the circumstances in which a Court must declare a director to be a delinquent director, reads as follows:

"(5) A court must make an order declaring a person to be a delinquent director if the person -..."

[48] It is clear that the provisions of section 162(5) are thus peremptory which entails, that once I have found that any of the provisions of subsections 162(5)(a) to 162(5)(f) are present, I would have to declare applicant to be a delinquent director. This in turn entails that it leaves no room for any conditional relief in this regard. A director is either a delinquent director, or he is not, depending on if it is found that any of the aforesaid subsections are applicable.

[49] Accordingly the relief sought in the counter-application to declare applicant a delinquent director is bad in law and cannot be brought on a conditional basis.

[50] Even if I am wrong in this regard, I am mindful of what Binns-Ward J, inter alia stated in *Lewis Group Woollam and Others* (1)

[2017] 1 All SA 192 (WCC) in paragraph 18:

"It follows that for a company or any of its shareholders to succeed in obtaining a declaration of delinquency in respect of any of the company's directors or former directors they must demonstrate very serious misconduct by the person concerned. The relevant causes of delinquency entail either dishonesty, wilful misconduct or gross negligence. Establishing so-called 'ordinary' negligence, poor business decision-making, or misguided reliance by a director on incorrect professional advice will not be enough."

[51] Having regard to the aforesaid and the peremptory provisions of section 162(5), I cannot find that any of the complaints by respondents against applicant, read in conjunction with the explanations applicant has given, comes close to conduct that would be considered delinquent as provided for in section 162(5). In fact, I am of the view that the conduct of applicant has been neither delinquent, nor has it been such that he should be placed under probation.

[52] In regard to the relief sought that applicant be placed under probation, the only potentially relevant section being section 162(7)(a)(ii) reads as follows:

"(7) A court may make an order placing a person under probation, if-

(a) while serving as a director, the person-

(i) ...

(ii) otherwise acted in a manner materially inconsistent with the duties of a director; or

(iii) ...”

[53] From the content of the affidavits filed on record and bearing in mind the applicable law when dealing with a matter on affidavit, and as culminated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 and *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at 290D-E, I cannot find that the conduct of applicant has been delinquent, nor has it been such that he should be placed under probation. Each allegation made by respondents in their affidavit is carefully considered and dealt with in applicant’s

(as respondent in the counter-application) answering affidavit thereto. I must accept applicant’s version in this regard

as there is no basis on the papers before me to find that the allegations made on his behalf is so far-fetched, or so clearly untenable, that it I am justified in rejecting that version on the papers before me.

[54] Accordingly I cannot find in favour of respondents regarding their relief sought in the alternative either.

[56] In regard to the issue of costs, I find no reason to depart from the general rule that costs should follow the result, and neither can I find any reason why I should depart from a party-party scale regarding the costs of the applications.

[57] Accordingly, the following order is made:

1. the resolution dated 28 October 2021 purporting to appoint first respondent as a director of third respondent is declared to be null and void and of no force and effect;
2. the resolution taken by first respondent and second respondent on 6 May 2022 to remove applicant as director of third respondent is declared to be null and void and of no force and effect;
3. any and all actions taken by first respondent after 28 October 2021 in her purported capacity as a director of third respondent is declared to be null and void and of no force and effect;
4. first respondent and second respondent shall pay the costs of the application jointly and severally, the one paying the other to be absolved;
5. the counter-application is dismissed;
6. first respondent and second respondent shall pay the costs of the counter-application jointly and severally, the one paying the other to be absolved.

LE ROUX, AJ

ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicant : A Smalberger SC instructed by Werksmans Attorneys For 1st and 2nd
respondents : A Oosthuizen SC instructed by STBB Attorneys and Kim Pistor Attorneys

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