

SOUTH AFRICA / JUDGMENT

Wait v Marais and Others (1707/2021) [2022] ZAECQBHC 41 (1 November 2022)

[2022] ZAECQBHC 41**COURT**

Eastern Cape High Court, Gqeberha

BEFORE

Potgieter

CASE / FILE NUMBER

1707/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, GQEBERHA)****CASE****NO: 1707/2021****In**

the matter between:

MARIUS

WAIT

Applicant

and

JAN

JOHANNES

MARAIS

First Respondent

ZAHED

RASSOOL

Second Respondent

CREMATION

AUTHORITY (PTY)

LTD

Third Respondent

COMPANIES

AND INTELLECTUAL PROPERTY

COMMISSION

Fourth Respondent

REPORTABLE: YES/NO
OF
INTEREST TO OTHER JUDGES: YES/NO
REVISED.

JUDGMENT

POTGIETER J

Introduction

[1] The applicant, who is a former director of the third respondent, is seeking the following relief in terms of section 71(5) of the Companies Act, 71 of 2008 (“Act”):

“1. Declaring invalid, alternatively, reviewing and setting aside, the decision of the board of directors of the third respondent purporting to remove the applicant as a director of the third respondent taken at the meeting of the board held on 26 May 2021;

2. Declaring the applicant to be a director of the third respondent, alternatively reinstating the applicant as a director of the third respondent;
3. Directing the first respondent to amend its records to reflect that the applicant is a director of the third respondent;
4. Directing that the first and second respondents pay the costs of the application on the scale as between attorney and client;
5. Further and/or alternative relief.”

[2] The fourth respondent has been joined because of its interest in the matter and is not participating in the proceedings. The first, second and third respondents are opposing the application. Their interest in the matter appears from what is set out below. They have raised and since abandoned a point in limine that the applicant failed to comply with rule 41A which deals with the referral of disputes to mediation. They were well advised in this regard. Peculiarly, they themselves failed to comply with rule 41A as they were obliged to do. Nothing further needs to be said about this aspect.

Background

[3] The applicant and his father-in-law had started conducting a crematorium business during 2002 in the town of Despatch, under the name Despatch Crematorium. The business was operated through a partnership between the two owners for approximately 16 years until the applicant’s co-owner wanted to retire from the business and offered to sell his share in the partnership to the applicant. The latter was unable to afford the purchase price resulting in the co-owner endeavouring to find alternative purchasers.

- [4] Ultimately the first and second respondents (“the respondents”) agreed to purchase the co-owner’s 50% share of the business on condition that the business be incorporated as a private company with the respondents each receiving 25% of the shares and the applicant the remaining 50%. In execution of the agreement, the third respondent was incorporated. The applicant and the respondents were made directors of the third respondent on 16 July 2018.
- [5] The relationship between the respondents on the one hand and the applicant on the other became strained over time as more fully set out below. On 4 February 2021 the respondents held an urgent meeting of the board of directors of third respondent without notice and resolved to remove the applicant as a director. The respondents subsequently had a change of heart and accepted that this decision was irregular and decided against implementing the same. In correspondence from their attorneys dated 5 March 2021 addressed to the applicant’s attorneys, it was recorded that the respondents would not proceed with the applicant’s removal as a director and that a subsequent meeting will be convened on adequate notice where the matter would be dealt with.

The impugned decision

- [6] On 13 April 2021 the applicant was notified via correspondence that:’
- (a) a meeting of the board of directors of the third respondent would be held on 26 May 2021 at 10h00 at the premises of the third respondent’s registered secretary for the purpose of adopting a resolution to remove the applicant as a director of the third respondent;
 - (b) the statement prepared by the board which was annexed to the notice would serve as the grounds upon which the board desired to adopt a resolution for the applicant’s removal;
 - (c) the applicant would have an opportunity to make representations to the board at the meeting, setting out the reasons in opposition to the proposed resolution, whether in person or through a representative.
- [7] In terms of the statement in support of the proposed resolution to remove the applicant as a director, the respondents averred,

inter-alia, that:

- (a) “the agreed-upon most imperative duties for you to hold the position of director of the Company, amongst the other more general duties reasonably expected of a director of a Company, are as follows-
 - i. continued support to the Company when required;
 - ii. provision of advice during meetings;
 - iii. client liaison and emergency assistance when required;

iv. weekly interaction with directors in connection with the carrying on of the Company, which includes site visits;

v. Fiduciary duties and compliance which includes compliance with the South African Revenue Service concerning the Company and also ensuring registration for Value Added Tax;

vi. financial assistance to the Company in times of emergencies. The Directors of the Company have individually loaned approximately R280 000.00 (Two Hundred and Eighty Thousand Rand) over the period of the past three months to the Company by reason of the fact that an overdraft facility cannot be arranged due to your absence from the country;

vii. administrative duties which included signatures required for application of services in connection with refrigeration containers, tool and generator rentals, vehicle rentals and/or purchase and Telkom accounts. In respect of the aforementioned administrative duties the Company requires signatures of all three of its directors. Accordingly, as a consequence of your absence, the Company was forced to facilitate transactions through our corporate structures.”

(b) since 17 February 2020 the applicant had not fulfilled any of the above-mentioned duties;

(c) the applicant left South Africa “without adhering to any required procedures or providing the board with the required proper notice of your absence required by the Act”;

(d) the board did not have knowledge as to whether the applicant was ever out of the country, and if the applicant was, for how long the applicant was out of the country for;

(e) the premises of the company caught on fire and suffered damages;

(f) the services of the previous manager had been terminated and a new manager appointed, whose signature needed to be added to the bank account of the Company as a matter of urgency to limit the company’s damages;

(g) the board had determined that the removal of the applicant as a director was imperative for the proper functioning of the company;

(h) that the applicant never showed any interest to act as a director or communicated such interest to the board of directors;

(i) the board assumed that the applicant had forgone his duties as a director by choosing to leave the country;

(j) due to the applicant’s delinquency the company could not employ the services of the bank to open an overdraft facility and to conclude imperative transactions for the carrying on of the business in the absence of the applicant’s signature;

(k) the applicant breached his duties under section 76 of the Companies Act in that the applicant did not act in good faith and for a proper purpose and failed to act in the best interests of the Company;

- (l) the applicant's 'neglectedness and derelictness' consequently warranted the applicant's removal as a director.
- [8] A copy of the resolution did not accompany the statement provided by the first and second respondents.
- [9] The proposed resolution was eventually provided to the applicant on 7 May 2021.
- [10] On 18 May 2021, the applicant, through his attorneys of record, informed the respondents that the applicant intended to make

representations to the board in opposition to the proposed resolution, however, due to the vagueness of the allegations, which

were lacking in specificity, the applicant requested that the following information be provided to him to reasonably permit him to prepare and present a response:

- (a) copies of minutes of all meetings and resolutions of directors during the period February 2020 to April 2021;
 - (b) copies of the third respondent's annual financial statements for the periods 2018 to 2021 as contemplated in section 24(3)(c)(ii) of the Companies Act;
 - (d) records of all distributions made by the third respondent as contemplated in terms of section 46 of the Companies Act;
 - (f) records of any and all financial assistance provided by the third respondent to the first and second respondents or to any directors of related or interrelated companies, or to a member of any related or interrelated company, or to any persons related to any of the aforementioned parties as contemplated in section 45 of the Companies Act, and all documentation in support of and authorising the provision of such financial assistance;
 - (g) records pertaining to the change in signatories of the third respondent's bank account and the resolution adopted in support thereof;
 - (h) copies of all communications requesting compliance by the applicant with respect to the duties that he allegedly breached;
 - (i) reasons for the termination of the previous manager's services as alleged, and an explanation of the basis upon which the new manager was added to the bank account as referred to in paragraph 8 and 19 of the Statement;
 - (j) a list of the 'administrative problems' alleged in paragraph 14 of the Statement.
- [11] In the aforesaid letter, it was also enquired whether the first and second respondents would be amenable to holding a without prejudice meeting to pursue an amicable resolution to the situation.

- [12] On 19 May 2021, the respondents advised the applicant that the first and second respondents were amenable to holding the proposed meeting on 21 May 2021, and that in the event that no amicable resolution to the matter could be achieved at the meeting, then the first and second respondents would provide the applicant with the requested documents and information by no later than 24 May 2021.
- [13] No amicable resolution was achieved at the without prejudice meeting held between the parties.
- [14] On 25 May 2021, the day prior to the proposed meeting, the respondents reneged on the undertaking to provide the applicant with the requested information and advised that the meeting would proceed nonetheless.
- [15] On 26 May 2021 the applicant attended the meeting under protest, without having been furnished with the documents and information
- required to prepare his presentation.
- [16] At the meeting held on 26 May 2021 the first and second respondents resolved that the applicant be vacated from the office of director.

The applicant's case

- [17] The applicant contends that the decision to remove him as a director was substantively and procedurally unfair and was taken in a manner inconsistent with the provisions of section 71(4) of the Companies Act. Accordingly, the applicant seeks that the court review the decision in terms of section 71(5) of the Companies Act and direct that the applicant be reinstated as a director of the third respondent.
- [18] The applicant further contends that the information requested was crucial to enabling him to explain why, in the circumstances, he could not be regarded as having neglected or been derelict in his duties as a director.
- [19] The applicant indicated that since being appointed as directors, it has been the modus operandi of the first and second respondents to refuse to provide salient financial information to the applicant, and to keep him in the dark in respect of the reasons for the financial decisions regarding the company. When the directors were to vote on financial matters the first and second respondents would simply outvote the applicant and push their decisions through as the majority.
- [20] A significant example of this was the decision of the first and second respondents to change the distribution of profits from monthly distributions made to the shareholders, proportionate to their respective shareholding, to payments of directors' salaries in equal proportion. It was contended by the applicant that the decision evidenced the intention of the first and second respondents to serve their personal interests as the main priority. The respondents sought to rely on objectionable hearsay evidence for the basis of the decision to remove him and have not provided a cognizable ground for how the decision would serve

the company any better than the status quo ante.

- [21] The applicant furthermore indicated that the reduction in the income that he received as a result of the decision to alter the remuneration structure, placed him in an unsustainable financial position.
- [22] In April 2020, the first and second respondents decided to stop paying a monthly remuneration to the applicant at all. This is admitted by the respondents.
- [23] As a consequence of the decisions of the first and second respondents, the applicant contended that he was forced out of desperation to seek alternative employment to provide for himself and his family. He thus took an appointment in the United States during 2020. The applicant returned to South Africa in October 2020.

The respondents' case

- [24] The respondents contend that they complied with the obligations to provide the applicant with a copy of the proposed resolution to remove him as a director and a statement setting out the reasons with sufficient specificity for the proposed resolution. Furthermore, the applicant was given a reasonable opportunity to make representations to the board before the resolution was put to a vote. The applicant elected not to make representations but rather to request documents and information to prepare the presentations. The board refused to provide these documents or information because they were irrelevant.
- [25] According to the respondents it is not clear what would constitute sufficient specificity as envisaged in section 71(4)(a) of the Act. They submitted, relying heavily on the decision of the Western Cape High Court in *Pretorius v PB Meat (Pty) Ltd* [2013] ZAWCHC 89, that a director is only entitled to "limited information".
- [26] They expressed the tentative view that the review of the board's decision provided for in section 71(5) which is at issue in this matter, is limited to "enquiring into the procedural correctness of the decision and not the substance of the decision". They concede, however, in the same breath that "an argument may be made that a court reviewing the decision of the board of directors under section 71(5) of the Companies Act would ... be empowered to consider both the merits and the procedural aspects of the decision".
- [27] They submitted that the applicant has failed to make out a case for the relief being sought and that the application should be dismissed with costs.

The Companies Act

- [29] Section 71 of the Companies Act introduced an innovation which permits the board of directors to remove a director from office under certain specified circumstances. The section provides as follows in relevant part:

"71. Removal of director

...

- (3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company-
- (b) has neglected or been derelict in the performance of, the functions of director,
- the board, other than the director concerned, must determine the matter by resolution, and may remove a director it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.
- (4) Before the board of the company may consider a resolution contemplated in subsection (3), the director concerned must be given-
- (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out the reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a 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.
- (5) If, in terms of subsection (3), the board of the company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.
- (6) If, in terms of subsection (3), the board of the company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be-
- (a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and
- (b) the court, on application in terms of paragraph (a), may-
- (i) confirm the determination of the board; or
- (ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated or has been negligent or derelict.
- (7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.
- (8) If a company has fewer than three directors-
- (a) subsection (3) does not apply to the company;

- (b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and
- (c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.
- (9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for-
 - (a) loss of office as a director; or
 - (b) loss of any other office as a consequence of being removed as a director.
- (10) This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.”
- [30] It is readily apparent from the architecture of the section that the process of removal is triggered by an allegation of a shareholder or director warranting the removal of the affected director. The board of directors is then obliged to determine the matter by resolution. A determination is required of the factual situation and the objective veracity of the allegation. A formal process applies where the affected director enjoys various safeguards. The director must be given notice of the meeting, must be provided with a copy of the proposed resolution as well as a statement setting out sufficiently specified reasons for the proposed resolution so as to reasonably permit the director to respond. The director is entitled to provide the board with relevant information and a response and to a reasonable opportunity to make a presentation to the meeting before the resolution is put to a vote. These requirements are set out in peremptory terms in section 71(4). The protections provided to the director in this regard are imperative where the resolution or statement is couched in vague and general terms. This is so given that the board has to make a proper objective factual determination on cogent grounds, for example, that the affected director neglected or was derelict in the performance of the functions of a director.

(ii) The offending conduct

- [31] The wording of some of the parts of section 71 gives rise to a measure of confusion. This is particularly so in respect of the use of the terms ‘neglect’ and ‘negligence’ in subsection (3). The offending conduct set out in subsection (3) is that the affected director allegedly “has neglected ... the functions of a director”. At the same time a determination that the director was “negligent” is required for his or her removal. The latter is confirmed by subsections (5) and (6). The terms ‘neglect’ and ‘negligence’ are not synonymous. In the context of subsection (3) the word ‘neglect’ is used as a verb. Negligence on the other hand is an element of fault. It is not immediately apparent whether the term ‘negligence’ imports a further jurisdictional fact for removal into section 71 thus requiring the board to determine firstly, whether or not the director neglected his or her functions and secondly, whether or

not this was due to negligence on his or her part. The alternative is that these two terms refer to the same state of affairs in that neglect incorporates an element of negligence and that the board is only required to undertake one determination to ascertain whether the director's neglect was blameworthy.

[32] Similar conundrums arise with regard to the requirement that the director should have "been derelict in the performance of the functions of director". The term "derelict" is not defined in the Act. It is also not immediately apparent in this regard what degree of fault is required in order for conduct to amount to being 'derelict' in this context. Is negligent conduct sufficient or is a higher degree of fault required such as intent or recklessness. Some authors suggest that if negligence would suffice it is superfluous to refer to both negligence and dereliction of duties in section 71. This implies that a higher form of fault than negligence is required in respect of dereliction of duties (cf Henochsberg on the Companies Act 71 of 2008 General note on s71).

[33] In view of the conclusion to which I have come in this matter, it is not necessary for purposes of this judgement to make a final determination in respect of the above issues which were also not fully argued before me. I therefore refrain from doing so.

(iii) Reasons for proposed removal

[34] There is a dispute between the parties whether or not the respondents complied with the obligation in terms of section 71(4)(a) to furnish the applicant with reasons for the proposed resolution to remove him as a director "with sufficient specificity to reasonably permit the director [applicant] to prepare and present a response".

[35] The short answer is that the respondents undertook to provide the applicant with the requested documents and information to enable him to prepare and present a response. It is common cause, however, that the respondents reneged on this undertaking after the parties could not come to an agreement at the meeting of 21 May 2021. The board meeting was convened for 26 May 2021 and the respondents initially undertook to provide the requested documents and information by no later than 24 May 2021. However, on 25 May 2021 the defendants had a volte face and reneged on this undertaking. They now belatedly averred during argument that the applicant had sufficient opportunity to obtain the documents and information from the company's auditor and that they were not legally obliged to provide the same to the applicant.

[36] The respondents do not suggest in their papers that they have already provided reasons with sufficient specificity. In any event, they would have been hard pressed to do so given their earlier agreement to provide the documents and information thereby accepting that it was reasonably required by the applicant to prepare and make a presentation at the board meeting. The respondents instead indicated that the applicant should have obtained the documents and information from the auditors therefore they are not legally obliged to provide the same. The respondents' argument is flawed. Section 71(3) and the relevant provisions that follow, undoubtedly introduce a process where the board is required to take

the initiative to remove the director. The duty to provide a statement setting out the reasons rests on the board and not the auditors. It was therefore not open to the respondents to attempt to circumvent their earlier undertaking by shifting their duty to the company's auditors. They were legally obliged to provide the documents and information to the applicant, as they had undertaken to do.

[37] The respondent's failure to provide the applicant with the requested documents and information amounted to a breach of their duty in terms of section 71(4)(a). The applicant was entitled to receive the relevant documents and information despite the respondents' belated argument that he did not and that they have provided sufficiently specified reasons. A cursory look at the reasons provided show that they were vague, general and unspecified. By way of example, the applicant was entitled to any documentary or other proof and relevant information substantiating the allegations by the board that he failed to fulfil his duties since 17 February 2020 and had left South Africa without adhering to any required procedures; that his removal was imperative for the proper functioning of the company; that he never showed any interest to act as a director; that he breached his duties under section 76 and did not act in good faith, for a proper purpose or in the best interests of the company; and that his 'neglectedness and derelictness' warranted his removal as a director. Whichever way one looks at the term "sufficient specificity", these "reasons" in my view fell far short of this standard.

[38] In the matter of Pretorius v PB Meat supra relied upon by the respondents, the court concluded that "sufficient specificity" would mean "sufficiently detailed reasons to mount a response". I am in respectful agreement with that conclusion. Naturally, whether or not there was compliance with this requirement is to be determined in the light of the particular facts and circumstances of the case at hand. In Pretorius the court concluded that in the circumstances of that matter sufficiently specified reasons, as well as a response to the director's

request for particulars, had in fact been provided to the director. That decision is accordingly of no direct assistance to the

respondents in this matter who had reneged on their undertaking to provide the requested particulars.

(iv) Right of the director to review the determination

[39] Section 71(5) applies in the present matter. It empowered the applicant to bring the present proceedings to review the board's

determination

on 26 May 2020 to remove him as a director. This much is not in issue between the parties. The respondents, however, contend albeit somewhat tentatively that the review is limited only to a determination whether there were any procedural irregularities which vitiated the board's decision. I do not agree.

[40] The term 'review' does not have a fixed or singular meaning. In the time-honoured classification in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111, Innes CJ distinguished 3 forms of review that the court might be concerned with, namely: firstly, review of inferior courts, secondly, common law (inherent) review of administrative authorities, and lastly, a statutory review in terms of which "the legislature has from time to time conferred on this Court or a judge a power of review which in my opinion was meant to be far wider than the powers which it possesses under either of the [first two] review procedures" (at 116).

[41] Professor Baxter points out that the terms 'review' and 'appeal' have at the best of times been ambiguous or even confusing. In some instances, concerning decisions of statutory tribunals "one 'appeals' to the tribunal to 'review' or 'revise' a previous decision" (*Administrative Law* pp256 & 706). The same author states that in the context of statutory redress 'review' means 'judicial scrutiny' the scope whereof depends on the wording of the statute (op. cit. p707). Furthermore, as was pointed out, "every appeal is in the nature of a review" (per De Villiers CJ in *Klipriver Licensing Board v Ebrahim* 1911 AD 458 at 462). The term 'appeal' is often used in instances of statutory 'reviews' to indicate the courts wider jurisdiction, which differs from 'ordinary' judicial review in the administrative law sense. This may vary from statute to statute. In order to capture the range of this jurisdiction, 3 broad categories have been identified which are most usefully set out in the following formulation found in *Tickly v Johannes* NO 1963(3) SA 588 (T):

"(i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly."

[42] Professor Hoexter indicates that the "legislature may and often does confer on the courts a statutory power of view. This is 'special' because it differs from 'ordinary' judicial review in the administrative-law sense (as now governed by the PAJA). It is sometimes a wider power than ordinary review, and thus more akin to an appeal; but may well be narrower, with the court being confined to particular grounds of review or particular remedies. While Innes CJ

spoke of the statutory review power as being ‘far wider’ than the first two kinds of review mentioned by him, it is clear that the precise extent of the power always depends on the particular statutory provision concerned (Administrative Law in South Africa (2ed) p.113 para 5)”.

[43] The New Shorter Oxford English Dictionary vol1 (1993) p 2582 gives the meaning of ‘review’ as “the act of looking over or through (a book etc) for the purpose of correction or improvement; a reconsideration of some subject”.

[44] In *Williams v Workmen’s Compensation Commissioner* 1952(3) SA 105 (C) at 108 the court held with reference to dictionary definitions that in the context of the then applicable Workmen’s

Compensation legislation ‘review’ means “the act of looking over something (again) with a view to correction or improvement. The Commissioner looked over his decision ... again in the light of fresh evidence supplied and ... he confirmed ... his existing decision.”

[45] In *President of the Republic of South Africa v Gauteng Lions Rugby Union* 2002(2) SA 64 (CC) para [13] the Constitutional Court stated that “it is settled law that when a court reviews a taxation it is vested with the power to exercise a wider degree of supervision identified in the time-honoured classification of Innes CJ in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111”.

[46] In my view, the sense in which the term “review” is used in section 71 must be determined by means of applying a purposive interpretation having due regard to its context in the Act. Regard must also be had to the dictum in *Nel & Another NNO v The Master* 2005 (1) SA 276 (SCA) paragraph [25] that “... it is important to have regard to the nature of the functions entrusted to the person whose decision is under review”.

[46] Applying the above approach, it is of note that section 71(3) and (4) entrust a novel power to the board of directors of companies to remove a director after having followed a peremptory formal process. The removal patently has potentially far-reaching consequences for the affected director such as an affront to integrity and dignity; reputational harm; impairment of standing and future prospects of acquiring directorships; adverse financial consequences and the like. The potential for abuse of the power must also be factored in. The decision-maker is often not endowed with the requisite adjudicatory skills to properly make a determination which requires that complex factual and legal conclusions must be drawn in respect of complicated questions, for example, whether or not negligence, neglect or dereliction of duties have been established on the part of the affected director.

[47] The need, identified in section 5(1), to give effect to the purposes of the Act set out in section 7 when interpreting the provisions of the Act must be borne in mind. In this regard the purposes of encouraging transparency and high standards of corporate governance (section 7(b)(iii)) as well as encouraging the efficient and responsible management of companies (section 7(j)), are particularly pertinent. Also of importance is the underlying purpose of

providing adequate safeguards for the rights of the affected director. This is illustrated by the rights to adequate notice, sufficiently specified reasons for the proposed resolution to reasonably permit the director to prepare and present a response, and a reasonable opportunity to make a presentation to the meeting before the resolution is put to a vote.

[48] Taking all the above considerations into account, a proper interpretation of the term “review” in section 71(5) requires the court in my view to undertake a complete reconsideration, in the wide sense, of the board’s

determination as envisaged in the above authorities. This conclusion also gives due weight to the need to provide adequate protection to the rights of the affected director. I accordingly adopt this approach to the present application.

Assessment

[49] As indicated, the failure of the respondents to provide the requested documents and information to the applicant as they had undertaken to do, constitutes a breach of the duty in terms of section 71(4)(a) and rendered the determination made at the board meeting of 26 May 2021 to remove the applicant as a director, fatally flawed. The “reasons” provided for the proposed resolution were vague, couched in general terms, and lacked sufficient specificity as required by section

71(4)(a). The respondents accordingly also failed to comply with the prescripts of the latter section in this respect. The applicant was therefore fully justified to request and entitled to obtain the relevant documents and information from the board, which was in effect constituted by the first and second respondents. He was under no duty to undertake the task to prepare and present a response to the “reasons” under the circumstances and was equally justified to attend the board meeting “under protest” as he did.

Conclusion

[50] Having undertaken a reconsideration of the determination by the board, I am satisfied that the applicant has made out a proper case for the determination to be reviewed and for the relevant relief being sought to be granted to the applicant. The application should accordingly succeed.

[51] It is of note that in terms of section 70(2) no vacancy has as yet arisen on the board of the third respondent, but the applicant is currently suspended from his office as director by operation of law. This situation must be reversed.

[52] Furthermore, it is not justified in my view to grant a punitive costs order against the respondents in the circumstances of the case.

[53] In the result I make the following order:

1. The determination of the board of directors of the third respondent made at the meeting of the board held on 26 May 2021 to remove the applicant as a director of the third respondent, is reviewed and set aside;
2. The applicant is forthwith reinstated as a director of the third respondent;
3. The fourth respondent is directed to amend its records, if necessary, to reflect that the applicant is a director of the third respondent;
4. The first and second respondents are directed to pay the costs of the application on the party and party scale.

D.O. POTGIETER

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant:

Adv J.M Ramsay, instructed by Nelson Attorneys, 60A Worraker Street, Newton Park, Gqeberha

For the first to third respondents: Mr H.M Huisamen, instructed by Bezuidenhout Attorneys, 12 Buckingham Road, Mill Park, Gqeberha

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04 August 2022

Date of delivery of judgment: 01 November 2022

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