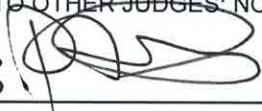




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2023/037410

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>30/05/2023</u> 	
DATE	SIGNATURE

In the matter between:

PIOTRANS (PTY) LTD

First Applicant

NOMAZOTSHO YVONNE MEMANI NO

Second Applicant

And

MMC OF TRANSPORT COJ

First Respondent

THE EXECUTIVE DIRECTOR

Second Respondent

CITY OF JOHAANNESBURG

Third Respondent

**MEC TRANSPORT FOR GAUTENG DEPT OF
TRANSPORT**

Fourth Respondent

HOD GAUTENG DEPARTMENT OF TRANSPORT
THE NATIONAL DEPARTMENT OF TRANSPORT

Fifth Respondent

MINISTER OF TRANSPORT

Sixth Respondent

DG DEPARTMENT OF TRANSPORT

Seventh Respondent

SABRATA (CHAIRPERSON OF SABRATA)

Eighth Respondent

Neutral Citation: *Piotrans (Pty) Ltd and Another v MMC of Transport COJ and Others*
(Case No: 2023/037410) [2023] ZAGPJHC 601 (30 May 2023)

JUDGMENT

MALUNGANA AJ

Introduction

- [1] This application came before me on Saturday, 22 April 2023. It was enrolled by the second applicant, who described herself as the non-executive director and the chairperson of the Board of Directors of the first applicant. The latter is a Bus Operating Company ('BOC') contracted by the City of Johannesburg Metropolitan Municipality which, according to the applicant, serves as a part of the Bus Rapid Transit system (commonly known as "Rea Vaya").
- [2] Although the application was brought on an *ex parte* urgent basis, due to the nature of the relief sought, and the respect for the principle of *audi alteram partem* I directed that the application be served upon the relevant respondents. Accordingly, I stood the matter down. In the afternoon, Mr Mayet noted his appearance on behalf of the respondents, and after making submissions I was constrained to afford the respondents an opportunity to file opposing papers. I enrolled the matter on my roll and heard arguments on the 28th of April 2023.

[3] In the notice of motion the applicants are seeking an order on urgent basis in the terms paraphrased as follows:

3.1. That this Court dispenses with the forms and service and the matter be heard as urgent in terms of Rule 6(12);

3.2. That pending the Annual General Meeting of the first applicant scheduled for July, a rule nisi be issued calling upon the first and second respondents to show cause why the following should not be made a final order of this court:

3.2.1 That the appointment of the seventh to twelve respondents as the Board of Directors and Executives of the first and second respondents be declared unlawful and set aside;

3.2.2 That the first and second respondents are interdicted and restrained from interfering with the operations of the Board of Directors of the first applicant with immediate effect;

3.2.3 That the first and second respondents are interdicted and restrained from interfering with the activities of the second applicant (Executive Chairperson) and the Board members of the first applicant with immediate effect;

3.2.4 That the seventh to twelve respondents are directed to cease and desist from holding themselves as Board and/or Executives of the first applicant with immediate effect;

3.2.5 That the seventh respondent is directed to cease and desist from holding himself as the Chief Executive Officer of the first applicant with immediate effect;

3.2.6 That the seventh to twelfth respondents are interdicted and restrained from giving any instructions and or any directives to any employee of the first applicant with immediate effect;

3.3. That the first and second respondents are interdicted from holding an induction for the seventh to the twelfth respondents as has been planned for the 23rd of April 2023 or another day;

3.4. That the relief sought above operates as interim relief pending the return of the rule *nisi*.

[4] Meanwhile as the matter stood down, the parties proceeded to deliver their respective answering and replying affidavits. In addition, the applicant filed an amended notice of motion, followed by supplementary founding and answering affidavits. Joinder applications were also delivered by both parties, which increased the volume of the papers already filed. The question of urgency remained in dispute.

Urgency

[5] Urgency is a matter of degree. It is the applicant who should pursued the court that his or her case bears the necessary facts upon which the court may depart from the prescribed time limits set out in the Rules. In re: *Several Matters On Urgent Roll 18 September 2012* [2012] 4 All SA 570(GSJ) 8 para 15, the Court stated that:

“Further, if the matter becomes opposed in the urgent motion court and the papers become voluminous there must be exceptional reasons why the matter is not removed from the ordinary motion roll. ‘The urgent court is not geared to dealing with a matter which is not only voluminous but clearly includes some complexity and even some novel points of law.’ See *Digital Printers vs Riso Africa (Pty) Limited* case number 17318/02, an unreported judgment of Cachalia J delivered in this division.”

[6] The above notwithstanding, I heard the argument on the question of urgency and the merits together. The applicant avers in the founding papers that the application is urgent based on the number of reasons, *inter alia*:

- 6.1 The new board members were and the purported executives were introduced by the first respondent to the staff of the first applicant. The conduct of the first respondent is tantamount to a *coup d'état* which has overthrown the legitimate structure of the first applicant.
- 6.2 The first applicant provides essential service to the public within the city of Johannesburg and the current first applicant cannot provide the service legitimately;
- 6.3 The first respondent gave a directive that the new board and executives must re-instate a finance manager who was lawfully suspended for financial misconduct, subject to investigation and disciplinary hearing;
- 6.4 The first respondent further gave instruction to bring on board, one Mr Erick Motshwane who was settled out of the company due to broken relationship between himself and the company, his employer and was implicated in a forensic investigation by First Africa;
- 6.5 The first respondent has appointed one Vusi Mahlangu as a Chief Executive Officer despite the fact that the appointment of the Chief Executive Officer is the prerogative of the Board of Directors.
- 6.6 The first respondent has also appointed the spokesperson of his political party (Patriotic Alliance) as a member of the new board of the first applicant;

- 6.7 The above poses a serious legal and reputational risk for the first applicant, and renders this matter to be heard on urgent basis on an urgent basis.
- 6.8 The unlawful appointed Board and Executives will have access to confidential material of the first applicant such as financial and employee's records, as well as access to information on ongoing investigations against certain individual employees and disturb the flow of case management.
- 6.9 The applicant will not be afforded the substantial redress in the hearing in due course in that there would be a forced induction of the newly appointed board and executive members on the 23rd of April 2023, if this matter is not heard on urgent basis;
- 6.10 The reputation of the company is extremely at stake and it will be impossible to prevent the damage to the governance and operations of the first applicant.
- 6.11 The people appointed as board and executives have not been vetted, nor interviewed by the legitimate governance structure of the Board., and if this matter is enrolled in the normal course it will cause enormous and unimaginable risk to the first applicant.

[7] On 24 April 2023 the applicant delivered its amended notice of motion in the following respects:

"1. That the Applicant be granted leave to amend the Notice of Motion as follow:

1.1 That the names of the Twelfth Respondent which read ANDIBA YET be amended to read AADIL MAYET

1.2 That a relief which read as follows "The meeting that was called by the first Respondent under the pretence that it was a shareholders meeting held on the 18th of April 2023 and which was chaired by the first Respondent be declared

unlawful and of no effect and thereby be set aside” be inserted as the first prayer of the prayers in the Notice of Motion.

1.3 That the relief which reads as follow “The decision taken in the meeting of the 18th of April 2023 which is referred to as a Resolution of the Shareholders and such decision was to dissolve the current Board of the first Applicant and appoint the seventh to twelfth Respondents as the new Board of the first Applicant be declared an unlawful decision which has no consequence and is hereby set aside.”

- [8] The respondents took issue with the urgency of the matter. According to the respondents the matter is simply not urgent, and even if the court finds that it is so, the urgency is self-created. The applicant has been aware of the meeting of shareholders of the 18th of April 2023 since 13 April 2023 as evidenced by the email of Winny Maleta in which she was copied.¹ The delay in taking the necessary steps to interdict the shareholders’ meeting evidences her dilatory conduct. The relevant portion of the letter reads:²

“Hi Jeff,

Regarding the shareholders meeting next week Tuesday, unfortunately the chairperson is not available as mentioned to Bakang from the MMC office. I have been tasked to request for postponement to the 20th or you can provide an alternative date.

The 20th was postponed to MMC office, and I mentioned to Bakang that the board would appreciate meeting with the MMC and ED before the shareholders meeting. Only yesterday I was informed that the meeting is on 18th.”

- [9] In essence, the respondents argue that the applicant approaches this court after the fact to overturn the decision and resolution of the shareholders which had been made on 18 April 2023.³

¹ Case lines 017-6-7. Respondents Answering Affidavit.

² Case lines 018-42. Annexure “H” to the Answering Affidavit

³ Case lines 023- 7. Supplementary Answering Affidavit

- [10] According to the transcripts of the minutes of Piotrans Board dated 19 April 2023, the applicant was informed of the meeting. It also recorded that she tried to stop the meeting.⁴
- [11] Counsel for the applicant sought to argue that the applicant would suffer prejudice should they wait for the matter to be heard in the ordinary course. It is not clear what kind of prejudice the applicant would suffer if the matter is not heard in the ordinary course, in light of the reasons which will follow herein below. He further submits that the seventh to the twelfth respondents have been unlawfully appointed as board of directors of the first applicant. With regard to the delay he argues that the impugned decision occurred on the 18th of April 2023, and the applicant took a decision to file the application on 21 April 2023.
- [12] Counsel for the respondents submitted that the resolution of the shareholders holding 96.87% of the total issued shares of the first applicant were present at the meeting, and that clause 4.6 (1) only requires 75% of all the voting rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting. Almost 96.87% voted to remove the previous Board, which included the second applicant as a director. The resolution is the absolute answer to the applicant's case.
- [13] Submissions were also made on behalf of the respondents that the shareholders are entitled to vote on, and appoint directors, in terms of the Memorandum of Incorporation read with s 68(1) of the Companies Act. I am in agreement with this proposition for the reasons that will become apparent in this judgment.
- [14] It is trite that urgency is decided by reference to the applicant's papers alone.⁵ The question of whether a matter is sufficiently urgent to be enrolled

⁴ Case lines 026-1. Transcripts of the Piotrans Board Meeting.

⁵ *Twentieth Century Fox Film Corporation and another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 at 586G.

and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course.⁶The facts of this matter makes it abundantly clear that the applicant was well aware of the subject matter of the meeting held on 18 April 2023. The applicant sought to amend her notice of motion to challenge the resolution of the shareholders. It appears to me that the declaratory relief sought in the amended notice of motion is an afterthought triggered by the opposing papers. This in my view, constitutes the shift in the relief sought by the applicant when the decision was taken to bring this application on urgent basis.

[15] As is apparent from the letters from the Chairperson of Tswelopele, the 31,26% shareholders of Piotrans and Eyaminawe Investment Holdings holders of 15,89% dated the 25th April 2023, a meeting was convened on 18 April 2023 to dissolve the Board and appoint a new one.

[16] The applicant avers that on 18 April 2023, first and second respondents held a meeting where they purportedly imposed the newly appointed board and executive on the first applicant. They invaded the offices and other premises where they informed the staff members of the first applicant that they had replaced the current board which was duly elected in accordance with the MOI of the company. I have difficulty with this allegation in that the events leading up to the appointment of the new board contradict the applicant's contention in this regard. This is clearly demonstrated in the documentary evidence placed before the court by the Respondents.

[17] The Respondent's counsel referred this court to the decision of this division, in *David Garth Miller v Natmed Defence (Pty) Ltd and others* [2021] (Case No. 18245), delivered on 24 August 2021, where the court dealt with the removal of the director by shareholders. The relevant paragraph reads:

“[29] It bears mentioning outrightly that section 71 of the Companies Act 71. Of 2008 draws a clear distinction between the removal of a director by the

⁶ *East Rock Trading 7 (Pty) Ltd and another v Eagle Valley Granite (Pty) Ltd and others* quoted in *Several Matters on Urgent Court Roll 2013* (1) SA 549 (GSJ) para (7)

company's shareholders and instances where the board of directors seek to remove a director. Section 71 reads, in relevant part:

"(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)."

[18] I align myself with the principle quoted in the above decision. There is evidence in the present matter that the shareholders who were entitled to vote in the context of s 71, adopted a resolution to remove the Board of Directors in which the applicant was a non-executive director. The removal was preceded by a notice in which the applicant was also copied. I hold that there is nothing untoward about the resolution adopted by the shareholders on the 18th of April 2023.

[19] That brings me to the *in limine* point raised in the respondents papers relating to the applicants lack of *locus standi* in bringing these proceedings on behalf of the first applicant. In respect of this point of law, the respondents contend that the first applicant being a private company, ss 72 to 74 of the Companies Act are applicable and therefore it is controlled by a Board of Directors. It further contends that on 18 April 2023 a resolution was taken by shareholding amounting to 96,87% of shareholders in Piotrans, constituted on the Taxi Operators Investment Company ("TOICS") appointing all the seventh to the twelfth respondents as the board. It is evident that the board of directors in which the applicant was part of has been dissolved by the shareholders, and the applicant is therefore not entitled to act on behalf of the first applicant without requisite authority. The point *in limine* in this regard is upheld.

[20] I have given consideration to the submission of the respondents' counsel that the applicant was well aware of the meeting to remove the board of the

directors on 18 April 2023. The respondents have also raised some weighty argument with regard to the step the applicant was supposed to take in light of the imminent dissolution of the previous board. With regard to alternative remedy, the respondents contend that the applicant has an alternative remedy under common law for unpaid salary. It is apparent from the Piotrans letter dated the 31 March 2023 signed by the applicant that there was already a decision taken by the shareholders at the general meeting to 'head hunt independent directors from various professional background to be responsible for the governance of the company.'⁷ It begs a question as to why the applicant can allege that this matter is urgent.

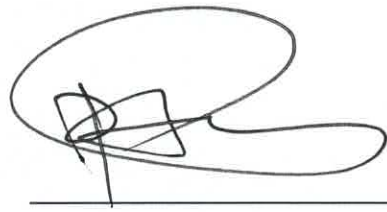
[21] Moreover, due to the voluminous nature of the papers filed of record coupled with the complexity of the issues raised, I ought not to have enrolled this matter in an urgent court, as in my view , it falls within the category of matters referred to in *re: Several Matters On Urgent Roll 18 September 2012, supra*.(matters not geared to dealing with in urgent court)I hold the view that this application was not of sufficient urgency to justify the procedure adopted by the applicants.

[22] For all of the above reasons, I find that the applicant has failed to justify that the application is urgent. The applicant has alternative remedies at her disposal and can still approach the motion court for the appropriate relief.

[23] I summarize my judgment as follows;

1. The *point in limine* in respect of the applicant's *locus standi* is upheld.
2. The application is dismissed with costs.

⁷ Case lines 023-24

A handwritten signature in black ink, consisting of a large, stylized 'M' with a horizontal line extending to the right and a vertical line crossing it near the top.

MALUNGANA AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Appearances

For the Applicant: AM Mafanele and MPT Maluleke instructed
by Thibedi Ramasehla Attorneys

For the Respondents: Aadil Mayet instructed by Mayet Attorneys
Incorporated

Date of hearing: 28 April 2023

Date of judgment: 30 May 2023