

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2023-082594

1. REPORTABLE: YES
2. OF INTEREST TO OTHER JUDGES: YES
3. REVISED: YES

DATE: 28 AUGUST 2024

SIGNATURE OF JUDGE:

A black rectangular box redacting the signature of the judge.

In the matter between:

**LYNETTE JEAN JONES
PHILIPPUS VERMEULEN
JEFFREY ALBERT EARLE**

First Applicant
Second Applicant
Third Applicant

and

**HENDRIK FREDERICK DELPORT
JAN ANDRIES COETZEE
KOLISANG MOCHESANE LEPHOLISA
NIKLAAS JOHANNES DEGENAAR
CHRISTOPHER ARTHUR ILLSTON PICKARD
NICOLETTE MULLER
RAND AIRPORT HOLDINGS (PTY) LTD
RAND AIRPORT MANAGEMENT COMPANY (PTY) LTD**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent
Eighth Respondent

JUDGMENT

H F OOSTHUIZEN AJ**INTRODUCTION**

- [1] This is a review in terms of section 71(5) of the *Companies Act, 2008*¹ ("the act") of the determination of the board of directors of the seventh and eighth respondents ("Holdings" and "Management" respectively and collectively "the companies") to remove the first to third applicants (collectively "the applicants") in terms of section 71(3)(b) of the act as directors of the companies. All references in this judgement to sections are to sections of the act.
- [2] The first to sixth respondents are the other directors of the companies who made the determination.
- [3] The ninth respondent is the Companies and Intellectual Property Commission who did not participate in the application.

BACKGROUND FACTS

- [4] Holdings is the owner of the immovable property from which the Rand Airport operates.
- [5] Management, a wholly-owned subsidiary of Holdings, manages and operates the Rand Airport.

¹ Act 71 of 2008

- [6] The shareholders of Holdings are Rand Operators (Pty) Ltd ("Operators"), holding 50% of the issued shares, Mayondi Investments (Pty) Ltd ("Mayondi"), holding 30% of the issued shares, and Ekurhuleni Metropolitan Municipality ("Ekurhuleni"), holding 20% of the issued shares.
- [7] The approximately 38 shareholders of Operators are occupants of properties at the Rand Airport and conduct business from the Rand Airport.
- [8] The shareholders agreement of Holdings provides that Operators is entitled to appoint five directors to the board of Holdings on condition that the appointees are also directors of Operators, which directors are appointed by the shareholders of Operators. Mayondi and Ekurhuleni are entitled to appoint three and two directors respectively.
- [9] The applicants and the first and second respondents were appointed by the shareholders of Operators as directors and they thus became directors of Holdings. The applicants and the first and second respondents are shareholders or representatives of shareholders of Operators. The third to sixth respondents were appointed as directors of Holdings by Mayondi and Ekurhuleni.
- [10] All the directors of Holdings are also directors of Management.
- [11] Until February 2023 Stuart Colin Coetzee ("Coetzee") was employed by Management as airport manager. He was also a director of Operators and the companies.
- [12] At the end of 2022, the companies became aware of certain irregularities which prompted an investigation into Coetzee's conduct, which culminated in Coetzee's resignation as a director of Operators and the companies on 16 February 2023. He was shortly thereafter replaced as airport manager.
- [13] On 28 April 2023, Coetzee and four other shareholders of Operators (of which the applicants are either directors or members) addressed demands to the board of Operators to call a shareholders meeting for the purpose of removing the first and second respondents as directors of Operators. Various grounds

in support of the removals were stipulated in the demands. The first and second respondents were at that stage the only directors of Operators.

- [14] On 1 June 2023, a shareholders meeting of Operators was held at which the applicants were appointed as directors of Operators. Upon their appointment, the applicants automatically became directors of the companies. This meeting did not deal with the removal of the first and second respondents as directors of Operators.
- [15] On 9 June 2023, the boards of the companies adopted unanimous round-robin resolutions to proceed with civil action against Coetzee regarding alleged financial mismanagement, fraud and theft which had occurred at the Rand Airport, which resolutions have been implemented. Pursuant to a forensic investigation, criminal charges were also laid against Coetzee.
- [16] On 18 July 2023, the first applicant convened a board meeting of Operators for 20 July 2023 to consider the demands of 28 April 2023 to hold a shareholders meeting of Operators to consider the removal of the first and second respondents as directors of Operators.
- [17] On 20 July 2023, the board of Operators adopted a resolution to hold a shareholders meeting of Operators on 7 August 2023 to consider the removal of the first and second respondents as directors of Operators.
- [18] On 25 July 2023, the first respondent convened a board meeting of the companies for 27 July 2023 to consider a resolution to remove the applicants as directors of the companies in terms of section 71(3)(b). I will deal with the notice of the meeting and the supporting documents below.
- [19] The board meetings of 27 July 2023 were non-quorate and were accordingly automatically rescheduled for 3 August 2023.
- [20] On 3 August 2023, resolutions were adopted to remove the applicants as directors of the companies, which resolutions form the subject matter of the applicants' review.

- [21] On 7 August 2023, the first and second respondents were removed as directors of Operators at the shareholders meeting.
- [22] The first and second respondents contend that the shareholders meeting was invalid and accordingly applied for urgent interim relief pending the finalisation of an application setting aside the resolutions adopted at the shareholders meeting. A court order for interim relief was granted on 1 September 2023. I am informed that the application to set aside the resolutions adopted at the shareholders meeting is pending.

THE REMOVAL OF THE APPLICANTS AS DIRECTORS

- [23] The notice of the board meeting of 27 July 2023 (which was re-scheduled for 3 August 2023) called upon the boards of the companies to consider and resolve, in terms of section 71(3)(b), read with section 71(4), to remove the applicants as directors of the companies on the basis that they were negligent and derelict in their duties as directors.
- [24] The applicants were provided with notices of the meeting; copies of the proposed resolutions to be adopted, a statement setting out the reasons for the proposed resolutions ("the reasons") and they were given an opportunity to make presentations to the meeting before the resolutions were put to a vote.
- [25] After setting out the alleged criminal conduct of Coetzee and the civil and criminal steps which had been taken against him, the reasons contained the following allegations:
- [25.1] The applicants embarked upon a campaign which was designed to remove the first and second respondents as directors of the companies, which would benefit Coetzee and be to the detriment of the companies.
- [25.2] It is the intention of the applicants to change the composition of the boards of the companies to enable the new boards to withdraw the

criminal charges against Coetzee and to terminate the legal action against him.

- [25.3] The applicants used their position as directors to gain an advantage for Coetzee and knowingly cause harm to the companies in conflict with section 76(2)(a).
- [25.4] The applicants did not exercise their powers and perform their functions as directors of the companies in the best interest of the companies and with the degree of care, skill and diligence that may reasonably be expected of persons carrying out the same functions in relation to the companies in conflict with sections 76(3)(b) and 76(3)(c)(i).
- [26] During the presentation on behalf of the applicants, the reasons were attacked on the basis that there is no evidence that the applicants:
- [26.1] have neglected, or been derelict in the performance of, their functions as directors of the companies; and
- [26.2] acted in conflict with their obligations in terms of sections 76(2)(a), 76(3)(b) or 76(3)(c)(i).
- [27] The presentation dealt as follows with the allegations that the applicants support Coetzee:
- "a) *The proximate cause of the reasons for the proposed resolutions was a perceived belief by [the companies] - nurtured and fueled by the first respondent - that the applicants are supportive of ... Coetzee and his alleged unlawful activity against [the companies].*
 - b) *Not only was this allegation baseless, but the demand for a shareholders meeting in Operators - being a related, but distinct juristic entity to that of [the companies] - could hardly be termed as being 'supportive' of ... Coetzee. There is no rational connection between the two concepts.*

- c) *No objective facts were placed before [the companies] which could substantiate a finding of "support" by the applicants for ... Coetzee, which could be compared to substantial proof that the applicants were negligent or derelict in their duties as directors of [the companies]."*

[28] The board of the companies, other than the applicants, subsequently adopted resolutions that the applicants had neglected, or been derelict in the performance of their functions as directors and they were accordingly removed as directors of the companies with immediate effect.

THE SCOPE OF A REVIEW IN TERMS OF SECTION 71(5)

[29] Section 71 reads in relevant parts as follows:

- "(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 whom it has determined to be ... negligent or derelict...
- (4) *Before the board of a 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 a company has determined that a director ... has been negligent or derelict ... the director concerned ... 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 ... has not been negligent or derelict...-*

- (a) *any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of the director, may apply to a court to review the termination 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 ... has been negligent or derelict."*

[30] Before 1994, our law recognised only three types of review, namely a review of the decisions of inferior courts; a common law review of decisions of administrative authorities; and a wider form of statutory review.²

[31] In *Nel NO v The Master*³ Van Heerden AJA dealt as follows with statutory reviews:

"When engaged in this third kind of review, the Court has powers of both appeal and review with the additional power, if required, of receiving new evidence and of entering into and deciding the whole matter afresh. It is not restricted in exercising its powers to cases where some irregularity or illegality has occurred. However, while it is sometimes stated that the Court's powers under this kind of review are 'unlimited' or 'unrestricted', this is not entirely correct. The precise extent of any 'statutory review type power' must always depend on the particular statutory provision concerned and the nature and extent of the functions entrusted to the person or body making the decision under review. A statutory power of review may be wider than the 'ordinary' judicial review of administrative action (the 'second type of review' identified by Innes CJ in the Johannesburg Consolidated Investment Co case), so that it combines aspects of both review and appeal, but it may also be narrower, 'with the court being confined to particular grounds of review or particular remedies'." (footnotes deleted)

[32] These three forms of review still exist today but the list has been expanded as a result of later developments, including the advent of the democratic Constitution. Our law currently recognises the following types of review: review of the proceedings of lower courts; automatic review; judicial review in the

² *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 at 116

³ 2005 (1) SA 276 (SCA) para [23]

constitutional sense; judicial review in the administrative-law sense; and special statutory review.⁴

[33] In *Pityana v Absa Group Limited*,⁵ the Court was called upon to decide whether rule 53 is available to an applicant who applies in terms of section 71(5) for the review of a determination of the board in terms of section 71(3).

[34] In interpreting section 71(5), the learned Judge referred⁶ to the different meanings which the word “*appeal*” can have in legislation, as enunciated in *Tikly v Johannes NO*,⁷ namely:

[34.1] an appeal in the wide sense, that is, a complete hearing of, and fresh determination on the merits of the matter with or without additional evidence or information;

[34.2] 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; and

[34.3] 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 decision maker had exercised their powers and discretion honestly and properly.

[35] The learned Judge held⁸ that “[i]t is clear that the review foreseen in section 71(5) falls into the third category listed in *Tikly*”, which finding was relied upon by Mr Williams on behalf of the first to sixth respondents and the companies (collectively “the respondents”).

⁴ Hoexter and Penfold *Administrator of Law in South Africa*, Third Edition, pp 142 to 144

⁵ 2024 (1) SA 491 (GP)

⁶ *Pityana supra* para [74]

⁷ 1963 (2) SA 588 (T) at 590F-591A

⁸ *Pityana supra* para [81]

[36] I am respectfully of the view that this finding is, for the following reasons, incorrect:

[36.1] Section 71(5) uses the term “review”, which implies that the decision in *Tikly*, which interpreted the term “appeal”, is irrelevant.

[36.2] The article by Rehana Cassim entitled “*Contesting the Removal of the Director by the Board of Directors under the Companies Act*”⁹ does not contain a statement that a review in terms of section 71(5) is *sui generis* and does not support a finding that “*the review is of limited nature*”,¹⁰ which findings were also relied upon by Mr Williams.

[36.3] The learned author argued that

“it is not clear whether a court would be empowered to review the substance and merits of the board’s decision or whether it would be empowered to review only the procedural aspects of the decision”

but also that

“an argument may be made that a court reviewing the decision of the board of directors under s 71(5) of the [act] would ... be empowered to consider both the merits and the procedural aspects of the decision.”

[36.4] Contrary to what is stated by the learned Judge,¹¹ at the time of the judgement in *Pityana*, there was a reported judgement on the interpretation of section 71(5), namely *Wait v Marais*,¹² which came to the opposite conclusion on the scope of a review in terms of section 71(5). (I will deal with this decision below.)

[36.5] As is demonstrated in *Nel supra*, the question in a statutory review is not necessarily “*whether there were irregularities in the proceedings*

⁹ SALJ 2016, p 133

¹⁰ *Pityana supra* para [75]

¹¹ *Pityana supra* para [74]

¹² 2022 JDR 3202 (ECP)

which may show that there has been a failure of justice", as found by the learned Judge.¹³

- [36.6] The finding that a court reviewing the determination of the board "would be empowered to enquire not only into the procedural correctness of the decision but also at least whether the factual finding is correct that there was indeed negligence or dereliction"¹⁴ contradicts the finding that the purpose of a review in terms of section 71(5) is "to determine, not whether the decision ... was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly".¹⁵
- [37] The word "review", used in section 71(5), was interpreted as follows in *Wait*:
- "[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* [supra] 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 endorsed 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 has 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

¹³ Para [76]

¹⁴ Para [77]

¹⁵ *Tikly supra* at 591A

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."*

[38] The finding of the learned Judge¹⁶ that *"the court will ... not lightly interfere with the determination to remove the director as a director of a company is deployed to that position at the behest of the shareholders or other directors"* (which is also relied upon by Mr Williams) cannot be supported. This finding ignores the fact that directors serve at the behest of shareholders who elected them and that the shareholders can remove the directors at will in terms of section 71(1) of the act without having to provide reasons.¹⁷ Directors are not *"deployed ... at the behest of ... other directors"*.

[39] I similarly disagree with the finding of the learned Judge¹⁸ (which are also relied upon by Mr Williams) that *"[i]t seems doubtful that the court will interfere with the decision of the board to remove a director if the procedures have been complied with, his removal is rationally supported by the reasons and there has been compliance with s 71(4) in respect of the reason and the required specificity"*.

[40] It accordingly follows that I do not agree with Mr Williams that the court is only obliged to consider whether the peremptory requirements in section 71(4) have been complied with and not whether the determination in terms of section

¹⁶ Pityana *supra* para [80]

¹⁷ Miller v Natmed Defence (Pty) Ltd 2022 (2) SA 554 (GJ) para [36]

¹⁸ Pityana *supra* para [90]

71(3) was correct. I concur with the finding in *Wait* that the court is entitled, depending on the facts, to “*undertake a complete reconsideration, in the wide sense, of the board’s determination*”.

THE GROUNDS OF REVIEW

[41] The applicants contend in the founding affidavit that

“[t]he application is instituted in terms of section 71(5) ... on the ground of legality and/or section 6(2) of the Promotion of Administrative Justice Act no 3. of 2000 (“PAJA”).”

[42] Mr Labuschagne, who appeared on behalf of the applicants, conceded that the determination in terms of section 71(3) does not amount to administrative action and that the determination can accordingly not be reviewed in terms of PAJA, which concession was correctly made.¹⁹

[43] The principle of legality operates as a residual source of review jurisdiction but legality also has a wider meaning, namely the broad constitutional principle that governs the use of all public power rather than the narrower realm of administrative action. This principle of legality is an aspect of the rule of law, a founding value that features in section 1(c) of the Constitution. It expresses the fundamental idea that “*the exercise of public power is only legitimate where lawful*”.²⁰

[44] In support of their review “*on the ground of legality*”, the applicants contend as follows in the founding affidavit:

“103. The entrenchment of the principle of legality via the foundational rule of law is vital for the realisation of the constitutional right to administrative justice.

¹⁹ *Pityana supra* paras [12] to [31]

²⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras [56] to [59]

104. *The achievement of administrative Justice is dependent upon administrative action being invalid and therefore in compliance with the principle of legality.*
105. *Legality, being an incident of the rule of law, is one of the constitutional controls in the exercise of public power. The exercise of any power must accordingly comply with the Constitution and the doctrine of legality.*
106. *At its core, the doctrine of legality requires that the exercise of administrative discretionary power by the board of directors of [the companies] must be lawful."*

- [45] In view of the fact that the boards of the companies did not exercise a public power in terms of section 71(3), the reliance on the principle of legality (in the sense used by the applicants) as a ground of review is inappropriate.
- [46] The fact that the determination by the boards of the companies does not amount to administrative action and that the boards of the companies did not exercise public power, do not however mean that the application ought to be dismissed, as submitted by the respondents.
- [47] Mr Labuschagne submitted that the determination by the boards of the companies should be reviewed on the basis that the alleged conduct, as set out in paragraph [25] above, does not amount to neglect or dereliction in the performance of the applicants' functions as directors of the companies.

DISCUSSION

- [48] The provisions of section 76, upon which the respondents rely, read in the relevant parts as follows:

"(2) *A director of a company must-*

(a) *not use the position of director...*

(i) *to gain an advantage ... for another person other than the company...; or*

(ii) *to knowingly cause harm to the company...*

- (3) ... a director of a company, when acting in that capacity must exercise the powers and perform the functions of director-...
 - (b) in the best interests of the company; and
 - (c) with the degree of care, skill and diligence that may reasonably be expected of a person-
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director."

[49] The applicants were appointed as directors of Operators and thus became directors of the companies on 1 June 2023.

[50] The conduct of the applicants in supporting Coetzee on 28 April 2023 to demand that a shareholders meeting of Operators be held for the purpose of removing the first and second respondents as directors of Operators was done in their capacities as representatives of shareholders of Operators. In view of the fact that the applicants had not been appointed as directors of the companies at that stage, this conduct is irrelevant and cannot support allegations of neglect or dereliction in terms of section 71(3)(b).

[51] The removal of the first and second respondents as directors of Operators occurred after the adoption of the resolution in terms of section 71(3) and could accordingly not have been relied upon on 3 August 2023 when the resolutions to remove the applicants as directors were adopted.

[52] The fact that the applicants (in their capacities as representatives of shareholders of Operators) supported the removal of the first and second respondents as directors of Operators had nothing to do with their positions of directors of the companies. The applicants did not "*use their positions of directors*" of the companies when they acted as representatives of shareholders of Operators and they accordingly did not breach their duties in terms of section 76(2)(a).

- [53] In view of the fact that the conduct of the applicants on which reliance is placed by the respondents did not amount to the exercise of powers and the performance of functions of directors of the companies, the applicants similarly did not breach their duties in terms of section 76(3)(b) and 76(3)(c)(i).
- [54] There is in any event not a shred of evidence to support the respondents' contention that the applicants sought to remove the first and second respondents as directors of the companies with the intention of changing the composition of the boards of the companies to enable the new boards to withdraw the criminal charges against Coetzee and to terminate the legal action against him. The respondents' allegations in this regard amount to unsupported speculation.
- [55] The fact that the applicants supported legal action against Coetzee approximately six weeks after they had indicated that the first and second respondents should be removed as directors of Operators and the fact that the legal action against Coetzee is ongoing without any evidence of interference by the applicants therein, support the applicants' allegation that they do not have the intention to terminate the legal action against Coetzee.
- [56] There is no reason why the applicants cannot simultaneously support legal action against Coetzee and the removal of the first and second respondents as directors of Operators and the companies.
- [57] I accordingly hold that the applicants were not negligent or derelict in the performance of their functions of directors of the companies, within the meaning of section 71(3)(b), and that the first to sixth respondents could not validly determine to remove the applicants as directors of the companies.
- [58] In the premises the determinations of the board of the companies to remove the applicants as directors of the companies fall to be reviewed in terms of section 71(5).
- [59] The parties agreed that costs should follow the result and that costs on scale B are appropriate.

ORDER

[60] I accordingly grant an order in the following terms:

- [60.1] The determinations of the boards of directors of the seventh and eighth respondents, made at the meeting of the boards held on 3 August 2023, to remove the first to third applicants as directors of the seventh and eighth respondents, are reviewed and set aside.
- [60.2] The first to third applicants are forthwith reinstated as directors of the seventh and eighth respondents.
- [60.3] The ninth respondent is directed to amend its records, if necessary, to reflect that the first to third applicants are directors of the seventh and eighth respondents.
- [60.4] The first to eighth respondents are directed to pay the costs of the application on scale B.


H F OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 28 August 2024.

Appearances

Counsel for the applicants: Adv F J Labuschagne
Instructed by Cilliers Attorneys

Counsel for the first to eighth respondents: Adv D L Williams
Instructed by Wraith Rose-Innes Inc

Date of Hearing: 24 July 2024

Date of Judgment: 28 August 2024