IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Reportable

Case No: 14827/2024

TJ GOLDEN	Applicant
and	
QUANTUM FOODS HOLDINGS LIMITED	First Respondent
WOUTER ANDRE HANEKOM	Second Respondent
GEOFFREY FORTUIN	Third Respondent
LARRY RIDDLE	Fourth Respondent
GARY VAUGHAN-SMITH	Fifth Respondent
ADEL VAN DER MERWE	Sixth Respondent
ANDRE MULLER	Seventh Respondent
THE COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Eight Respondent
THE JOHANNESBURG STOCK EXCHANGE LIMITED	Ninth Respondent

JUDGMENT: 7 November 2024

DAVIS AJ

Introduction

[1] This application raises a singular but important question for company law. It can be framed thus: Can a director of a publicly listed company be removed by the majority of the directors of the board of that company in the absence of informing that director of his or her intended removal and without absence of affording that director the opportunity to make representations in respect of this decision as well as in the absence of providing the director with access to a written notice of the intended removal. This question is posed within the context of an absence of the affected director having resigned her post as a director.

The factual matrix

[2] It appears that the key facts upon which this application is predicated are, in the main, common cause. A meeting of the board of directors of first respondent took place on 23 May 2024. At that meeting a discussion took place regarding the repeated requests by Braemar Trading Limited for the board to call a special shareholders meeting in terms of which certain resolutions would be put before the shareholders. Of relevance to the present dispute is whether an opinion relating to Braemar's repeated requests that had been obtained from a senior counsel on the instruction of first respondent should be disclosed to the board. The applicant argued forcibly in favour of disclosure but there was much resistance thereto from fellow directors. The legal opinion was not disclosed.

[3] On 30 May 2024 a majority of the directors signed a notice requesting applicant to resign as a director of the board of first respondent. The directors claimed to be acting under the powers bestowed in terms of the Clause 29.3.2.1, first respondent's Memorandum of Incorporation (MOI). On 31 May 2024 a SENS announcement was published by first respondent to inform the shareholders that the applicant had resigned.

[4] In addition, to these common cause facts the respondent has set out

additional facts in its answering affidavit. Accordingly in terms of respondents reliance on *Plascon – Evans Plaints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634, it is necessary to examine the salient features thereof.

[5] First respondent is a diversified feeds and poultry business which was previously a division of Pioneer Foods Group. In 2014 it was unbundled from Pioneer and listed on the main board of the securities exchange operated by the JSE Ltd.

[6] In June 2020 CBH, a South African competitor of first respondent, acquired 31% of the shares of first respondent. At the same time it submitted a non binding letter of intention to take over first respondent but this intention appeared to have been deferred at some point, notwithstanding that CBH and associated persons continued to buy shares in first respondent.

[7] A month later in July 2020 Astral Africa S.á.sl (Aristotle) bought 31% of first respondent's shares. Astral Foods Ltd, which was listed on the JSE then bought approximately 10 % of first respondent's shares. Astral is a competitor of CBH and had appeared to have bought these shares to protect a supplier agreement with first respondent. At a similar time the management of first respondent bought around 2% of the shares of first respondent.

[8] Between 13 July 2021 and 20 July 2021 CBH, which at that stage held 30.8% of first respondent's shares, sold 25.1% of these shares to Braemar. Braemar also acquired a further 5.7% of the shares, having purchased these from Fouries Poultry Farms (Pty) Ltd. Thereafter both Braemar and CBH's shareholding amounted to 30.8% of first respondent's shares.

[9] In its answering affidavit, the respondents point to Braemar's ownership and, in particular, place emphasis upon the fact that its shareholder and director is one Adrianne Rudland, the mother of two Zimbabwean businessmen Simon and Haimish Rudland.

[10] First respondent avers that the Rudland brothers have attracted considerable controversy. Simon Rudland founded Goldleaf Tobacco which SARS

has accused of tax avoidance. Magister Investments Limited, a Mauritian company controlled by Haimish Rudland, was involved in a controversial attempt to take over Tongaat Hulett Ltd. Braemar is part of the Magister Group.

[11] In the first week of March 2024 CBH required Astral's entire shareholding in first respondent by which stage it held 15.7% of the shares in first respondent. At the time, that is between 1 and 7 March 2024, first respondent's share price increased exponentially by 104.4%. While CBH informed the board of first respondent that it had no intention of taking control of the company it requested the shareholders register from first respondent's company secretary. It continued to buy shares at prices well above the volume weighted average price of R 4.48 for the six months preceding its purchase of Astral shares in first respondent.

[12] All of these events, according to respondents' affidavit, resulted in the board of first respondent remaining suspicious of the intentions of CBH together with further suspicions held by it concerning the latter's relationship with Braemar.

[13] On 11 March 2024 Braemar sent a letter to first respondent's board demanding that it call a shareholders meeting. This was done on the same day as CBH informed the board of its intention not to seek to assume control of first respondent and shortly after CBH's acquisition of Astral shares in first respondent. On 13 March 2024 first respondent refused to call this meeting. On 18 March 2024, an attorney representing first respondent, explained in detail to the board the reasons for refusing Braemar's demand. It is alleged that applicant attended this meeting, heard the legal advice and concurred in this decision. Braemar was not however satisfied with this reaction and generated two further letters to the board on 10 May 2024 reiterating its demand for a shareholders meeting and registering a series of complaints including the board's refusal to meet in person with representatives of Braemar.

[14] On 23 May 2024 a further meeting of the board took place. At that meeting applicant asked a representative of first respondent's attorney as to whether the board would be obliged to call a meeting if Braemar remedied various defects in the demand to which the response was that it would. At this point applicant sought access to the

opinion of senior counsel. Mr Kobus Human of One Capital, first respondent's JSE sponsor and corporative advisor, advised against the provision to the board of the opinion on the basis of concern about the loss of confidentiality and privilege.

[15] A robust discussion took place among members of the board at which point applicant requested a closed session of the board with only the non-executive directors to be present. This particular averment is contested by applicant in her replying affidavit in which she avers that she sought only to exclude the company's advisors and senior management. That version is hotly denied by the respondents who insist, on the basis of *Plascon-Evans* test, that the dispute should be resolved in its favour. On these papers this raises a difficulty to which reference will be made later in this judgement

[16] At the closed session of the board different views were expressed regarding the SC's opinion. At that meeting Adelle van Merwe, the sixth respondent, expressed a concern about the leaking of sensitive information and explained to the members of the board that applicant had also requested the securities register from the Company secretary on 25 March 2024 without informing the board. In her replying affidavit, applicant suggests that she wished to acquire access to the security register in order 'to stay abreast of shareholding developments'.

[17] According to the respondents these facts heightened the suspicions of applicant's co directors with regard to applicant's conduct. This became the trigger for the impugned decision. In the answering affidavit deposed to by Mr Hanekom, on behalf of the respondents, the following explanation was provided with regard to the directors disquiet:

> 'After the meeting, Ms van der Merwe, Mr Muller, Mr Vaughan-Smith and I were highly concerned about Ms Golden's requests for share register and, in this context, Ms Golden's continued insistence that she should be provided with a copy of the SC Opinion. We were also concerned about Ms Golden's attempt to exclude the executive Directors from deliberations, which concern was exacerbated by the fact that Ms Golden had made such request in front of the Company's entire senior executive team, who were in attendance at the

Board meeting. This undermined the executive Directors in front of the senior executives and portrayed a division between the Board members. Mr Lourens shared these concerns when he was informed of what transpired at the meetings.'

[18] Applicant then received a telephone call from Mr Hanekom on 31 May 2024. Mr Hanekom said that he unfortunately had bad news for the applicant, that the majority of directors had called for her resignation in accordance with the first respondent's MOI, and that a decision had been taken that the applicant must resign. Hanekom read paragraph 29.3.2.1 of the MOI to the applicant over the phone.

[19] On 31 May 2024 shortly after the discussion with Hanekom, a SENS announcement was published by first respondent to inform the shareholders thereof that the applicant had resigned. This was done in circumstances where the applicant had, at that date, not tendered her resignation.

The basis for the dismissal

[20] Much reliance was placed by the respondents on Clause 29.3.2.1. of the MOI which reads thus:

'29.3.2 Subject to any provisions of Clause 29.3.4, a Director shall resign his or her office as Director if –

29.3.2.1 a majority of his co-Directors sign a written notice in which he is requested to resign in his office and lodge it at the registered office of the Company (which shall come into effect upon lodging thereof at the registered office of the Company), but without prejudice to any claim for damages...'

[21] Central to the application brought by the applicant to review and set aside the decision taken on 31 May 2024 for the removal of the applicant is for a declaration that Clause 29.3.2.1 of the MOI is inconsistent with s 71 (3) and (4) of the Companies Act 71 of the 2008 (the Act).

The applicant's case

[22] Ms Pillay, who appeared together with Ms Moodley on behalf of the applicant, submitted that clause 29.3.2.1 of the MOI is inconsistent with s 71 (3) read with s 71 (4) of the Act. She further submitted that Clause 29.3.2.1 of the MOI alters unalterable provisions in the MOI and for that reason is invalid and void.

[23] In particular, Ms Pillay referred to the definition of alterable provision in the Act which means:

> 'a provision of this Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's Memorandum of Incorporation.'

[24] An unalterable provision means:

> 'a provision on this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company's Memorandum of Incorporation or rules.'

[25] Ms Pillay submitted that s 71 (3) and (4) of the Act constituted unalterable provisions as defined; that is they could not be negated or restricted by an MOI, in particular by clause 29.3.2.1 of the MOI.

Section 71

[26] It is thus necessary to examine the meaning and scope of s 71 (3) and (4) of the Act. Section 71, to the extent relevant, provides thus:

> 'Removal of Directors

(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 and shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).

(2) Before the shareholders of a company may consider a resolution contemplated in subsection (1) –

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company –

(a) has become –

(i) ineligible or disqualified in terms of s 69, other than on the grounds contemplated in s 69 (8); or

(ii) incapacitated to the extent that the director is unable to preform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

(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 ineligible or disqualified, incapacitated, or negligent or derelict as the case may be.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the directors 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 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.'

[27] Ms Pillay noted that the header to s 71 was "Removal of Directors". There was, in her view, no indication that when a director seeks to remove a fellow director this could be done outside of the framework of s 71 (3). Section 71 (3) clearly indicated that where there is an allegation by a director against a fellow director, being an allegation which related to ineligibility or disqualification as set out in s 69 of the Act or where a director neglected or was derelict in the performance in his or her functions as a director, the board could decide to remove the said director, empowered as it is by s 71 of the Act.

[28] Section 69 of the Act and, in particular s 69 (7) and (8) thereof, are also relevant in that they set out the criteria for ineligibility or disqualification. The point made by Ms Pillay is that s 69 contains a measure of flexibility in that s 69 (6) provides that, in addition to the provision of s 71, the MOI can impose additional grounds of ineligibility or disqualification of directors or minimum qualifications to be met by directors of that company. Beyond these specific additions which must, in her view, be provided for in the MOI, applicant's central argument was that it was not open to first respondent to remove the applicant on any ground other than those set out in s 71 (3) of the Act or expressly drafted provisions in the MOI.

[29] A further issue relating to the removal of a director is triggered by s 66 (4) (b) of the Act in that provision must be made in the case of a profit company for the election by shareholders of at least 50% of the directors and 50% of alternative directors. Thus a removal of a shareholder representative from the board by the remaining directors would affect the balance of powers between shareholders and directors. See Rehana Cassim "The power to remove a company directors from office: historical and philosophical risks" 2019 (25) Fundamina accessed at https://scielo.org.za

[30] In the light of this approach to the relevant law, Ms Pillay referred to the difference between the detailed provisions of s 71 which provides for a director's removal either by the shareholders of the company pursuant to s 71 (1), (2) or by the board in terms of s 71 (3) and (4). In both cases a prescribed process has to be followed whereby the director has to be given notice of the meeting at which a resolution of removal would be considered as well as affording the director an opportunity to make representations.

[31] By contrast, clause 29.3.2.1. of the MOI negates these provisions because, if valid, it would permit the removal of the director in the absence of any of the procedural protections afforded to directors in terms of s 71 (3) and (4). Further, it would permit the removal of a director in the absence of any substantive protections afforded to directors in terms of s 71 (3) and (4) of the Act. While an MOI could impose additional grounds for disqualification or ineligibility pursuant to s 69 of the Act, the fact, according to Ms Pillay, was that clause 29.3.2.1 of the MOI imposed no such additional grounds at all.

Respondents version

[32] Mr Harris, who appeared together with Mr Toefy and Mr Smith on behalf of the respondents, submitted that the MOI is a contract between the shareholders inter se, the company and each shareholder together with the company and each director. The legal status of an MOI is therefore a matter to be governed by the law of contract which provides for the removal of directors by shareholders, the directors or a third party. In this connection he cited a series of English cases, including the Privy Counsil decision in *Lee v Chau Wen Hsien and others* [1984] (1) WLR 1202 (PC).

[33] In this case, the applicant received a notice from his codirectors requesting him to resign his office as a director of a company pursuant to the relevant article of the Memorandum and Articles of the company. The relevant portion of the Articles (Article 73) provided that the office of a director shall be vacated if he is requested in writing by all of his codirectors to resign.

[34] Writing for the Privy Council Lord Brightman at 1206-1207 said:

> 'Their Lordships are in agreement with the majority of the Court of Appeal that the power given by article 73 to directors to expel one of their number from the board is fiduciary, in the sense that each director concurring in the expulsion must act in accordance with what he believes to be the best interests of the company, and that he cannot properly concur for ulterior reasons of his own. It does not, however, follow that notice will be void and of no effect, and that the director sought to be expelled will remain a director of the board, because one or more of the requesting directors acted from an ulterior motive.
>
> To hold that bad faith on the part of any one director vitiates the notice to resign and leaves in office the director whose resignation is sought, would introduce into the management of the company a source of uncertainty which their Lordships consider is unlikely to have been intended by the signatories to the articles and by others becoming shareholders in the company.
>
> In order to give business sense to article 73 (d), it is necessary to construe the article strictly but in accordance with its terms without any qualification, and to treat the office of director as vacated if the specified event occurs. If this were not the case, and the expelled director challenged the bona fides of all or any of his co-directors, the management of the company's business might be at a standstill pending the resolution of the dispute by one means or another, in consequence of the doubt whether the expelled director ought or ought not properly to be treated as a member of the board. Their Lordships therefore take the view that the plaintiff's claim, as spelt out in the endorsement on the

writ, in argument before the Court of Appeal, and in his printed case, inevitably fails at this point.'

[35] Mr Harris also emphasized a similarity of wording between s 203 D of the Australian Corporations Act and s 71 of the Companies Act. Section 71 (1) refers to the fact that a director may be removed by an ordinary to resolution of shareholders which, in his view, indicated generally a permissible directory quality rather than being peremptory or mandatory, an interpretative view shared by Australian Courts, as is discussed presently. Further, s 66 (4) (a) (i) expressly recognises that a director may be removed by any person who is named or determined in terms of the Memorandum of Incorporation, therefore contemplating the removal of directors other than by shareholders and the board as set out in s 71. This, in his view, was a rebuttal of the argument that s 71 comprehensively and exhaustively sets out the grounds for a delinquent director.

[36] In *State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation (Pty) Ltd v Retirement Villages Group Management (Pty) Ltd* [216] FCA 675, the Federal Court of Australia held that:

'Although s 203 D (1) is mandatory in a sense that it overrides a company's constitution to the extent of any inconsistency. It does not provide an exhaustive codification of the mechanism for removal.' (para 16)

[37] After reviewing the various authorities in Australia, the Court then said:

'Australian courts have all reached the conclusion that the statutory removal power which has existed in various iterations culminating the presence s 203 D does not abrogate shareholders ability to remove a director by ordinary resolution in accordance with companies constituent documents provided that those constituent documents does not otherwise contravene any other applicant law.' (para 26)

[38] In summary Mr Harris offered a contrary interpretation to the importance of s 71 of the Act; that is means that there could be no alternative means by which a

director could be removed.

[39] By contrast the purpose of s 71 was to entrench the inalienable right of shareholders, and the board on listed grounds, to remove a director. This is why the section is one of the unalterable provisions of the Act: it ensures that rights of removal of a director cannot be removed or eroded by the MOI. But it does not preclude a method of removal of a director by the board, outside of the parameters of s 71 (3) of the Act.

Evaluation

[40] In summary, applicant's counter argument to the respondents reliance on s 66 (4) (a) and (i) is that this section cannot be interpreted to negate the unalterable provisions of s 71 (3) and (4); unattainable in a sense that there was no other power by which a director could be removed.

[41] Ms Pillay contended that s 66 (4) (a) of the Act does not seek to circumvent the procedural mechanisms placed within the Act by s 71 of the Act. Its sole purpose is to stipulate that the company's MOI can provide for the identity of persons who can appoint and remove directors. In other words, it identifies the persons who can make the appointment and who can remove a director. This does not, in any way, remove the procedural mechanisms which are set out in detail in s 71 when seeking to remove a director. On the facts, s 66 (4) (a) (i) of the Act is not applicable because the MOI does not regulate the 'direct appointment and removal of directors by a named person in the MOI'. Examining the express wording of s 66 (4) (a) (i), Ms Pillay argued that, on the respondent's version, the section allowed for a company's MOI to provide that a single director can remove another director without any reason, not to mention any justifiable reason.

[42] This intense debate on the interpretation of s 66 (4)(a) (i) was triggered by Mr Harris' reliance on the decision of *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) at para 50 to 51, namely that if the language used by the law giver is ignored 'the result is not interpretation but divination.' In particular, in that case, Unterhalter AJA (as he then

was) said at para 50:

> 'The meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selected standard definitions of particular words often taken by dictionaries but by understanding the words and sentences that comprise the contested terms as they fit into the larger structure of the agreement, its context and purpose.'[1]

[43] On the basis of this approach to statutory interpretation there does not seem to be a justification for the contention that s 66 (4) (a) overrides the procedural mechanisms put in place by s 71 when its sole purpose appears to be to provide for the identity of persons who can dutifully appoint or remove directors.

The validity of Clause 29.3.2.1 of the MOI

[44] It is perhaps prudent to recall the manner in which the applicant was removed as a director. As was stated in the answering affidavit, on 30 May 2024 a majority of the directors of the board of first respondent signed a notice requesting applicant to resign as a director. The notice became effective and applicant resigned her office as a director when it was lodged, at the company's registered office on the following day. The justification offered for this decision is clause 29.3.2.1.

[45] Section 71 (1) clearly does not apply because it concerns the removal of a director by an ordinary resolution adopted at the shareholders meeting. Section 71 (3) provides for a removal by a director by shareholders in circumstances as set out in s 71 (3) (a) and (b). Significantly, in this connection the affected director must be given 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 affected director to prepare and present a response together with a reasonable opportunity to make a presentation to the board prior to a decision to remove that director. On the basis that s 66 (4) (b) of the Act, as has been found,

[1] In this case s 66 (4) (a) must be read as providing for the direct appointment and removal of one or more directors by a person who is named in or determined in terms of the MOI. The purpose clearly of the section both in terms of sentence and speaker meaning is to designate the identity of the person

does not apply in this case, the question which arises is whether the MOI in terms of Clause 29.3.2.1 can justify the removal of a director for reasons other than specified in s 71 (3) and without the procedural safeguards which are provided for in s 71 (4).

[46] The answer provided for in LAWSA Vol 6 (2) at para 21 is that in circumstances of this case s 71 has no relevance in relation to the exercise of the power granted to directors under the MOI. Thus, even if s 66 (4) (a) is read as the respondents contend to empower the board of directors to remove a fellow director, subject to compliance with the fiduciary duties of the board to act in the best interests of the company, its purpose surely is to stipulate the identity of persons who can so appoint and remove directors which, on respondents reading, would include the board. But if it is merely an identification section as to who may appoint or remove directors, there is nothing within that section itself which justifies the absence of procedural safeguards as are contained in s 71 of the Act. Significantly in the Privy Council decision in *Lee*, the Articles provided specifically for removal by the board but in circumstances where no reference was made by the Court to relevant legislation such as s 71 or s 69 of the Act or accompanying procedural safeguards.

[47] Given the procedural safeguards in s 71 the Act presents an anomaly on the basis of the arguments put forward by the respondents. Where a director is accused of serious misconduct; that is of being negligent or derelict in the performance of his or her functions or incapacitated to the extent that the director is unable to perform the functions of a director or is ineligible being disqualified in terms of s 69 of the Act, specific safeguards prior to removal are provided as I have indicated. Where, on the other hand, for reasons which fall outside of these requirements the board, as in this case, decides to remove a director, no such safeguards are in place, no reasons have to be given to the director nor is the director to be afforded any opportunity to gainsay any of the allegations which have been made, in this case against her.

[48] Indeed one of the difficulties which the applicant faced in this particular case is that the first time that she gained comprehensive insight into any reasons which the respondents had for her removal were those set out in the answering affidavit.

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making the decision to remove

For this reason therefore she was constrained to provide reasons in a replying affidavit which has limited use. See in this connection the remarks of Schutz JA in *Minister of Environmental Affairs v Phambili Fisheries* 2003 (6) SA 407 (SCA), concerning the limitations of a replying affidavit.

[49] To return to the question as to whether a MOI can sanction the removal of a director without reasons and in the absence of any due process, the applicant contends that, were this to be the case, Clause 29.3.2.1 would be contrary to public policy.

The Public Policy arguments

[50] In this connection Ms Pillay made four separate submissions on behalf of the applicant. She contended that, contrary to a reliance by respondents on the basis that the MOI was a contract which had been agreed to between the parties, it was a sui generis document which required compliance with the provisions of the Act. In turn this meant that s 16 of the Act was of relevance and that its provisions, unlike with an ordinary contract, governed the amending of the MOI. She further submitted that where an agreement seeks to achieve an objective which is against public policy it will not be enforced. In turn, this requires a court to have recourse to the values that underline the Constitution; in particular to apply the values of fairness, reasonableness and justice in the formulation of the relevant approach to public policy.

[51] By relying on *Beadica at 231 CC and others v Trustees Oregan and others* 2020 (5) SA 247 (CC) at para 59, Ms Pillay submitted that a provision which negates a statutory right would undermine the objects of the statute and hence be against public policy and unenforceable.

[52] In *Beadica*, the majority judgment of Theron J devoted considerable time to the role of public policy within the context of the law of contract. In particular, the learned judge said:

> 'It is clear that public policy imports values of fairness, reasonableness and justice. Ubuntu which encompasses these values is now also recognised as a

constitutional value, inspiring our constitutional compact which in turn informs public policy. These values form important considerations in the balancing exercise require to determine whether a contractual term or its enforcement is contrary to public policy.' (para 72)

[53] The learned judge continued:

'In addition these values play a fundamental role on the application of developmental rules of contract law to give effect to the spirit purport and objects of the Bill of Rights. The courts are bound by s 39 (2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights when developing the common law.' (para 74)

[54] Correctly, Mr Harris referred to the emphasis placed by Theron J on the requirement that contracting parties must honour obligations that had been freely and voluntarily undertaken. In other words, *pacta sunt servanda* has:

'Continued to play a crucial role in the judicial control or contracts whether instrument or public policy. This gives expression to central constitutional values.' (para 83)

[55] What complicates a decision in a case such as the present is the further paragraph in the majority judgment:

'In our new constitutional era, pacta sunt servanda is not the only, nor the most important principle informing the judicial control of contracts. The requirements of public policy are formed by a wide range of constitutional values. There is no basis for privileging pacta sunt servanda over other constitutional rights and values. Where a number of constitutional rights and values are implicated a careful balancing exercise is required, to whether enforcement of the contractual terms would be contrary to public policy in the circumstances.' (at para 87)

[56] This *dictum* is then further qualified by reference to the idea of 'perceptive

restraint namely that ‘a court will use the the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases.’ (para 88)

[57] In the present case, there can be no question that Clause 29.3.2.1 of the MOI would if valid, extend the powers of directors to remove a fellow director in circumstances which go way beyond the scope of protections set out in s 71; hence the question arises as to whether a clause with such vast breadth and which can be exercised in the absence of any of the carefully stipulated grounds as set out in s 71 of the Act is not contrary to public policy.

[58] Respondents, in effect, have launched two fundamental challenges to the submission that Clause 29.3.2.1 is contrary to public policy. In the first place, they contend that when applicant became a director, she was aware that under s 15 (6) of the Act the company’s MOI is binding upon shareholders inter se, the company and each shareholder, the company and each director. When she became a director she must have been aware not only of this position but further that her directorship and thus her conduct as a director was subject to the MOI.

[59] Furthermore, the submission is made that Clause 29.3.2.1 does not permit the removal of directors at their co-directors “whim” or “without justifiable reason”. Directors are bound to exercise this power as with all other powers of directors in accordance with their fiduciary duties pursuant to s 76 (3) of the Act, which includes the duty to act in good faith for a proper purpose and in the best interests of the company and with reasonable care, skill and diligence.

[60] A further submission was made that courts, as a matter of principle, will not be likely to interfere in the domestic management of companies or in the exercise of directors powers where these have been exercised in terms of the business judgment rule and in good faith. In this connection Mr Harris cited *Visser Sitrus (Pty) Ltd v Goedehoop Sitrus (Pty) Ltd and others* 2014 (5) SA 179 (WCC) at para 75 which, in turn, relied on the case of *Manning River Cooperative Diary Col Ltd v Shoesmith and another* [1915] HCA 32; [1915] 19 CLR 714 (HC) at 723 to the effect that shareholders who have agreed to abide by the honest discretion of directors for the common welfare cannot ask a judge to overrule it. Significantly, in *Visser Sitrus* Rogers J (as he then

was) applied the public law test of rationality to a company law dispute contending:

> 'These principles relating to rationality in the exercise of public power can, I think, be applied with appropriate modifications to the rationality requirement for the proper exercise by directors of their powers.' (para 78)

[61] In my view, this conclusion must be correct in that a company is not entirely to be uncoupled from legislative regulations in that the relevant legislation being the Company's Act provides the foundational sources for the establishment and management of the company. A company, particularly a public company, cannot be treated as a purely private entity, sourced in contract. It must also be noted that the Act promotes a stakeholder model of company law that requires that the company owes a fiduciary interest to a range of constituencies beyond shareholders only. It is therefore subject to statutory regulation; public law principles with appropriate modification provide the appropriate content for the rationality criterion set out in s 76 of the Act.

[62] The sharp point is whether because a director assumes office on the basis of his/her knowledge of the MOI and further that a company is a private institution, a court should refuse to interfere with a decision that justifies a regime which is contrary to s 71 of the Act and provides for no statutory safeguards, no right to be heard and no reasons to be provided before the taking of the significant step of removing a director with all the consequential reputational issues that flow therefrom. In my view, under a constitutional regime which emphasises a culture of justification, a removal of a director by way of a regime which provides for no opportunity to be informed as to the reasons for removal prior thereto or to respond to such allegations stands sharply in contrast to the values of the Constitution and hence to current public policy. It promotes the possibility of decisions that cannot be adequately tested against the principle of justification.

[63] This finding compels an examination of s 163 (1) of the Act which is relied upon by the applicant as justification for the relief she seeks.

Section 163 (1) of the Act: whether the directors actions were oppressive

prejudicial or unfair

[64] Section 163 (1) of the Act, to the extent relevant, provides thus;

> 'A shareholder or a director of a company may apply to a court for relief if –
>
> > (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
> > ...
> >
> > (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.'

[65] In *Technology Corporative Management (Pty) Ltd and others v De Sousa and another* [2024] ZASCA 29 the court canvassed s 252 of the 1973 Companies Act, which is the predecessor to s 163 of the Act. In the judgement in *Technology Corporative Management supra* at para 29 it was noted that, while s 252 had been repealed, decisions of this earlier provision will be of assistance in relation to cases arising under s 163 (1) of the new Act.

[66] After an encyclopaedic journey through the relevant South African and comparative law, the court summarised the position thus at para 113:

> 'An applicant who seeks relief under this section has to establish a particular act or omission that has been committed or that the affairs of the company had been concluded in the manner so alleged. The applicant will need to show that:
>
> > 1. such act or omission or conduct of the company's affairs is unfairly prejudicial, unjust or inequitable to the applicant or to some part of the members of the company;

2. the nature of the rely that must be granted to bring to an end the matters of which there is a complaint and it is just and equitable that the relief be so granted.

3. it is just an equitable that the relief be so granted.'

[67] The Court went on to say:

'[w]hether the affairs of the company were conducted in a manner unfairly prejudicial to the minority requires an objective assessment of the overall conduct.'

[68] Of particular importance is the emphasis expressed in para 80 of the judgment to the effect that:

'The enquiry is whether objectively speaking the conduct complained of was unfairly prejudicial to the shareholder or part of the shareholders.'

[69] As the wording of s 16 of the Act suggests, where a director of a company applies for relief on the basis that the act of a company has resulted in consequences which are oppressive or unfairly prejudicial to that person, namely in this case, the removal of a director, the section must have application.

[70] The applicant does not allege commercial prejudice but, unquestionably as a senior counsel at the South African Bar, she has a legitimate concern for her reputation on the basis of her being removed as a director of the first respondent. To remove such a person in circumstances where any fair procedure has been eschewed, without any provision of reasons and without any opportunity for the removed director to be heard, not only causes reputational damages but it stands as unfair, simply on the basis of a clear breach of natural justice, let alone the values of the Constitution.

Conclusion

[71] It must follow that the decision to remove the applicant as a director of first respondent in the circumstances as set out in this case were prejudicial to her and were unfair. An exclusive reliance on Clause 29.3.2.1 of the MOI cannot be sustained because that clause, without any procedural protections, must be considered to be in violation of current public policy as shaped by the values of the Constitution. While the respondents proffered a series of reasons for the removal of applicant in the answering affidavit, the fact that they felt empowered to remove applicant in circumstances where no reasons had to be provided at the time of the decision and they were not compelled to "hear her side of the story" raises in and of itself a significant problem.

[72] Respondents are constrained to accept that in such a removal the directors have to act in good faith and in the best interests of the company. But if they are not compelled to provide any reasons for their decision, nor to give the affected director an opportunity to put her case, the question arises as to how the test of acting in good faith and in the best interests of the company will be definitely determined, unless a review is ultimately brought before the High Court.

[73] At this point it is perhaps appropriate to document the responses that the applicant provided with regard to the reasons given by the respondents for her removal. These appear in her replying affidavit, which was her first opportunity to set out her version of events. As she states, three reasons were provided, by respondents for her removal being that she had sought to meet and discuss important matters with non executive directors to the exclusion of executive directors and on more than one occasion, that she had requested a copy of the Company Securities Register / Shared Register from the Company's secretary without notifying her fellow directors, that she had requested information about certain of the company's suppliers for personal community projects without following the appropriate channels and without informing or explaining her conduct to the board.

[74] To this she responded thus: she contended that it is a regular and well accepted occurrence in the area of publicly listed companies for non-executive directors to meet separately. This is in order 'to properly exercise their oversight role in relation to executive directors, meeting sessions of non-executive directors are not

only warranted but necessary from time to time.'

[75] To the extent that Mr Hanekom alleged that this was not the first time that applicant had sought to exclude the executive directors, the applicant notes that he had referred to a meeting in 2020 in relation to a matter from which there had been 'a vehement disagreement' between the previously lead independent non-executive director and the then CEO. The event took place more than four years before the critical events which respondents contend justified the removal of applicant as a director.

[76] With regard to the access to the securities register she noted that she requested a copy thereof on 25 March 2024. The allegation is that she colluded with CBH in respect of the Securities Register. She noted that CBH "does not need anyone to seditiously obtain and provide it with a copy of the Securities Register for as the shareholder it was entitled to a copy thereof as of right in accordance with s 26 (1) (e) of the Act.'

[77] As she points out, this request took place some significant time before the critical events of May 2024. She avers therefore that:

> 'My request for a copy of the Register is not a true reason for my removal and is evidenced from the fact that I was allowed to attend all meetings subsequent to my request including the board meetings (committee meetings ARC and SETC meetings) on Tuesday 21 May 2004 and the board meeting on 23 May 2024 without any concerns or objections raised.'

[78] Concerning the question of the first respondent's supply list she noted that a copy of the supply list was included in the SETCom agenda in 2023 and 2024. Thus she had access to the companies supply list for at least a period of two years.' She avers further that she approached Ms Pether, the Executive for Human Resources, with regard to suppliers 'in respect of an idea that I had for a community project which I intended to place before the board for approval in due course.' In her view, on the facts that she laid out her removal, apart from being based on speculation and conjecture and incorrect facts was 'also motivated by mala fides made from alternative

purposes to avoid disclosure of the legal opinion to me.'

[79] With regard to the question of access to the legal opinion she stated:

> 'My request for a copy of the legal opinion was not at all "unusual". I am a lawyer and was the only lawyer on the board. I had a duty in exercise my fiduciary duties to interrogate any legal advice obtained on behalf of the Board and to advise the board if I was concerned about the correctness of the advice.'

[80] The purpose for setting out applicant's responses to the reasons proffered for her removal by respondents is illustrative of the inadequacy of the procedure adopted by respondents to trigger the dismissal of applicant as a director. It is uncertain whether she was removed before any of this information could be provided to the whole board. And most certainly the board had none of applicant's responses The information which she set out most certainly goes to the heart of the question as to whether the act of removing the applicant as a director was undertaken in the best interests of the company and for a *bona fide* purpose. It is for this reason that basic principles of natural justice would permit a transparent accountable and plausible process to have been adopted.

[81] In this case, the only manner in which it can be determined is by way of the answering affidavit which then constrains the respondent to place her version in the public domain only by way of the restricted recourse to a replying affidavit. It surely must be within the ambit of public policy, at the very least, to have similar provisions of protection against abuse, acts of bad faith and acts which do not promote the interests of the company to incorporate procedures similar to those which are set out in s 71 before a director may be removed.

[82] To sum up with regard to the Court's assessment of the various arguments which have been raised: I am prepared to assume for the purposes of this judgment that clause 29.3.2.1 of first respondent's MOI does not fall to be struck down in terms of s 71 (3) and (4) of the Act, in that it is arguable that, along the lines of the Australian jurisprudence, these sections are not to be regarded as unalterable and therefore do

not constitute the default position in respect of the removal of the director. However, the fact that clause 29.3.2.1 empowers a director to be removed without cause, without being provided with reasons for that dismissal, without any act to make representations to the board and is therefore contrary to fundamental principles of natural justice and hence the values of the Constitution means that these provisions must be struck down as against public policy.

[83] Furthermore, the decision to summarily remove a director from the board in the manner in which this was taken in the present case breaches s 163 of the Act. The wording 'any conduct ... (which) has had a result that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the applicants' clearly envisages conduct which is unjust or harsh and which at the very least involves a element of lack of probity or fair dealing (See *Grancy Property Ltd v Manala and others* [2013] 3 All SA 111 (SCA) at para 22 – 23) where the concept of unfairness is seen to flow from the use of the word oppression. This connotation was also emphasised by Rogers J (as he then was) in *Visser Sitrus* at para 55, namely that conduct which results in the dismissal of a director without any of the substantive or procedural safeguards which otherwise would be contained in s 71 (3) (4) of the Act must be classified as lacking a fundamental commitment to fair dealing to the prejudice, in this case, of the applicant as a director the company.

Order

[84] For all of these reasons therefore, the application must succeed. The following order is issued:

1. Clause 29.3.2.1 of the first respondent's Memorandum of Incorporation ('the MOI') is declared to be against public policy and, as a result is invalid, unlawful and void.

2. It is declared that the decision to summarily remove the applicant from the Board of Directors of the first respondent and its effect was unfair, prejudicial and oppressive as contemplated in s 163 of the Act.

3. The decision taken on or about 31 May 2024 for the summary removal of the applicant by the second and/or third and/or fourth and/or fifth and/or sixth and/or seventh respondents who voted in favour of the decision to summarily remove the applicant from the Board of Directors of the first respondent is reviewed and set aside.

4. The applicant's removal as a director from the first respondent's board is invalid, unlawful and void.

5. The first respondent is ordered with immediate effect, to reinstate the applicant to the first respondent's Board as a non-executive director to serve in such capacity for the remainder of her term until the company's AGM in February 2025.

6. The first respondent (through its Board of Directors) is ordered to issue a SENS announcement within 5 days of the grant of this Court's order to notify shareholders of: (a) this Court's order; and (b) the grounds on which this Court's order was granted.

7. The first respondent, the second, third, fifth and seventh respondent are ordered to pay the applicant's costs on Scale C, including the costs of two counsel where so employed, jointly and severally, the one paying the others to be absolved.

DAVIS AJ

APPEARANCES

FOR APPLICANTS:	Adv K Pillay SC
	Adv J Moodley

INSTRUCTED BY:	Mr Z Soofie, Denton’s
FOR FIRST, SECOND THIRD, FIFTH AND SEVENTH RESPONDENT:	Adv L Harris SC Adv A Toefy Adv P Smith
INSTRUCTED BY:	Trevor Versfeld, Webber Wentzel