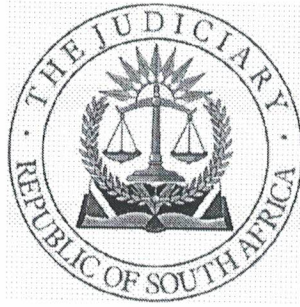




- 1) REPORTABLE: YES/NO
- 2) OF INTEREST TO OTHER JUDGES: YES/NO
- 3) REVISED: YES/NO

SIGNATURE

10 May 2023

DATE

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

CASE NUMBER: 64258 / 2021

In the matter between :

**SIPHO MILA PITYANA**

Applicant

and

**ABSA GROUP LIMITED**

First Respondent

**ABSA BANK LIMITED**

Second Respondent

**PRUDENTIAL AUTHORITY**

Third Respondent

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 10 May 2023

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## JUDGMENT

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M Snyman, AJ

***Introduction***

- [1] This application is related to and was argued together with the matter under case number 53829/2021. However, I will deal with the matters separately in handing down judgment. I shall term this application the “Rule 30 application”. The first and second respondents, (which I shall refer to collectively as “ABSA Bank”) brought an interlocutory application, generally, to declare that utilising rule 53 to review a decision of the board of ABSA Bank, an irregular step and set it aside.
- [2] In the main application that I do not need to consider, Mr Pityana seeks to review and set aside the decision of the board of ABSA Bank to remove him as a non – executive director. The main application is pursued in terms of section 71(5) of the Companies Act 71 of 2008 (“the Companies Act”).
- [3] In the Notice of Motion to the main application, Mr Pityana calls upon ABSA Bank to dispatch the record of decision in terms of Uniform Rule 53(4). It is not disputed that Mr Pityana made use of the provisions of Rule 53 and the procedures provided by it in the main application which will result in ABSA Bank being obliged to deliver the record of the proceedings and reasons for the decision to Mr Pityana.

- [4] In his heads of argument, Mr Loxton SC with Me Milovanovic-Bitter, appearing for ABSA Bank, summarised ABSA Bank's approach as follows:

*"Absa contends that Mr Pityana's approach is irregular and that Rule 53 does not apply to an application in terms of section 71(5) of the Companies Act. On the proper interpretation of section 71(5), the review of the Board's decision is limited to compliance with the provisions of section 71 of the Companies Act, because a Court will not interfere in the business judgment by a board of directors of a company – unless, of course, it finds that the board failed to act in the best interests of a company, or that the directors' conduct falls short of the standards set out in section 76 of the Companies Act, or the common law."*

- [5] Mr Subel SC with Me N Stein, who appeared for Mr Pityana argued in general that rule 53 is applicable due to the matter being a review.

- [6] The relevant part of the reasons why ABSA Bank claims that utilising Rule 53 constitutes an irregularity are contained in the Rule 30 notice, which reads as follows:

- "2. *In the applicant's Rule 53 review application, the applicant seeks to review the decision of the boards of the first and second respondents to remove him as a director in terms of section 71(5) of the Companies Act, 2008.*
3. **However, the decision by the boards of the first and second respondents to remove the applicant as a director does not constitute the performing of a judicial, quasi-judicial or administrative function. Consequently, Rule 53 does not apply.**

4. *The applicant's Rule 53 review application is therefore an irregular step, alternatively is non-compliant with the Rules."*

[Emphasis added]

[7] In the notice of motion, the relevant relief sought is set out as follows:

- “1. *Declaring that the respondent's review application dated 21 December 2021("the review application") constitutes an irregular step, alternatively is not in compliance with the Rules insofar as it invokes the provisions of Uniform rule 53 of the Uniform Rules of Court;*
2. *Setting aside, alternatively striking out that portion of the Notice of Motion in the review application which invokes the provisions of Uniform rule 53;*
3. *Ordering the respondent to pay the costs of this application, including the costs of two counsel;”*

[8] The first question raised is whether Rule 53 of the Uniform Rules of Court applies to review proceedings as contemplated in the section 71(5) Companies Act.

[9] The second question that may come to the fore is whether any of the parties suffered or will suffer prejudice, should the procedure followed be found to be irregular.

[10] Before dealing with the interpretation of the provisions of the Companies Act and the purpose of providing a record in general, I need to deal with some of the arguments raised by the parties which will place the matter into perspective. I will deal with the issues raised, but not necessarily under a separate heading.

- [11] Mr Pityana in the answering affidavit to the Rule 30 *inter alia* claims that the decision is administrative action as contemplated in the Promotion of Administrative Justice Act 2 of 2000 ("PAJA"), and the application is subject to the provisions thereof. I need to address this issue first.

***Administrative action or not***

- [12] First of all, for the decision by a board or shareholders to remove a director to be administrative action the definition of the PAJA needs be investigated. The definition reads as follows:

*"any decision taken, or any failure to take a decision, by—*

*(a) an organ of state, when-*

- (i) exercising a power in terms of the Constitution or a provincial constitution; or*
- (ii) exercising a public power or performing a public function in terms of any legislation; or*

*(b) a natural or juristic person, other than an organ or state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external effect. . . ."*

[Emphasis added]

- [13] In *Minister of Defence and Military Veterans v Motau and Others*<sup>1</sup> the Constitutional Court identified seven requirements of the definition of an administrative action as set out in PAJA:

*"there must be: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering*

*provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions’.*

[14] For the purposes of the current matter I will accept that the decision adversely affects the rights of any person and has a direct, external effect. It is also clearly a decision by a juristic person and does not fall under any of the exclusions listed in the definition in PAJA.

[15] Furthermore, the power of the board of directors flow directly from the provisions of section 71 of the Companies Act.

[16] The remaining questions in this respect for determination therefore are:

(a) whether is of administrative nature; and

(b) whether it is done in the exercise of a public power or public function.

[17] In the matter of Trustees for the time being of the *Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another*<sup>2</sup> the Supreme Court of Appeal at paragraph 14 summarised how the court is required to approach the matter to determine whether a decision is of administrative nature.

*“[14] When regard is had to the structure of the definition of an administrative action, the requirement that the decision be of an administrative nature, is a gate-way to determining whether a particular decision constitutes administrative action. As Wallis J explained in Sokhela and Others v MEC for Agriculture and Environmental Affairs, this requirement demands that a detailed analysis be undertaken of the nature of the public power or public function in question, ‘to determine its true character’. Thus, the determination of what constitutes administrative action*

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<sup>2</sup> 2022 (1) SA 424 (SCA)

*does not occur by default, and '[t]he court is required to make a positive decision in each case whether a particular exercise of public power or performance of a public function is of an administrative character. . . ."*

[Emphasis added – footnotes omitted]

- [18] Simply put, if conduct is not of an administrative nature, it cannot constitute administrative action envisaged in PAJA. At this stage it needs be pointed out that PAJA provided for the applicability of rule 53 in the interim and since 2019, when the rules relating to PAJA were amended, the applicable rules provide therefore. If the decision is of administrative nature, the rule may be applied at the choice of the applicant.
- [19] In the matter of *Legacy Body Corporate*<sup>3</sup> the court, with reference to the decision of *Chirwa v Transnet Limited*<sup>4</sup> decided that the: - *"The fact that bodies corporate derive their powers from statute, does not, without more, translate their decisions into the exercise of any public power or performance of a public function"*.
- [20] In *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others*<sup>5</sup> it was pointed out that conduct of an administrative nature is generally understood as the *"... the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out the daily functions of the state which necessarily involves the application of policy, usually after its translation into law..."*. In the present case, there is nothing bureaucratic

<sup>3</sup> 2022 (1) SA 424 (SCA) at [16]

<sup>4</sup> 2008 (4) SA 367 (CC) at [183]

<sup>5</sup> *Greys Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) at [24]

about the Boards' decision, nor does it involve 'application of policy'. Instead, the decision seems more commercial or managerial in nature, rather than administrative. The boards' decision was made in the course of running and managing ABSA Bank, both Public Companies. The nature of the power is thus business-related. The decision is in nature no different to a decision of a meeting of shareholders of a company.<sup>6</sup>

[21] The boards' decision was clearly not of an administrative nature.

[22] The first hurdle having been failed, it should be the end of this enquiry.

[23] I however share the view of Makgoka JA who found in the matter of *Legacy Body Corporate* in respect of bodies corporate that:

*"..., given the interrelatedness of the requirements, and the far-reaching implications the judgment of the high court holds for bodies corporate generally, I will consider the other two requirements."*<sup>7</sup>

[24] I am of the view that the same should apply in this matter where no authority is to be found directly in point relating to companies and the decisions of its board of directors in respect of section 71.

[25] The question whether private entities are capable of exercising public powers or performing public functions is vexed.

[26] In *Chirwa*<sup>8</sup> it was held that determining whether a power or function is 'public' has to be determined with regard to all the relevant factors including: (a) the

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<sup>6</sup> *Pennington v Friedgood* 2002 (1) SA 251 (C) where it was held that decisions taken at the annual meeting of a medical aid scheme were not in the exercise of a public power

<sup>7</sup> Above at para [19]

<sup>8</sup> Above

*relationship of coercion or power that the actor has in its capacity as a public institution; (b) the impact of the decision on the public; (c) the source of the power; and (d) whether there is a need for the decision to be exercised in the public interest. None of these factors will necessarily be determinative; instead, a court must exercise its discretion considering their relative weight in the context'.*

- [27] In the matter of *Legacy Body Corporate*<sup>9</sup>, the court applied the test as set out in *Calibre Clinical Consultants*<sup>10</sup> where the Supreme Court of Appeal cited with approval the following remarks by in *YL v Birmingham City Council*:<sup>11</sup>

*"[T]he role and responsibility of the state in relation to the subject matter in question . . . the nature and extent of any statutory power or duty in relation to the function in question . . . the extent to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question, and imposes criminal penalties on those who fall below publicly promulgated standards in performing it . . . whether the function in question is one for which, whether directly or indirectly, and whether as a matter of course or as a last resort, the state is by one means or another willing to pay. . . ."*

- [28] The Supreme Court of Appeal in *Calibre Clinical Consultants*<sup>12</sup> went on to observe that "courts have consistently looked at the presence or absence of features of the conduct concerned that is 'governmental' in nature". Relevant considerations in this regard include:

*"[a] the extent to which the functions concerned are "woven into a system of governmental control", or [b] "integrated into a system of statutory regulation", or [c] [that] the government "regulates, supervises and inspects the performance of the function", or [d] it is "a task for which the public, in*

<sup>9</sup> 2022 (1) SA 424 (SCA) at [21]

<sup>10</sup> *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* 2010 (5) SA 457 (SCA) at [31]

<sup>11</sup> *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and Others* [2007] 3 All ER (HL)

<sup>12</sup> Above at [38]

*the shape of the state, have assumed responsibility”, or [e] it is “linked to the functions and powers of government”, or it [f] constitutes “a privatisation of the business of government itself”, or [g] it is publicly funded, or [h] there is “potentially a governmental interest in the decision-making power in question”, or [i] the body concerned is “taking the place of central government or local authorities” . . . .”*

- [29] On the facts and having regard to the purpose and content of the relevant section of the Companies Act with which I will deal more fully below, I find none of these considerations to be present or applicable.
- [30] The decision of ABSA Bank’s board to remove Mr Pityana, is also clearly not administrative action even in terms of the definition thereof in section 33 of the Constitution.
- [31] The decision of a Board to remove a director in terms of section 71(3), as read with section 71(5) of the Companies Act, is therefore not an administrative decision or administrative action, either as defined in the Constitution or PAJA.
- [32] The question as to the applicability of rule 53 however still remains unanswered.

### **Rule 53**

- [33] The argument on behalf of ABSA Bank relies on a strict interpretation of the wording of Rule 53.
- [34] The relevant part of Rule 53 reads as follows:

*“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing **judicial, quasi-judicial or administrative functions** shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected...”*

[Emphasis added]

- [35] It is clear that the Companies Act does not prescribe whether the provisions of rule 53 apply, nor does it exclude it.
  
- [36] The purpose of rule 53 is to facilitate and regulate review applications. Rule 53 imposes on the decision-maker an obligation to deliver the full record of proceedings sought to be corrected or set aside. That is trite.
  
- [37] As indicated above, the decision to remove a director is clearly not administrative action. However, such decision is not the only type of decision that can be reviewed and set aside. There exist also legality reviews and the common-law or contractual reviews, referred to in the matter of *Legacy Body Corporate*<sup>13</sup> as well as statutory reviews.
  
- [38] It would be shortsighted to think that rule 53 automatically apply to all these types of review.

- [39] The Constitutional Court in the matter of *President of the Republic of South Africa v Democratic Alliance and Others*<sup>14</sup> indicated that it did not have to find whether Rule 53 applied to the review of executive decisions. The reason being that the matter had become moot. The court a quo in that matter however found the rule to be applicable to executive decisions. I need luckily not venture into that terrain. The Constitutional Court however stated: -  
*“without deciding whether the principle applies to this matter, that executive decisions are generally reviewable under the principle of legality or rule 53”.*
- [40] Firstly, the current decision in this matter is also not an executive decision or a legality review. In a legality review, as in this matter, the argument is that the applicant is or should be in possession of the record and therefore does not have to make use of the procedural advantage of obtaining a record.
- [41] The statement in the matter of *President of the Republic of South Africa v Democratic Alliance and Others* that executive decisions “generally reviewable under the principle of legality or rule 53”, is clearly obiter and made without proper consideration. Rule 53 provides for a procedure and does not grant any party or person a right to review. Simply put, rule 53 is not a basis for review.
- [42] That being said, the mere fact that a decision is sought to be set aside or reviewed does not automatically entitle an applicant to the procedural advantages of the rule as indicated above. The ratio behind the findings that the record is to be provided seemingly lies in the concept of “Access to Court”.

- [43] The wording “*all proceedings to bring under review the decision or proceedings of **any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions...***”, according to the argument does not apply to the current matter, as the decision was not “*judicial, quasi-judicial or administrative functions*”.
- [44] Despite the wording of the rule and the fact that the impugned decision is clearly not that of any inferior court or tribunal, board or officer performing judicial, quasi-judicial or administrative functions, it is not determinative of whether the rule finds application. To argue that the rule is not applicable does not take into consideration that over a long period of time and even before the advent of the Constitutional era, the rule provided for and was used in proceedings for review for instance of the decisions of the Jockey Club. Those decisions are what is currently termed common law reviews. Currently those review applications more often than not involve decisions of voluntary associations, home owners' associations where the relationship is based on contracts. Simply put those decisions are not Administrative actions, cannot be set aside in terms of PAJA and are not legality reviews.
- [45] Furthermore, it is clear that the rule being only procedural in nature, does not grant a party any right in respect of the review, except some procedural advantage and convenience. Saying this I do not ignore the advantages for court of having the record available at the hearing.
- [46] This is however in my view not a reason why rule 53 should be applicable.

- [47] I now turn to the provisions of the Companies Act and the interpretation thereof, which in my view will be determinative of the issue.

### **Companies Act**

- [48] The applicable provisions are found in section 71 of the Companies Act. At the heart to the removal of a director lies a vote, whether to remove the director. Two scenarios are provided for, namely a removal by Shareholders or removal by the Board of directors if the company has more than two (2) directors.
- [49] It was common cause between the parties that inter alia section 71(3), (4) and (5) provides for the removal of Mr Pityana. It reads as follows:

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

*(a) has become—*

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

*(ii) incapacitated to the extent that the director is unable to perform 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 director concerned must be given—*

- (a) *notice of the meeting, including a copy of the proposed resolution and a statement **setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present 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 is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, **the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.***"

[Emphasis added]

[50] It is clear that sub-section (5) is the section providing for the authority to have the determination set aside. In my view the interpretation of the provisions of section 71 lies at the nub of this matter.

[51] In passing, subsection (6) provides for the court to review a decision where the board voted not to remove the particular director. In terms of that subsection the court may also review the proceedings, but it has specific powers as set out in subsection (6)(b).

### ***Interpretation of section 71(5)***

- [52] The Constitution requires a purposive approach to statutory interpretation.<sup>15</sup> In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,<sup>16</sup> Ngcobo J stated:

*“The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the ‘spirit, purport and objects of the Bill of Rights.’”*

- [53] This approach is one that has been applied to varying degrees by our courts under the common law<sup>17</sup> and the purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.<sup>18</sup>

- [54] In the dissenting judgment of Schreiner JA in *Jaga v Dönges, NO and Another*,<sup>19</sup> cited with approval by Ngcobo J in *Bato Star*,<sup>20</sup> articulates the importance of context in statutory interpretation:

*“Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that ‘the context’, as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of*

<sup>15</sup> *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC) at paras 21, 25, 28 and 31; *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* 2000 (1) SA 113 (SCA) at para 21

<sup>16</sup> 2004 (4) SA 490 (CC)

<sup>17</sup> *University of Cape Town v Cape Bar Council and Another* 1986 (4) SA 903 (AD); *Jaga v Dönges NO and Another*; *Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3

<sup>18</sup> Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville

<sup>19</sup> 1950 (4) SA 653 (A)

<sup>20</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC)

*the statute, its apparent scope and purpose, and within limits, its background.”<sup>21</sup>*

[Emphasis added]

- [55] This being said, it is clear that the intent must be found in the wording of the enactment.
- [56] From sub-section (5) quoted above, it is clear that the director or person who appointed him/her, may have the decision to remove that director, reviewed. The question here is however, what procedure the applicant may or must utilise?
- [57] The decision to remove the director must be made in terms of sub-section (3).
- [58] Thus, the first requirement is that at least an allegation must be made by a director or shareholder that the director to be removed or his actions fall within the categories set out therein. I do not need to decide when the complaint or notice is to be made. I will call this the triggering event which may be an allegation that the director “*has neglected, or been derelict in the performance of, the functions of director....*”.
- [59] The second requirement is that of notice to the director, which notice must contain the reasons for the removal with sufficient specificity to enable the director to be removed to respond to the notice. I need similarly not deal with this issue.

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<sup>21</sup> *Jaga v Dönges* above at 662G-H

- [60] It is clear that the procedural requirements set out in sub-section (4) must be followed before the determination to remove the director can be made. That determination is made after notice and reasons containing sufficient specificity, is provided. The reasons must be provided beforehand and the director or his representative must be given an opportunity to be heard before the determination is to be made to remove him/her or not, whereafter the matter is determined by vote.
- [61] It is clear that no indication is given what procedure is applicable to a review as set out in section 71(5). Furthermore, it is to be remembered that not only the director who has been removed, may apply for a review, but also the person who was entitled to appoint him/her. No requirement is stated that the person who appointed the director be informed of the reasons or even partake in the process. For all intents and purposes that person or entity can be in the dark. I must however must not interpret the section on the current facts, but I must apply the interpretation to the facts.
- [62] That having been said, I cannot make a finding as in the case of a legality review, that the record or reasons is or will be available to the applicant. It is clear that the director to be removed must have the reasons and must have attended the meeting, at least through a representative.
- [63] As stated above, the procedural requirements for the determination to remove, is clear.

- [64] As stated above, I need not go into more details for instance what will suffice to trigger the section. That in my view will be determined by the facts in each matter.
- [65] The question is whether the record is needed in such a review as foreseen in section 71(5). Or put differently, may the applicant make use of the procedural advantage created in rule 53?

***Is record needed?***

- [66] In *Jockey Club of South Africa v Forbes*<sup>22</sup> the Appeal Court, as it was then called, found that the purpose of rule 53 is to facilitate and regulate applications for review by granting the aggrieved party seeking to review a decision access to the record of the proceedings in which the decision was made, to place the relevant evidential material before court.
- [67] When a party is requesting the record, the founding affidavit is not to be relied upon to determine the relevancy of the record or parts thereof as the applicant may still amend or supplement his/her case.
- [68] In this matter, there seems to be no reason to seek the record as the reasons and documents have been provided to Mr Pityana before the determination was made to remove him as a director. Even if only the procedure is reviewed, as was the case in reviews under the common law, an applicant was still entitled to make use of the advantages rule 53 creates. Despite it

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<sup>22</sup>

1993 (1) SA 649 (A)

being clear from the wording of section 71 that the review is limited and mostly only directed at the procedure followed, there is still some kind of review on the merits. If for instance, the reasons are not provided, no record is needed to show that there had been non-compliance with the section and I can foresee that a party in such a matter need not make use of the advantages of rule 53.

[69] Despite the fact that the reasons and record may be available to a director as he/she should have been provided with the relevant reasons as required in terms of rule 53, there are other persons who may also make use of the same section to review the determination to remove who had no access to the reasons or record. That is the very reason why the rule was created.

[70] I therefore find that rule 53 is available to any applicant applying for a review of the determination.

[71] Mr Pityana however pertinently states in the founding affidavit to the main application what is required and that he relies on the provisions of Rule 53 to be able to obtain those documents as part of the record. On Mr Pityana's version these documents did not form part of the discussions or proceedings during which the determination was made to remove him as director. It is not at this stage possible to determine, nor am I called upon whether those minutes and documents called for indeed exist or even form part of the record. Documents do not form part of a record of a decision simply because the applicant or respondent believe that it is part thereof. I am not called upon to make that decision. *Prima facie*, it seems doubtful whether the documents specifically so mentioned forms part of the record, but I need not make a

finding in that respect. That is for ABSA Bank to determine. Should they determine that the documents so identified do not form part of the record, Mr Pityana can approach the court to compel delivery thereof.

[72] The argument by ABSA Bank that the wording of rule 53 simply means that the rule cannot apply to the current matter as it is not judicial, quasi-judicial or administrative action, is clearly misplaced as the courts have never interpreted the rule in that way.

[73] However, the argument on behalf of ABSA Bank is correct that the review contemplated in terms of section 71(5) is *sui generis*. That however, as indicated above does not mean that an applicant is not entitled to make use of the advantages of the rule. It is illogical to interpret the section that a person entitled to appoint a director and who had no access to the documents and/or reasons provided for the determination, will be entitled thereto, but the director who was removed is not.

[74] This being said, I do not find that reviews do not involve only an enquiry into the procedural aspects of the decision.<sup>23</sup> However, I will hereunder make a few remarks having interpreted the provisions as there seems to be no caselaw available on the interpretation on section 71.

[75] The view that the review is of limited nature is supported by the South African Law Journal.<sup>24</sup> Me Cassim who authored the article in the Law Journal did not

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<sup>23</sup> *Tikly v Johannes* NO 1963 (2) SA 588 (T) at 591

<sup>24</sup> Contesting the Removal of a Director by the Board of Directors Under the Companies Act, Rehana Cassim, Senior Lecturer, UNISA, SALJ 2016, p 133 at 153

deal with the applicability of rule 53, but concluded that the review is *sui generis*.

### ***Ambit of a review***

[76] The question in an appeal is whether the decision was right or wrong,<sup>25</sup> while the question in a review is whether the procedure adopted was correct or whether there were irregularities in the proceedings which may show that there has been 'a failure of justice'.<sup>26</sup> This, at the very least was the requirements for review before the Constitution of 1996 was enacted.

[77] In my view, on a simple reading of sub-section (5), a court reviewing the decision of the board of directors 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 as it is the trigger to the process. This enquiry may be limited and not as extensive as a review under sub-section (6), but the record should be provided to court to properly determine the matter.

[78] A court reviewing a decision where the board has decided not to remove a director in terms of section 71(6) can either confirm the decision of the board, or remove the director from office if the court is '*satisfied*' that the director is ineligible, disqualified, incapacitated or has been negligent or derelict. In reaching such a decision the court must make inter alia factual decisions. The word '*satisfied*' indicates that, in reviewing the board's decision not to remove

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<sup>25</sup> *Thuketana v Health Professions Council of South Africa* 2003 (2) SA 628 (T) at 634 – 5

<sup>26</sup> *Tikly*, above at 590 – 591

a director, a court would be empowered to consider the merits of the matter, and not just the procedural aspects of the decision. In such a review the record would also clearly be relevant.

- [79] The legislature clearly knew when drawing the particular sections that the powers of the court would be limited in a normal review process and granted the court more extensive powers under section 71(6).
- [80] It should be noted that the court will in my view 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. The Companies Act provides for the removal of such a director by the Board only in respect of certain companies and only in certain limited circumstances.
- [81] It is clear that the review foreseen in section 71(5) falls into the third category listed in *Tikly v Johannes NO*<sup>27</sup>, referred to above, i.e. a limited re-hearing with or without additional evidence / information to determine, not whether the decision was correct, but whether the hearing of first instance was properly conducted.
- [82] That however does not disentitle a party to the record. If the notice and reasons are not provided then there has not been compliance with the procedure and no record is needed to show that there has been no compliance.

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<sup>27</sup> *Tikly v Johannes NO* 1963 (2) SA 588 (T) at 591

[83] Having regard to the provisions of section 71(5) as compared to section 71(6), the view that the review under section 71(5), is sui generis, is correct.

[84] In the matter of *Helen Suzman Foundation v Judicial Service Commission*<sup>28</sup> the court found that:

*“[14] Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:*

*‘Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.’ (\*Democratic Alliance v Acting National Director of Public Prosecutions [2012] ZASCA 15; 2012 (3) SA 486 (SCA) at para 34)*

*[15] The filing of the full record furthers an applicant’s right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponents. (\*Lawyers for Human Rights v Rules Board for Courts of Law and Another 2012] 3 All SA 153 (GNP)) This requires that ‘all the parties have identical copies of the relevant documents on which to draft their*

affidavits and that they and the court have identical papers before them when the matter comes to court'.

[16] In *Turnbull-Jackson* this Court held:

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision maker's stance; and in the performance of the reviewing court's function.' (\**Muller v The Master* 1991 (2) SA 217 (N) at 219J-220C)

[Emphasis \_ and footnotes \* added]

- [85] These considerations are clearly not applicable to review applications as contemplated in terms of section 71(5) or sub-section (6) as no administrative action or constitutional rights are involved. However, the remarks as made in *Turnbull-Jackson* as emphasised, is clearly correct and equally applicable to the current matter.
- [86] Any claim that the applicant's right of access to court may be infringed upon is clearly misplaced. The applicant is not precluded from accessing court. Even if the provisions of rule 53 cannot be utilised, I cannot see how a party's right to apply to court or institute proceedings is infringed or limited. The court may in all applications, should the need arise, still approach the court to supplement his/her papers in terms of rule 6.

- [87] The review in terms of section 71(5) does not flow from the - “*constitutionally entrenched review function*”, it is clear that there is no basis on which it can be argued that the record is to be provided as a result of such a review function as it simply does not exist.
- [88] In respect of the documents called for by Mr Pityana in the founding affidavit, I have indicated that I doubt that the documents form part of the record. This is supported by the fact that should that have been the case, Mr Pityana would have complained about the lack of specificity given in the reasons provided for the determination. It seems that these documents are unrelated to his removal, but as indicated, I need not make that finding.
- [89] It seems clear that the application of ABSA Bank premature. If the minutes of the meetings are not provided as part of the record, it is only at that stage when a court may be called upon to determine whether the documents sought formed part of the record of proceedings or not. From the reading of the main application, it seems as if Mr Pityana believes that the record or minutes of those meetings will show that his removal was for an ulterior motive or purpose. That seems in my view irrelevant to the current dispute. If the reasons support a removal, the court cannot intervene, even on a liberal interpretation of section 71. I however am not called upon to make that determination.
- [90] It 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 section 71(4) in respect of the reasons and the required specificity.

- [91] The reasons for this are clear if regard is had to the fact that a director serves at the behest of those who appointed him/her. If the Board no longer deems it in the best interest of the company that the director remains in that position the court can hardly force the company to re-appoint him/her as director or retain him/her as a director. The remaining directors representing the shareholders are saddled with a wide discretion to determine by majority vote whether to remove the particular director or not. It seems clear from the wording of section 71(5) and 71(6) that the court has wider powers to interfere with the decision as provided for in terms of subsection (6).
- [92] It is clear that the court cannot intervene in an application under sub-section (5) simply because the court does not agree with the outcome. As the sections stand the court's powers under subsection (5) are clearly limited.

### ***Prejudice***

- [93] ABSA Bank claims that the record is confidential or privileged. The removal of a director in the position of Mr Pityana, is not only sensitive, but in my view confidential. The private business of a company cannot simply be made public because a former director is of the view that his removal is to be reviewed. The reasons why he was removed may not only be personal to the former director, but may expose sensitive and confidential business dealings or even expose the company to other liability if for instance it becomes clear that a company did not for instance deal with the removal as soon as possible.

[94] The record as all other documents filed in court becomes public and that may not only reveal confidential and sensitive information of the company, but also that of the erstwhile director. That is however in my view not a bar to providing the record or making use of rule 53 as the parties may even agree on the record not being made public, or the court being approached to make a ruling in that regard. The issue of *inter alia* confidentiality was dealt with by the Constitutional Court in the matter of *Helen Suzman Foundation* referred to above and I need not expand on it further.

[95] In the light of the finding that there is not irregularity, I need not make a finding if there is any prejudice suffered.

[96] As a result, I find that ABSA Bank has not made out a case under rule 30.

### **Conclusion**

[97] I find that Rule 53 is available to an applicant for review under section 71(3) as read with section 71(5) of the Companies Act of 2008. I specifically make no finding in respect of the applicability of rule 53 to review applications brought in terms of section 71(6).

[98] The application therefore cannot succeed.

[99] I am of the view that the costs must follow the result. Despite both parties having employed senior and junior counsel I do not deem it necessary to have appointed two counsel.

**Order**

[100] The application is therefore dismissed wit costs.

BY ORDER

A handwritten signature in black ink, appearing to be 'M. Snymman', with a stylized, cursive script.

M SNYMAN, AJ

Counsel for ABSA Bank:

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With

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ABSA Bank's Attorneys:

Weber Wentzel Attorneys

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