

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D429/2023

In the matter between:

MANDLA MBHEKISENI ZULU

FIRST APPLICANT

BHEKINKOSI JEREMIAH NGONYAMA

SECOND APPLICANT

MOSES FANI ZUNGU

THIRD APPLICANT

NONHLANHLA NTOMBELA

FOURTH APPLICANT

VUMILE NOMPUMELELO DLUDLA

FIFTH APPLICANT

SAKHUMUZI ZULU

SIXTH APPLICANT

MFANISENI MAPHIS! MASUKU

SEVENTH APPLICANT

BHEKIZENZO SIBUSISO BUTHELEZI

EIGHTH APPLICANT

and

KHUMBULANI JACKSON ZULU

FIRST RESPONDENT

THANDEKA ZUNGU

SECOND RESPONDENT

PRINCE SITHEKU AGRICULTURE PTY LTD

THIRD RESPONDENT

PRINCE SITHEKO AGRICULTURE PTY LTD

FOURTH RESPONDENT

JUDGMENT

MSIWAAJ

Introduction

[1] The applicants approached this Honorable Court for the relief set out in their Notice of Motion on an urgent basis. The court granted a rule nisi returnable on 27 February 2023. For purposes of this judgment, the first to the eighth applicant will be collectively known as 'the applicants'.

[2] The application papers were not served on the respondents. On the return date, the applicants sought a confirmation of the rule. The first respondent opposes the confirmation of the rule and instead sought that the rule be discharged.

[3] The application is brought by the chairperson of the Entembeni Royal House Community ('the Trust'), duly authorized to depose to the applicants' founding affidavit and pursue the application against the first respondent. The chairperson served as a trustee and serves as the chairperson of the Board of Trustees of the trust.¹

[4] The first respondent is an adult male executive director of Prince Sitheku Agriculture (Pty) Ltd and is also a registered member of the trust. He was served as a director on 29 December 2022 because of the alleged serious misconduct he has committed.

[5] The first and second respondent were appointed as salary directors responsible for the day to day management of the business affairs of the company. The two respondents were salaried on monthly remuneration for their service.

¹ Applicants' Notice of Motion.

[6] The second respondent has since resigned hence she does not feature in these proceedings. The first respondent was accused of orchestrating a secret business account, out of which it is alleged that they divested huge monies and funding sources destined for a primary business account and channeled them into a "secret account".² It is also alleged that no one knew the reason for the secret account except that funds were transferred into while concealing it. It was expected on an unaccounted regular cash withdrawal, recurring on line purchases, excessive fuel purchases, frequent supermarket and/or food outlets and/or restaurant purchasing sprees etc.

[7] As a result, a forensic investigation by Adv. Mdladla was conducted to verify the alleged gross misconduct. On 08 December 2022, pursuant to a resolution of the board of trustees, the first respondent was suspended with immediate effect, pending the disciplinary enquiry.³

[8] On 8 December 2022, the shareholders served the first respondent with a notice to attend a disciplinary enquiry on 22 December 2022. At the same time, the notice of the disciplinary enquiry calling upon him to appear before a shareholders meeting on 22 December 2022 at R66 Nandi Farm Melmoth to answer misconduct charges levelled against him.

[9] On 22 December 2022, the first respondent together with his attorney attended the disciplinary enquiry. They requested documentation for them to prepare for the first respondent's case. The disciplinary enquiry was postponed indefinitely to afford the furnishing of the required documentation to the first respondents' legal representative.

[10] It is submitted on behalf of the applicants that a notice of a special shareholders meeting was served on the first respondent on 8 December 2022, notifying him about the meeting on 22 December 2022.⁴ The notice also stated that he, as a

² Page 19, paragraph 44 of the applicants' founding affidavit

³ Page 27, paragraph 67 of the applicants' deponent Mr Mandia Mbhekiseni Zulu.

⁴ Page 28/24 paragraphs 72 and 73 of the applicants' founding affidavit.

company director, is removed and that Mr S B Zulu is to be appointed as an executive director of the company.

[11] On 10 December 2022 in an AGM, members of the trust beneficiaries resolved that they no longer want the first respondent to continue managing and directing the affairs of the trust company and resolved to mandate the board of trustees in their capacities as shareholders to remove him as a company director.

[12] The intended shareholders meeting did not take place on 22 December 2022 and was postponed to 29 December 2022.

[13] The applicants' counsel submitted that the first respondent was specifically informed of the postponement. He further stated that the first respondent was urged to attend and avail himself of the opportunity to make representations before the shareholders, as to why he should not be removed as a company director.⁵

[14] It is submitted by the applicants' counsel that on 29 December 2022, the first respondent, with his legal team failed to attend the special shareholders meeting, despite being given timeous notice and an invitation to the meeting. In the meeting, the shareholders unanimously resolved to remove the first respondent as a company director with effect from 4 January 2023. The shareholders further resolved to replace him with a non-executive director, Mr S B Zulu, as the sole executive director of the company.

[15] On 11 January 2023, the deponent advised him about the resolution of the board of trustees of 29 December 2022 in a shareholders meeting. As a result, he was obligated to surrender all company assets and belongings entrusted to his care while in service to the company, including the company car, laptops and cellphones. Also, the applicant served the first respondent with a letter of termination.⁶

[16] The applicants' case is that the first respondent was served on 8 December 2022 with the notice to attend the shareholders' meeting on 29 December 2022.

⁵ Page 30, paragraph 76 of the applicants' founding affidavit.

⁶ Page 32-33, paragraph 84 of the applicants' founding affidavit.

Therefore and to the extent that applicants were required to notify the first respondent of the shareholders meeting concerned, they substantially complied with the procedural requirements of s 71(2) of the Companies Act 71 of 2008.⁷ Mr Lethuxolo Zulu's confirmatory affidavit is filed together with applicants' replying affidavit. He confirms that he served the notice to a driver of the first respondent on 8 December 2022.⁸ It is further argued on behalf of the applicants that the first respondent's failure to attend the shareholders meeting constitutes a waiver of his right to be heard.

[17] The first respondent's argument is that the rule nisi should be discharged with costs. The respondent's counsel argued that before the resolution was taken by the board of trustees and shareholders to remove him as a director, there was non-compliance with the *audi alteram* principle, as rules of natural justice demand.

[18] It is also argued for the first respondent that he was never served with the notice to attend a meeting of 29 December 2022. Secondly, the first respondent states that there was a binding agreement between the applicants' attorney and respondent's attorney that a resolution to remove the first respondent as a director would not be moved on the 29 December 2022 meeting until he was presented with documents he had requested and be afforded an opportunity to present his case.⁹

[19] It is necessary that I determine whether the first respondent was afforded an *audi alteram* in terms of the rules of natural justice, seriatim. This requires the court to:

- (a) Determine whether a notice was served on the respondent inviting him to a shareholders' meeting on 29 December 2022.
- (b) Establish whether the respondent was entitled to present his case before the adverse decision to remove him was passed.

⁷ Page 230, paragraph 14 of the applicants' replying affidavit.

⁸ Page 243, paragraph 3 of the confirmatory affidavit by Sanele Zulu.

⁹ Page 151, paragraph 2.12 applicant's confirmatory affidavit Sanele Zulu.

- (c) Determine whether he was ultimately afforded a hearing and;
- (d) Examine the notice itself.

[20] There is a dispute as to whether the respondent was served with the notice of shareholders meeting on 29 December 2022. The applicants' initial version in his founding affidavit is that the notice was delivered to the first respondent on 08 December 2022. When the respondent refutes and denies having ever being served with the notice, the confirmatory affidavit by Mr Sanele Zulu was filed stating that he effected the service of the notice to Mr Dlamini, the first respondents' driver, in his presence in a car.¹⁰

[21] It escapes my mind why the notice was served on the driver instead of the respondent, who was with the driver in the same car. It is unbelievable. It contradicts the initial version by the applicants' deponent in the founding affidavit.

[22] It is also the applicants' contention that the first respondent and his legal representative failed to show up for the special shareholders meeting, despite being given adequate notice and invitation to the meeting. Further it is submitted that the respondent did not even tender an apology.¹¹

[23] It is stated further that the first respondent squandered his opportunity to make verbal representations to the meeting as to why he should not be removed as a director.

Notice

[24] It is abundantly clear from the wording of the notice itself that the shareholders are the invitees to cast their voting rights to remove the first respondent as a director. He was not a shareholder. The notice specifically refers to the shareholders only.

¹⁰ Pages 28, paragraph 72 of the applicants' founding affidavit.

¹¹ Page 35, Paragraph 92 of the applicants' founding affidavit.

[25] During the hearing of the matter, it is argued on behalf of the applicants that in terms of s 71 of the Companies Act, they are not obliged to furnish any reasons for their resolution to remove the first respondent as a director.

[26] The applicants' argument to the contrary, that the respondent was invited but waived his right to *audi alteram*, is unfortunately misplaced and baseless in the light of the notice relied upon as a means of the first respondent's invitation to a meeting to present his side of the case, concerning the alleged misconduct.

Legal principles applicable

[27] The principle of *audi alteram* is sacrosanct in the South African Legal System, like all other constitutional values.¹² The applicants relied on s 71(1) of the Companies Act¹³ to remove the respondent as a director of the company. Section 71(2)(b) provides '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.'¹⁴

[28] The language used in subsection (2) is peremptory and accordingly envisages that *audi alteram* must be afforded to the first respondent. The right to audi alteram is also founded and emphasized in courts. The applicant quoted correctly, Justice Matojane where he had this to say:

'Where shareholders seek the removal of a director, s 71(1) does not require shareholders to provide the director concerned with a statement setting out the reasons for the proposed resolution, as is the case where the removal is by

¹² Notice is hereby given to all shareholders of the company that a special meeting of Prince Sitheko Agriculture (Pty) Ltd shareholders will be held at 10:00 at Queen Nandi Farm on Thursday, 22 December 2022.

ATTENDANCE

The Ethembeni Royal House Community Trust (hereinafter "the Trust") is the sole shareholder of Prince Sitheko Agriculture 9Pty) Ltd.

The Trustees of the Trust have been vested with general powers to do all such things as may be necessary or conducive to achieve the objectives of the Trust and shall be the only individuals permitted to attend the shareholders meeting and exercise voting rights.

¹³ Section 71(1)" Despite anything to the contrary in a company's memorandum of Incorporation or rules, or any agreement between a company and a director may be removed an ordinary resolution adopted at a shareholders meeting by persons entitled to exercise voting rights in an election of that director, subject to subsection (2)."

¹⁴ Henochsberg on The Companies Act 71/2008.

directors. The legislature has deliberately preserved the right of the majority shareholders to remove a director whom they no longer support. Directors serve at the behest of shareholders who elected them. The shareholders can remove them at will, without having to provide reasons.¹⁵

Further, the applicants took umbrage that the first respondent or his attorney did not attend the meeting and raised the respondents' side of the story.

[29] The formulation of the *audi alteram partem* principle treats the principle as a rule of natural justice which comes into play when circumstances stated in a dictum exist i.e. whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights or whenever such an individual has a legislative expectation entitling him to a hearing.¹⁶

[30] Procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the substance of the allegations against him or her. **Corbett CJ** - following **Ridge v Baldwin**¹⁷ and subsequent decisions held that, the duty to act is 'simply another, and preferable, way of saying that the decision-maker must observe the principles of natural justice'.¹⁸ This was applied in subsequent decisions.

[31] In **Msiza v Motau N.O and Another**,¹⁹ it was also confirmed that it was in the interest of justice to extend the rule of law and natural justice to those individuals who are suspected, like the respondent in the instant matter, of wrongdoing by an investigator, Adv. Mdladla, who conducted a forensic investigation - it being the respondents right to be heard before an adverse decision culminating into a vote of his removal as a director by the shareholders in terms of both s 71(2)(b) of the Companies Act and rules of natural justice.

¹⁵ Miller v NATMED Defence (Pty) Ltd and Others 2022 (2) SA 554 (GJ) para 36.

¹⁶ Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A).

¹⁷ Ridge v Baldwin [1964] AC 40.

¹⁸ Administrator2, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A); Leech and Others v Farber NO and Others 2000 (2) SA 444 (W).

¹⁹ Msiza v Motau N.O and Another 2020 (6) SA 604 (GP).

[32] I now turn to the facts of this case which are abundantly clear. The applicants' case is that the first respondent was invited to attend a disciplinary hearing after a damning investigation report accusing the latter of serious misconduct of stealing company's money presented to the shareholders, the applicants herein.

[33] Upon request of documentation by the first respondents' legal representatives on 22 December 2022 from the applicants' evidence leader (supposedly) which were not forthcoming, the applicants' legal team postponed the disciplinary hearing indefinitely. It is not hard to find that such postponement was a ploy and in bad faith.

[34] The first respondent further avers that there was also an agreement between his legal representative and the applicants' legal team that such disciplinary hearing will not proceed pending the applicants' legal representative furnishing them with the requested documentation. This is not refuted and denied by the applicants. The respondent has since not been furnished with the requisite documentation and the disciplinary hearing is still pending. I accept the respondents' version as probable and creditworthy.

[35] On 29 December 2022, the shareholders commenced a meeting, passing a vote of removal of the first respondent, in his absence. This is in accordance with the expressed view on 22 December 2022 and in unison with notice of invitation to the shareholders' meeting. In the notice, it was plain that one of the items was a removal of the director. His removal was a foregone conclusion from the day of presentation of the forensic investigation.

[36] The applicants hold a view that the first respondents' failure to attend that meeting constitutes a waiver of his right to *audi alteram*, to present his side of the story regarding the misconduct allegation in terms of the forensic investigation aforestated. It is discernable from the applicants' affidavit that the first respondent was prejudged of guilt hence there was a haste to remove him as director without any concern about his absence.

[37] The first respondent contends that he was never served with any notice to attend the shareholders meeting on 29 December 2022 at Wilmoth farm in Durban.

[38] He further states that on 22 December 2022 while attending a disciplinary hearing, it was intimated that the shareholders would meet on 29 December 2022 for a resolution to remove him and substitute him with Mr Zulu. When it was so intimated, his legal representative implored the applicants not to do so pending the disciplinary hearing. It is abundantly clear that the shareholders were hell bent to remove the director; anything else was a waste of time.

[39] The contention by the applicants that they invited the first respondent to a shareholders meeting on 29 December 2022 is not founded on any evidence. The applicants' presented two contradictory versions which I reject as appalling and implausible. The first respondents' version is credible and satisfactory. I accept the respondents' version that he was not invited.

[40] Further on the ordinary and literal reading of the purported notice of invitation allegedly served on either the first respondent or his driver in his presence according to applicants' version, the notice is directed to the shareholders for them to attend the meeting to exercise their voting rights. Nowhere in the notice or any correspondence attached thereon, is the first respondent invited or mentioned whatsoever. *Expressio ius est exclusio alterius* applies herein.

[41] It is apropos to state that on the annexed resolution of the shareholders meeting on 29 December 2022, it is abundantly clear that it was first resolved that Mr S B Zulu, a non-executive director in terms of the company's memorandum of incorporation, was elected as an executive director. Secondly, thereafter the respondent was removed as a director in item no. 2 of the agenda.

[42] The only inescapable conclusion is that no notice of invitation for the respondent was ever served on him.

- Equally, there is no basis for the applicants to take exception for non-attendance by the respondent of the shareholders meeting on 29 December 2022. The respondent was never served.

- It is the duty of the applicants to prove and show that they served the respondent.
- The applicants have not discharged that onus.

[43] In conclusion, I find that the applicants' removal of the first respondent is in violation of the rules of natural justice in particular, denying the respondent an *audi alteram partem*. Consequently, and eventually the failure to afford the respondent an *audi alteram partem*, vitiates the process of his removal as a director and the substitution of him by any incumbent thereof. The removal of the first respondent is unlawful for want of observation of the *audi alteram partem*.

[44] As a result, I make the following order

- 1 The rule nisi issued on 23 January 2023 be and is hereby discharged.
- 2 The applicants are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

**ACTING JUDGE OF THE
DURBAN HIGH COURT**

APPEARANCES

Case Number : D429/2023

Applicant : MANDLA MBHEKISENI ZULU AND 7 OTHERS

Represented by : ADVOCATE MADIKIZELA

Applicant attorney : NGCAWENI SHABALALA INC

Respondent : KHUMBULANI JACKOSON ZULU AND 2 OTHERS

Represented by : ADVOCATE GUMEDE G.Z

Respondents attorney : TC DUMA ATTORNEYS

Date of Hearing: 22 MARCH 2023

Date of Judgement: 24 MARCH 2023

Reasons for Judgement: 06 APRIL 2023