

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: HCAA14/2019

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE..... SIGNATURE:.....	

In the matter between:

LIMPOPO PROVINCE VOLUNTARY GROUP

SCHEME BOARD

FIRST APPELLANT

MAFEFE H O, CHAIRPERSON OF LIMPOPO

PROVINCE VOLUNTARY GROUP SCHEME BOARD

SECOND APPELLANT

CHAUKE HW, DEPUTY CHAIRPERSON LIMPOPO

PROVINCE VOLUNTARY GROUP SCHEME BOARD

THIRD APPELLANT

SHIMANGE B S

FOURTH APPELLANT

TJALE V

FIFTH APPELLANT

And

MAHUBANE MACHIRI ALBERT	FIRST RESPONDENT
LAMOLA MADIMETJA MICHAEL	SECOND RESPONDENT
MASETE MAREME STEPHEN	THIRD RESPONDENT
MATHONSI RIRHANDZU PATIENCE	FORTH RESPONDENT
RAMPHISHA MMAMMITJI SUZAN	FIFTH RESPONDENT
SHILENGE THEMBENI BENNET	SIXTH RESPONDENT
MATHEBULA ELIZABETH SIZY	SEVENTH RESPONDENT
MAGEZA TINTSWALO GRACE	EIGHTH RESPONDENT
MKHABELA ZACHARIA GREGORY GODFREY	NINTH RESPONDENT

JUDGEMENT

KGANYAGO J

[1] The appellants were respondents in the court *a quo* whilst the respondents were applicants. The respondents have launched an application seeking an order to review and set aside the decision of the appellants to nullify the elections of the respondents and other elected members to the board during August 2016; a declaratory order confirming the validity of the board's election of the first appellant held during August – October 2016 in terms of the first appellant's constitution; and that the appellants be interdicted from preparing for the

rerunning of the election of the board of the first appellant with immediate effect.

[2] The background facts are as follows. The appellants are all members of the Old Mutual Group Policy Scheme. During August-October 2016 elections were held for board members of Limpopo Province Voluntary Group Scheme a non-profit company. Elections were held in terms of clause 11 of the constitution of the Limpopo Province Voluntary Group Scheme Board. Fifteen new board members were elected. The respondents were amongst the members elected to serve on the new board.

[3] On 9th February 2017 the respondents received letters from the first appellant notifying them of its decision to nullify the elections which were held during August-October 2016. The reasons for nullifying the elections was on account of disputes that were lodged by Mopani and Waterberg districts regarding elections of new members to the board. In the letters received by the respondents, it was stated that the nullification was mainly due to the non-compliance with the board's constitution on several clauses, which renders their legality to be highly questioned.

- [4] It is the respondents' contention that the elections held during August-October 2016 were conducted in substantial compliance with the constitution. That Old Mutual representatives as well as district managers were invited together with the provincial manager who conducted the elections as executive manager of the scheme with the right to conduct the elections. Further that district managers as Old Mutual representatives at district level and the administrator were invited to constitute district election committee. That the presiding officer gave members of the scheme in attendance at the elections an opportunity to ask clarity seeking questions prior to the process of the actual election of candidates, and there was no objection raised. The respondents submitted that the disputes raised by Mopani and Waterberg districts were supposed to have been dealt with by the election committee and not the first appellant. The respondents further submit that if there was non-compliance with clause 11 (1) of the constitution, such non-compliance was not sufficient to constitute an irregularity that justify a nullity or illegality of the elections. With regard to the reading of the CV's/ profiles the respondent submitted that the provincial manager reached an agreement with the attendees that since the candidates were short listed, the reading of their profiles should be dispensed with as there was no need to read their profiles.
- [5] The appellants in their answering affidavit have stated that the first appellant has nullified the results of all the district elections on the ground that the election committee which ran those elections was not

properly constituted and was also not authorised to run the elections; the provisions of clause 11.1 (a) and 11.2 (b) of the constitution were not complied with; and that members from other districts voted in districts in which they were not entitled to vote.

[6] The appellants submitted that the elections for Vhembe District, Mopani District, Waterberg District, Capricorn District and Sekhukhune District were conducted by Mr Keetse who is an Old Mutual representative at provincial level. That during elections the board administrator Ms Rahab Mamabolo was present and formed part of the election committee. That they were informed by Ms Mamabolo that in all the elections for these districts, the district representatives were present but did not form part of the election committee.

[7] That after the elections, the appellants received a complaint from Mr L.V Tjale from Waterberg district who complained that the elections were conducted by an Old Mutual provincial representative in violation of clause 11.1 (a) of the constitution and also that the provincial representative did not read the synoptic CV's/profiles of candidates. From Capricorn district Mr P Mdaka complained that during elections, there were people from other districts who casted their votes in Capricorn.

- [8] That on receipt of these complaints, a special executive management committee meeting of the board was called to deal with the complainants. At that meeting, the executive management committee resolved to annul the results of the elections in all districts. Thereafter, all the candidates were sent letters informing them of the decision of the executive management committee.
- [9] The respondents in their replying affidavit have stated that upon revisiting and perusal of the appellants answering affidavit, it was evident that there were facts that could not be proven on paper and that it will need oral evidence to be led.
- [10] The matter in the court *a quo* came before Sikhwari AJ who found in favour of the respondents. He further ordered that the respondents must assume office with immediate effect.
- [11] The appellants applied for leave to appeal against the whole judgment and order of Sikhwari AJ, and that application was dismissed. The appellants petitioned the Supreme Court of Appeal (SCA). On 27th June 2019 the SCA granted the appellants leave to appeal. On 9th July 2019 the appellant served the respondents with their notice of appeal. The

appellants notice of appeal was filed with the registrar of this court on 15th July 2019.

[12] On 1st November 2019 the appellants brought a substantive application seeking an order that the late application for a date for the hearing of the appeal and the late filing of the record be condoned and that the appeal be reinstated. The respondents did not file any opposing papers but filed a notice to remove cause of complaint in terms of Rule 30(2). In that notice the respondents stated that the appellant's application for condonation was an irregular step because the appellants have failed to apply for a date of hearing of the appeal in terms of Rule 49(7) (a)(ii). On 21st November 2019 the appellants filed their notice of application for a date for the hearing of the appeal.

[13] In their founding affidavit the appellants have stated that the reasons for the late filling of the record was that on 20th August 2019 they appointed Elt Pro Transcriptions to transcribe the record of the proceedings in the court *a quo*. However, they were informed by Elt Pro Transcriptions that it had encountered serious difficulties in obtaining the necessary documents from the Registrar and that was their primary cause for the late filing of the record. They submitted that they are having good prospects of success and that the delay was only marginal, and further that when they realized that the record will be filed late, immediate steps

were taken to ensure that the record was filed at the earliest opportunity.

[14] The respondents have addressed in their heads of argument their opposition to the appellants' condonation application. The respondents in their heads of arguments have stated that even if the appellants' application for condonation and reinstatement of the appeal was not opposed by them, it stands to fail. The respondents in their head of arguments have submitted that it is inexcusable for the appellants to rely on the absence of the record to justify their failure to prosecute the appeal on time, and that the appellants were required to apply for a date of hearing within sixty days whether the records were ready or not.

[15] The respondents in their heads of argument have also stated that the appellants' notice of appeal is fatally defective and invalid in that it fails to state the particular respect in which the variation of the judgment or order of the court *a quo* is sought. Further that the appellant's notice of appeal does not make it clear as to the findings of fact and/or rulings of law in the said judgment they are appealing against, and in what particular respect the variation of the judgment was sought.

[16] The first issue to be dealt with is the appellants' condonation application and reinstatement of the appeal that had lapsed. Factors which are usually taken into consideration in an application for condonation include the degree of lateness, explanation for the delay, prospects of success and prejudice, if any.

[17] In **Darries v Sheriff, Magistrate Court Wynberg and Another**¹ Plewman JA said:

"Condonation of the non-observance of the Rules of this Court is not a mere formality ... In all cases some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of court apply for condonation as soon as possible... Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When an application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the court to assess the appellant's prospects of success. But appellant's prospects of success is one of the factors relevant to the exercise of the court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be."

¹ 1998 (3) SA 34 (SCA) at 40I-41E

- [18] The appellants have served the respondents with their notice of appeal on 9th July 2019 and filed with the registrar on 15th July 2019. In terms of Rule 49(6) (a) the appellants were required within sixty days after the delivery of the notice of appeal, to make a written application to the registrar for a date for the hearing of the appeal. Since the stipulated sixty days is in terms of the Rules, it follows that it refers to court days. The sixty days' period has therefore lapsed on 3rd October 2019. When the sixty days' period lapsed, the appellants have not yet applied for a date of hearing of the appeal.
- [19] On 1st November 2019 the appellants filed an application for condonation for the late application for a date for the hearing of appeal, late filling of the record and also that the appeal be reinstated. The written application for the date of hearing of the appeal was served and filed on 21st November 2019. That makes their application for date of hearing of the appeal to be thirty four days late.
- [20] In their condonation application appellants have stated that the primary reason why the date of hearing of the appeal was made outside the prescribed time period was that the transcribers had serious difficulties in obtaining the necessary documents for transcription from the registrar. The applicants have also attached several letters sent to the transcribers requesting the transcribed records.

- [21] Rule 49(7)(a) provides that at the same time an application for a date for the hearing of an appeal is made, the appellant shall file with the registrar three copies of the record on appeal and shall furnish two copies to the respondent. This Rule uses the word “shall” meaning it is peremptory. If the appellant applies for a date of hearing of the appeal without filing three copies of record with the registrar and furnishing the respondent with two copies that application will be defective.
- [22] The record as envisaged in Rule 49(7)(a) will entail entire pleadings and the transcribed record of the court *a quo*. Even though the record of the proceedings in the court *a quo* usually contains addresses by the counsel of both parties and engagement with court, that might not be fatal even if they were not filed at the time of the application for a date of the appeal. They however, constitute a complete record of the proceedings as it gives a picture of what actually transpired when the matter was argued in the court *a quo*. It is therefore advisable to file them as in some instances, counsel may refer the court to authorities or law which does not appear in their heads of arguments.
- [23] It is common cause that as at 3rd October 2019 the transcribers have not yet transcribed the record of the proceedings in the court *a quo*. The appellants have explained in detail the steps they have taken to speed up the process of transcribing the record of the proceedings. Even before they receive the transcribed record, they launched an application

for condonation. In my view, that shows that they were not deliberately delaying the speedy finalization of their appeal. In my view, their explanation for the delay is adequate and satisfactory.

[24] The application for a date of hearing was made thirty four days late. Taking into consideration the steps that the appellants have taken in making sure that the records of the proceedings were transcribed, in my view, their application was not extremely late.

[25] With regard to prospects of success, the appellants in their application for condonation have given a history of this matter. That history set out briefly and sufficiently such essential information that will assist this court to assess the appellants' prospects of success. The appellants alleged that new elections were held prior to the hearing of the respondents' review application. The appellants further alleged that the respondents have unsuccessfully attempted to interdict the appellants from implementing the outcome of the new elections. The appellants submitted that when the respondents review application was heard, it was already moot as new elections were held and already implemented. The appellants further submitted that paragraph 2 of the order of Sikhwari AJ did not form part of the relief that was sought in the respondents notice of motion.

[26] The respondents did not oppose the appellants' application for condonation, and therefore their version remained unchallenged. This court is therefore of the view that with regard to prospects of success, the appellants are having an arguable case.

[27] The court is therefore satisfied that the appellants have adequately and satisfactorily addressed the factors taken into consideration in a condonation application. Their non-observance with the Rules was not flagrant and gross. Their application for the late application for a date for the hearing of the appeal and the late filling of the record is condoned, and their appeal is reinstated.

[28] The second issue to be determined is whether the appellants' notice of appeal is fatally defective and invalid in that it fails to state the particular respect in which the variation of the judgment or order of the court *a quo* is sought.

[29] Rule 49 (4) provides as follows:

"Every notice of appeal and cross-appeal shall state –

- (a) What part of the judgment or order is appealed against; and
- (b) The particular respect in which the variation of the judgment or order is sought".

[30] The appellants' notice of appeal read as follows:

“BE PLEASE TO TAKE NOTICE that the appellants herewith appeal to the full court of the Limpopo Division of the High Court, Polokwane against the whole of the judgment and order of the honourable Mr Justice Sikhwari delivered on 13 December 2018. Leave to appeal was granted by the Supreme Court of Appeal on 27 June 2019.

The appellants seek an order in the following terms:

1. That the appeal be upheld, with costs;
2. That the order of the court *a quo* be replaced with an order in the following terms:
 - 2.1. The application is dismissed,
 - 2.2. The applicants are ordered, jointly and severally, to pay the respondents' costs.”

[31] The respondents have submitted that the appellants' notice of appeal should specify clearly what the grounds of appeal really are, and that they are entitled to be informed in the notice of appeal, in clear and unambiguous terms exactly what case they must be prepared to meet on appeal.

[32] It is trite that an appeal lies against an order that is made by a court and not against its reasons for making that order. It follows that on appeal a respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court *a quo*. (**See SA Reserve Bank v Khumalo**²).

[33] Rule 49 (4) (a) requires the notice of appeal to state what part of the judgment or order is appealed against. What this entails is to state whether the appeal is against the whole or part of the judgment and

² 2010 (5) SA 449 (SCA) at 451 F-G

order. This sub-rule does not require a party to state the grounds. The appellants have stated in their notice of appeal that they are appealing against the whole of the judgment and order of Sikhwari AJ. If the appellants were appealing only against part of the judgment or order, it would have been sufficient for them to specify exactly that part without specifying the ground why they are appealing that part. In my view the appellants notice of appeal complies with the provisions of Rule 49 (4) (a).

[34] Rule 49 (4) (b) requires the notice of appeal to state the particular respect in which the variation of the judgment or order is sought. The appellants in their notice of appeal are seeking that the order of the court *a quo* be replaced with an order dismissing the application with costs. In my view, the appellants in their notice of appeal have stated the particulars in which the variation of the judgment or order is being sought.

[35] This court is therefore satisfied that the appellants notice of appeal is not defective and invalid. The appellants notice of appeal complies with Rule 49 (4). The respondents point *in limine* stand to fail.

[36] The third issue to be determined is whether the appellants' answering affidavit in the main application deposed by Bangi Sydney Shimange commissioned by Chidi Attorneys on 6th July 2017 was defective. The

respondents in their heads of argument have submitted that the commissioning of that answering affidavit did not comply with Regulation 3 (1) of the regulations governing the administration of an oath or affirmation in that the deponent did not sign the affidavit in the presence of the commissioner of oaths. It is therefore the respondents' contention that the appellants answering affidavit in the main application is invalid and that this appeal should be decided on the facts or allegation contained in the respondents' founding affidavit.

[37] The issue that the appellants founding affidavit was invalid was not raised in the court *a quo* but was raised for the first time in the appeal. It is trite that an appeal is based on the record. Even though an appeal is based on records, on appeal, the respondent is entitled to support the order on any relevant ground and is not confined to supporting it only for the reasons given by the court *a quo*. (See **SA Reserve Bank v Khumalo** *supra*)

[38] The respondents when replying to the appellants' answering affidavit did not challenge the validity of the appellants' answering affidavit. The court *a quo* was not obliged to *mero motu* determine the validity of the appellants' answering affidavit without the respondent having raised an issue on it. The respondent did not advance any reasons why the validity of the appellants answering affidavit was not challenged in the court *a quo*. The respondents were aware of the answering affidavit as

it stands and did not challenge it. By failing to challenge the validity of the answering affidavit in the court *a quo* shows that they have abandoned that defence. The respondents cannot therefore seek to pursue on appeal a defence that they have abandoned in the court *a quo*.

[39] Even if this court was to accept the respondents' submission on this issue, in my view it has no merit. The certificate at issue read as follows:

“ signed before me at Polokwane on the ____ of June 2017, the deponent having sworn that the contents of this affidavit we both true and correct acknowledged that he knows and understand the contents of this affidavit, that he has no objection to taking the prescribed oath, and that he considers the prescribed oath to be binding on his conscience.”

[40] Thereafter, the commissioner of oaths had signed, inserted his full names as Mahlodi Elias Ramethape, practising attorney. The commissioner of oaths instead of inserting a date on the space provided on the certificate, put his office stamp of Chidi Attorneys next to where he had signed. The date of that office stamp is 6th July 2017 and address is suit no 5, 82 (A) Hans van Rensburg Street, Polokwane 0700.

[41] The date of the filling notice of the appellants' answering affidavit is the 6th July 2017 and it shows that it was served on the respondents' attorneys on the 6th July 2017 at 17:00. Had the respondents raised this issue in the court *a quo*, it would have given the appellants an

opportunity to clarify that discrepancy. However, as things stand, the only conclusion is that the answering affidavit was prepared during June 2017 but presented before the commissioner of oaths for commissioning on the 6th July 2017 and the commissioner of oaths has omitted to delete June 2017 when he placed his office date stamp of the 6th July 2017.

[42] The same goes with the respondents founding affidavit, the commissioner of oaths did not specify whether the founding affidavit was signed by a female or male. The certificate state he /she and it cannot be both. However, in paragraph 1 of the founding affidavit, the deponent has stated that he is an adult male. Therefore, the certificate cannot be read in isolation with paragraph 1. The same with the certificate on the appellants' answering affidavit will not be read in isolation with the date stamp. These in my view, are not fatal omissions that affect the validity of both affidavits. It therefore follows that the point *in limine* raised by the respondents that the appellants answering affidavit is defective has no merit.

[43] Turning to the merits of the appeal, the appellants have submitted that the respondents had launched their application as a review application and on the basis that the decision of the board of the company constituted an administrative decision as contemplated in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). It is the respondents'

contention that this approach was patently incorrect and that the company is in fact a domestic tribunal. The respondents submitted further that they have never relied on PAJA in their review application, but that their review application is in terms of Rule 53 of the Uniform Rules of the High Court (Rules).

- [44] The respondents in their founding affidavit stated that the decision of the board to nullify elections did so in terms of an administrative action which may, if considered to be irregular or unlawful, be a subject of judicial review by the court. The respondents notice of motion states that the appellants are called upon in accordance with the provisions of Rule 53(1) of the Rules for the conduct of proceedings. There is nowhere in the papers where the respondents have stated that they are relying on PAJA. In my view, the mere fact that the respondents have stated that the appellant's action constitute administrative action, does not automatically mean that their review application was brought in terms of PAJA. Even when this matter was argued in the court *a quo*, the respondents did not rely on PAJA. The respondents notice of motion is clear that their review application is in terms Rule 53(1). The appellants also did not raise this matter when the matter was argued in the court *a quo*. It was raised for the first time when the appellants argued their application for leave to appeal. In my view, there is no merit in the appellant's arguments that the respondents review application was brought in terms of PAJA.

[45] The respondents in their replying affidavit have stated that the appellants' answering affidavit raised material disputes of fact and that the matter could not be decided on paper. The respondents have thereafter submitted that the alleged disputes of fact be referred for oral evidence.

[46] In **National Director of Public Prosecutions v Zuma**³ Harms DP said:

"Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon–Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can only be granted only if the facts averred in the applicants (Mr Zuma's) affidavits, which have been admitted by the respondent (NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bold or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

[47] The issue of the disputes of fact was raised by the respondents who are *dominus litis*. However, the court *a quo* in its judgment did not determine whether a real, genuine and bona fide dispute of fact exist. The respondents in their replying affidavit have seriously and

³ 2009 (2) SA 277 (SCA) at para 25

unambiguously addressed the facts they said to be disputed and also requested for the matter to be referred for oral evidence. The court *a quo* was supposed to have dealt with the respondent's contention that there was a dispute of fact and that the matter could not be decided on paper. If in deed there was a real, genuine and bona dispute of fact, the court *a quo* could not have granted a final order, but could have either dismissed the application or referred it for oral evidence on those disputed facts.

[48] It is not in dispute that the respondents were elected to serve on the new board as a result of elections that were held by the districts of the first appellant. The appellants on receipt of the outcome of the elections results of the district, received complaints from other districts who were alleging some irregularities when the elections were held. Upon receipt of the complaints, the appellants arranged a special executive management committee meeting of the board to deal with the alleged complaints. At that meeting the executive management committee resolved to annul the result of elections in all districts and that fresh elections be held. All the affected candidates were sent letters informing them of the decision of the executive management committee.

[49] The first appellant is a private company which is regulated by its constitution. In terms of clause 3(a) of the appellant's constitution, the

executive management committee may authorize any person or persons to act on behalf of the board and to sign all such documents and take all such steps as may be necessary to protect its interest in connection with any action, suits, proceedings, dispute, conciliation or arbitration. It seems to me that the executive management committee is wielding enormous power than the board itself. In case the board becomes dysfunctional the executive management committee will take over the running of the affairs of the board.

[50] Clause 10 and 11 of the constitution regulates the holding of the elections which must be overseen by an election committee. Clause 11.1 and 11.2 of the constitution read as follows:

“11.1 Election Committee

- (a) Old Mutual representatives at district level and the Board's Administrator constitute provincial election committee.
- (b) Old Mutual representatives at provincial level and the Boards Administrators constitute provincial election committee.

“11.2 Duties of election committee shall be to:

- (a) Prepare ballot papers.
- (b) Announce the names of candidates and read their synoptic CV's/ profiles.
- (c) Conduct elections.
- (d) Supervise elections.
- (e) Count votes.
- (f) Announce the results.
- (g) Resolve disputes if there are any.”

[51] Under normal circumstances disputes in relation to the elections must be handled by the election committee. However, in this case, the disputes that were lodged concerned the very same members who were supposed to constitute the election committee. Mr Keetse was an Old Mutual representative at provincial level and Ms Mamabolo the Board Administrator. The dispute lodged is centred around the two who are supposed to form part of the election committee. That make them to be conflicted and would therefore not form part of the committee to hear and determine the dispute that relates to them. The constitution is also silent as to the quorum of the election committee. The quorum in the constitution relates to the board only. With the enormous power the executive management committee was having, it decided to take over and dealt with the dispute on its own. It could not have referred the matter to the old board as that board was dissolved as a result of the holding of the elections. In my view, it was within the powers of the executive management committee to have dealt with the disputes received relating to the manner in which the elections were held.

[52] The appellant as a domestic company in dealing with the disputes raised by the aggrieved parties is required to have regard to its own rules or the fundamental principles of fairness. The constitution is silent as to the procedure to be followed in dealing with disputes emanating

from the elections except to say that the disputes will be dealt with by the election committee.

[53] In **Turner v Jockey Club**⁴ Botha JA said:

“The principles of natural justice does not require a domestic tribunal to follow the procedure and to apply the technical rules of evidence observed in a court of law, but they do require such a tribunal to adopt a procedure which would afford the person charged a proper hearing by the tribunal, and an opportunity of producing his evidence and of correcting or contradicting any prejudicial statement or allegation made against him... The tribunal is required to listen fairly to both sides and to observe “the principles of fair play. In addition to what may be described as the procedural requirements, the fundamental principles of justice require a domestic tribunal to discharge its duties honestly and impartially. They require also that the tribunal’s finding of the facts on which its decision is to be based shall be “fair and bona fide” ... It is, in other words, “under an obligation to act honestly and in good faith”.

[54] The constitution of a private company is the instrument that facilitate and regulate its members in the running of the activities of the company. Therefore, a private company is able to regulate itself and it is also best placed to determine how its members would participate in its internal activities.

[55] The constitution of the appellants regulates and facilitates how its members may participate in the internal activities of the company. Clause 10 and 11 of the appellants’ constitution regulates the holding of the elections. The constitution of the private company constitute the terms of the agreement entered into by its members. The relationship between the private company and its members

⁴ SA 1974 (3) SA 633 (A) at 646 F-H

is therefore contractual. Members of the private company if they are of the view that their constitution has been breached to their prejudice, are entitled to approach a court of law for an appropriate relief. (See **Ramakasa and Others v Magashule and Others**⁵)

[56] The appellants have taken a decision to annul the election results based on the submissions of the aggrieved parties only. The respondents were not given an opportunity to make their own submissions despite having an interest in the matter, and a negative outcome was going to affect them. In my view, the appellants were supposed to have sent the disputes to the respondents and hear their comments before it took a decision to annul the election results, and not just sent the outcome of their decision without having afforded the respondents an opportunity to be heard. In my view, the manner in which the appellants have handled the disputes of the election results, have failed to observe the principles of fair play. They have therefore acted unfairly towards the respondents.

[57] The question is whether this unfairness justify the setting aside of the decision of the executive management committee in nullifying the election results. The respondents does not dispute that clause 11(1) of the constitution was not complied with during the holding of the

⁵ [2012] ZACC 31; 2013 (2) BCLR 202 (CC) 18 December 2012 at paras 79 and 80

elections. In fact the respondents have stated in their founding affidavit that if there was non-compliance with that clause, such non-compliance was not sufficient to constitute an irregularity. Also with regard to clause 11.2 (b) the respondents do not dispute that it was not complied with. In fact they submit that the provincial manager reached an agreement that since the candidates were short listed, the reading of their profiles should be dispensed with. However, clause 11.2 in relation to duties of the election committee uses the word shall. That is peremptory, and there was no room to dispense with the reading of synoptic CVs/profiles of candidates. Therefore, even if the disputes were sent to the respondents for their comments, it would not have changed the fact that the constitution was flouted during the holding of the districts elections.

[58] After the elections results were nullified, fresh elections were held before the review application was heard in the court *a quo*. The respondents tried to interdict the holding of the fresh elections without success. There is no evidence that the respondents were prevented from taking part in the fresh elections. Any harm which the respondents might have suffered, has been minimized by the holding of fresh elections which were free for all. If the respondents had the support of the electorate, they might have still been elected again. In my view, when this review application was heard in the court *a quo* it was moot as a new board was already duly constituted. Since the respondents

were unsuccessful in their interdict application, there was nothing barring the appellants in proceeding with the holding of fresh elections. In my view, the respondents' review application should have been dismissed on the basis of mootness as it did not raise any discrete issue of public importance that will have an effect on future matters.

[59] As a private company is entitled to regulate its own affairs, this court will be slow to interfere. The transgressions which occurred during the holding of the district elections were serious, and the appellants could not have turned a blind eye. It would not have been in the interest of the members of the first appellant to have referred the dispute to the election committee since some of its members were conflicted. In nullifying the elections result the first appellant acted within the confine of its constitution which gives it the authority to regulate its own affairs. The appeal therefore stands to succeed.

[60] With regard to costs, it will be just and equitable if each party pays its/her/his own costs since appellants did not observe the principles of natural justice in nullifying the election results.

[61] In the result I make the following order:

(a) Condonation is granted for the late filing of the record.

(b) Condonation is granted for the late application for a date of hearing of

the appeal.

(c) The appeal is reinstated.

(d) The appeal is upheld.

(e) The order of the court *a quo* is set aside and substituted with the following:

“The application is dismissed and each party to pay its/his/her own costs”

(f) There is no order as to costs of the appeal.

MF. KGANYAGO J

**JUDGE OF THE HIGH COURT OF SOUTH
AFRICA, LIMPOPO DIVISION,
POLOKWANE**

I AGREE

MG PHATUDI J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO DIVISION,
POLOKWANE

I AGREE

M NAUDE AJ
ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

Counsel for the Appellant : APJ ELS

Instructed by : MMAKOLA MATSIMELA ATTORNEYS

Counsel for the Respondent : G SHAKOANE SC & L NEMUKULA

Instructed by : BALOYI SHIRARE ATTORNEYS

Date of hearing : 9TH OCTOBER 2020

Date of Judgment : 28TH JANUARY 2021