



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3696/2018

In the matter between:

QWAQWA RADIO
(Registration no: 023-021-NPO)

Applicant

and

MEI GEORGE SALEMANE

1st Respondent

MINA WETES

2nd Respondent

SEKA MOPELI

3rd Respondent

PHINDILE RADEBE

4th Respondent

JUDGMENT BY:

MHLAMBI J

HEARD ON:

25 OCTOBER 2018

DELIVERED ON:

06 DECEMBER 2018

MHLAMBI, J

[1] On 25 October 2018 this matter served before me as an extended return date of a *rule nisi* granted by the court on 23 July 2018 in terms of which the respondents were called upon to show cause why the following orders should not be made final:

1.1 Declaring the Board of Directors of QwaQwa Radio nominated and appointed at the elective general meeting on 23 March 2013 dissolved in terms of a resolution taken at the special general meeting held on 14 July 2018 (SGM), and furthermore, declare the directors of the abovementioned board lawfully removed from office and relieved of their powers and duties;

1.2 Declaring the interim board of directors of QwaQwa Radio ("*interim board*"), nominated and appointed at the above mentioned SGM validly constituted and appointed;

1.3 Interdicting and or restraining the respondents from interfering with and obstructing the interim board, the station management and general staff of QwaQwa Radio to exercise their powers and perform their duties and functions assigned to them, including, but not limited to, the day to day operations of the station;

- 1.4 Interdicting and or ordering the first respondent to refrain from continuing to perform any duties or exercise any powers under the guise of being a member and or chairperson of the QwaQwa Radio board, with immediate effect;
 - 1.5 Interdicting and/or ordering the respondents to submit and/ or return any and/or all property and/ or documents, files and ledgers of QwaQwa Radio in their possession and/ or under their control to the members of the interim board, with immediate effect;
 - 1.6 Interdicting and/ or prohibiting the first respondent and/ or respondents from entering the premises of QwaQwa Radio under the guise of being members of the board of directors or station management, save for visits restricted to their rights as ordinary members of the community of the Thabo Mofutsanyane District broadcast spectrum as contemplated in the constitution of the applicant;
2. Paragraphs 1.3 to 1.6 above shall serve and operate as an interim interdict against the respondents, pending the final determination of this application.

The parties

- [2] The applicant is QwaQwa Radio (Registration no: 023-021-NPO), a community radio station and class broadcasting services and spectrum licensee established in terms of its own constitution as

a non-profit organisation; registered in terms of the relevant statutes of the Republic of South Africa, with registered postal address at P O Box 17873, Wietsiehoek and principal place of business at shop 10 B, Mandela Park Phuthaditjhaba Shopping Centre, Phuthaditjhaba, Free State Province. The applicant shall, in terms of its own constitution, exist in its own right, separate from its members or office bearers and/ or general staff and is able to sue or be sued in its own name as a legal entity separate from its members.¹

- [3] The first respondent is cited as the erstwhile chairperson of the applicant's board; the second respondent as the erstwhile deputy chairperson; the third respondent as the erstwhile secretary of the board and the fourth respondent as the erstwhile director tasked with the human resources of the applicant's board of directors. The respondents assumed and executed their powers and duties as duly elected and appointed board members of the applicant for a four year term, having been appointed as such during the elective annual general meeting of QwaQwa Radio, which was held on 2 March 2013 in accordance with the provisions of the applicant's constitution.
- [4] The respondents opposed this application on the basis of the voidness and/or invalidity of the special general meeting and the decisions taken during such meeting which was held on 14 July 2018. The respondents filed a counter- application, seeking a

¹ Para 7:FA

declaratory order invalidating this meeting and the decisions taken thereat.

The background

- [5] In its founding affidavit², the applicant relied on its constitution which it attached as annexure “UA1” to highlight to the court that it was established in terms thereof; that provision was made for the board of directors to be dissolved by the annual general meeting and the election of an interim board which shall function as a board until the next elective annual general meeting. The purpose of annexing the constitution was to prevent the overburdening of the court papers, prolixity in averments and to incorporate the remainder of the terms and/or sections of the constitution not specifically mentioned, as if specifically averred and incorporated³.
- [6] The last AGM (which was elective) was held on 2 March 2013 during which the respondents were elected into office. As a result of a growing number of complaints and a report issued by the Independent Communications Authority of South Africa (ICASA) relating to the non-compliance with the rules of ICASA and the possible termination of the applicant’s licence, the QwaQwa community called for a Special General Meeting (SGM) on 14 July 2018, attended by community members during which a resolution was taken to dissolve the applicant’s board of directors. Seven members (including the deponent to both the opposing

² Paragraph 7, 17, 23 and 24

³ Para 28: FA

and replying affidavits, Mr Stanley Letsela, who was appointed as chairman) were appointed to the interim board. Its mandate was to take over total control of the affairs of the applicant; to report to the community within three months on progress made in the implementation of the action plan and to ensure that an elective AGM was held for the election of a permanent board.

[7] Following the appointment of the interim board, a letter dated 15 July 2018 was forwarded to the first respondent, informing him to refrain from visiting the premises of QwaQwa Radio, save for visits in the exercise of his rights as an ordinary member of the community and to refrain from performing any functions under the guise as a member or the chairperson of the erstwhile QwaQwa Radio board.⁴ Despite having been served with the letter, the first respondent continued to interfere with the operations of the applicant and prevented the interim board from carrying out its mandate to take over total control of the station. It was unacceptable to the interim board that the first respondent should enter and continue to occupy the premises in his capacity as chairman. Consequently, the applicant was forced to approach the court for the interim relief pending the finalisation of the matter.⁵

[8] The application is opposed by the first and third respondents only, the fourth respondent having withdrawn her opposition. The crux

⁴ Paragraph 37: FA

⁵ Paragraphs 38 and 39: FA

of their case in opposition to the granting of the relief sought in terms of the *rule nisi* and the counter application is as follows:⁶

1. The purported special general meeting which was held on 14 July 2018 in respect the affairs of QwaQwa Radio did not constitute a general meeting of QwaQwa Radio.
2. The July SGM was not convened in terms of the provisions of the QwaQwa Radio's constitution, as a result of which any and all the decisions and resolutions which were purportedly taken during the meeting regarding the affairs of QwaQwa Radio, including the purported decisions to dissolve the board of directors and establish the interim board, were null and void;
3. The interim board of directors did not have any powers, duties or functions regarding the affairs of QwaQwa Radio, including its management;
4. The interim board did not have the power to act on behalf of QwaQwa Radio and to prosecute these proceedings on behalf of QwaQwa Radio;
5. The current board of directors, consisting of the respondents who were appointed as members of the board of directors during the elective annual general meeting of QwaQwa Radio that was held on 2 March 2013, as well as Sello Patrick Lebeko and Mmathulo Jane Mofokeng, was and still is duly appointed and entitled to act as the board of directors in accordance with the provisions of the QwaQwa Radio's constitution and to exercise the powers, functions and duties

⁶ Para 17: Answering Affidavit

regarding the affairs of the QwaQwa Radio as provided for in its constitution.

- [9] During the AGM of 2 March 2013, certain amendments to the first constitution, adopted during 2000 and which was attached to and relied upon by the applicant in its founding papers, were proposed and adopted. A copy of the amended constitution was signed by the first and third respondents in their official capacities and ever since its adoption; the management of the applicant was conducted in accordance with its provisions. Copies of the constitution, the minutes and the attendance list, signed by the members who attended the meeting, were attached.⁷
- [10] The station manager, as an *ex officio* member, is empowered to convene an urgent SGM in terms of article 6.2 of the 2013 constitution. The July SGM was not convened and called by Mosala, the duly appointed station manager. She was not involved in any manner in the arrangements of such a meeting. It was clear from the evidence on which the interim board relied, that the meeting was not a special meeting convened by the station manager or the members of QwaQwa Radio and was also not called in accordance with provisions of the 2013 constitution, or even the first constitution⁸. The meeting did not constitute a meeting of QwaQwa Radio and the decisions which were taken at that meeting regarding the applicant and its board, were *ultra vires*, invalid and void⁹.

⁷ Paras 21-23: AA

⁸ Paras 54,55 and 58:AA

⁹ Para 67: AA

- [11] In the counter application, the respondents seek a declaratory order in terms of which all the actions and decisions taken by the interim board since 14 July 2018 are declared void and invalid. The court is also requested to declare that the board of directors, consisting of the respondents, Lebeko and Mofokeng should remain in office until the election of a new board of directors at an elective AGM; to be convened by the board of directors within 60 days from the date of the granting of the order in terms of the counter application¹⁰.
- [12] The applicant filed its replication and opposition to the respondents' counter- application and raised certain preliminary points which are not relevant for the adjudication of this matter. In its opposition, the applicant stated that as a registered non-profit organisation, it was subject to the regulatory framework described in the NPO Act¹¹. The amended constitution relied on, and attached to the respondent's opposing affidavit, did not pass muster in terms of the provisions of the NPO Act and the required registration of such amended constitution¹². It was therefore a nullity as there was no documentary proof to substantiate its validity and existence as an amended constitution. The only registered constitution that was still valid was obtained from the founders of the radio station and was attached as annexure "GJO3" to the applicants' replying affidavits. The SGM was called and convened by concerned and affected community members

¹⁰ Para 86:AA

¹¹ Non-Profit Organizations Act, Act 71 of 1997

¹² Para 7.2: Replying Affidavit

with insight into the incriminating ICASA report. The notice of the urgent SGM was publicised on various platforms for three to four weeks before the SGM was held. The platforms used were the social media, various radio stations, Facebook, WhatsApp and flyers.¹³

[13] In their replying affidavit in respect of the counter application, first and third respondents stated that the applicant raised a new matter in its replying affidavit or relied on allegations which were of a hearsay, vexatious, scandalous or defamatory nature¹⁴. In its founding affidavit, the applicant referred to the constitution annexed thereto as “UA1” as the applicant’s constitution which was established, valid and binding. To the contrary, Mr Letsela stated in his replying affidavit that annexure “GJO3” (the third constitution) to the replying affidavit was deemed to be the registered constitution which was currently valid. The content of the two constitutions differed substantially. To the extent that the allegations in reply were inconsistent with the applicant’s case in founding and constituted new matter that had to be relied upon in founding, the allegations contained in paragraph 7 to 7.2 and paragraph 68 ought to be struck out.¹⁵

[14] In paragraph 6.9, 11 and 70 of the replying affidavit a new case and additional relief were sought which did not form part of the applicant’s case in the founding affidavit to the extent that the applicant sought an order declaring the board of directors

¹³ Para 6.5: Replying affidavit

¹⁴ Para 38:Reply

¹⁵ Paragraph 38 to 42 of the reply

delinquent. Vexatious, scandalous and defamatory allegations were contained in paragraphs 6.13 to 6.17, 10, 39.6, 42, 49.2 to 49.4, 53.1, 58 and 60 and the court was requested to strike these allegations from the replying affidavit as Letsela falsely accused the first respondent of fraudulent conduct.

The issues

[15] The parties are *ad idem* that the issues in dispute for determination are:

4.2 *Whether* the special general meeting which was held on 14 July 2018 was properly convened and constituted a special general meeting of QwaQwa Radio;

4.2 Whether the meeting, as convened, duly notified the public of and/ or provided for resolutions to be taken at the meeting regarding the dissolution of the board of directors and the appointment of the interim board;

4.3 Whether the decisions taken at the July SGM were valid, being whether the board of the directors was validly dissolved and the interim board validly appointed by the said July special general meeting.

[16] The parties are furthermore *ad idem* that, should the court find that the July special general meeting was not properly convened, the main application must automatically fail and the counter application succeed.

The parties' submissions

[17] Mr Thompson submitted in his written heads and oral submissions that¹⁶ the constitution of the QwaQwa Radio and the NPO Act were of paramount importance to this application and that both the main and counter-applications would stand or fall thereby. He submitted that of paramount importance for purposes of the main application was clause/article 11 of the registered constitution which stated that, in case the board was dissolved, the special general meeting should elect an interim board which would function as such. The special general meeting of 14 July 2018 acted in accordance with this clause after the resolution was taken that the 2013 board be dissolved. The 2013 board failed to honour the provisions of the constitution, and there were no compelling reasons for the reinstatement of the 2013 board for the purpose of convening an elective AGM. That duty was already assigned to the interim board which had already resolved to hold an elective AGM on 04 November 2018, pending the outcome of the hearing. The community had no alternative but to call an urgent SGM on 14 July 2018 as it was entitled to do in accordance with the passage that Mr Thompson relied on in **National African Federated Chamber of Commerce And Industry v Mkhize**¹⁷ that *“I think it is self-evident that in any organization members should have the power to request a meeting of the organization or of its decision-making structures”*¹⁸. I have serious doubts with this line of thinking as shown below.

¹⁶ Applicant's Heads of Argument page 4 paragraph 3.1.1

¹⁷ (805/13) (2014) ZASCA 177 (21 November 2014) para 25

¹⁸ The remainder of the paragraph reads as follows: “But this is not the question to be decided here. The issue for determination is whether the December 2012 was lawfully convened. “(as it is the case in casu).

[18] Mr Pienaar submitted that the applicant attempted to rely on the third version of the QwaQwa Radio's constitution in its replying and opposing affidavits to the respondents' counter-application in order to make out a new case and seek additional relief to have the board of directors declared delinquent and be removed¹⁹. The introduction of a new matter was tantamount to an abandonment of an existing claim and the institution of a fresh and completely new claim on a different cause of action. In the founding affidavit, the applicant relied on the constitution as contained in annexure "UA1" whereas in the replying affidavit it relied on a third constitution in annexure "GJO 3". The said constitution was allegedly provided by the founders of the radio station but did not state who the founders were, when that constitution was registered and whether it was still so registered. The applicant's reliance on the third constitution was untenable as the allegations constituted hearsay evidence and contrary to the express allegations in its founding affidavit without explaining the contradiction at all. The question whether the July SGM constituted a valid meeting, has to be considered and determined based on the provisions of the 2013 constitution.

[19] He further submitted that the dispute of fact regarding which of the constitutions formed the current constitution, has to be determined in terms of the **Plascon Evans**²⁰ test, being the fact averred in the applicant's affidavits which have been admitted by the respondents, together with the facts alleged by the

¹⁹ Para 6: Respondents' replying heads of argument

²⁰ Plascon Evans Paints (Pty) Ltd vs. Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (a) at 634 to 635

respondents. The respondents did not take issue with the first constitution but alleged that it was consequently amended during 2013, which was also not expressly denied by the applicant in reply, save for its purported reliance on the provisions of the NPO Act. The said Act did not expressly provide that if the amended constitution was not registered, it constituted a nullity. I agree with this view.

Discussion

- [20] The provisions as contained in article 6.1 and 6.2 of the 2013 constitution do not differ materially from those provided for in article 6.1 to 6.2 of the first constitution on which the applicant relies in its founding affidavit (annexure “UA1” to the founding affidavit). Clause 6.27 of the first constitution and 6.28 of the second constitution contain similar provisions which read as follows:

“Should any vacancies arise in the board, the board shall co-opt a suitable replacement. In case the board is dissolved by the AGM, the station manager, as ex-officio member, shall take charges thereby preparing for an urgent SGM within 21 day which shall then elect an interim board.” (The 2013 constitution does not mention the period of 21 days)

- [21] The “*registered*” constitution as reflected on annexure “GJO3” to the replying affidavit, does not contain the same provisions as in clauses 6.27 and 6.28 of the other two constitutions. Mr Thompson relied in his written²¹ and oral submissions on clause 11.11 of the third constitution which reads as follows:

²¹ Paragraph 5.19 of the applicants heads of argument

“Should any vacancy in the board (sic), the board shall co-opt a suitable replacement. In cases the board is dissolved, the special general meeting shall elect an interim board, which will function as board.”

It is evident that unlike the other constitutions, the third constitution is silent on the manner, time and appointment of the SGM. Startling was the submission on behalf of the applicant²² that the applicant maintained throughout the papers that the 14 July 2018 SGM was validly convened. It was also within the powers of the SGM to dissolve the 2013 board and appoint an interim board as per clause 11 of the registered constitution obtained from its founding members who were responsible for the registration of QwaQwa Radio as a non-profit organisation.

- [22] In **National African Federated Chamber of Commerce and Industry and Seven others vs. VPN Mkhize and others**²³ it was stated that it was trite that the constitution of a voluntary association together with all the rules and regulations, collectively formed the agreement entered into by that association’s members. The constitution must be interpreted in accordance with the ordinary rules of construction applying to contracts in general. It is evident that the applicant failed to act in accordance with the constitution as relied upon in his founding documents, and the tacking back and forth as evidenced in its papers was ill-advised. It is evident from the minutes of the special meeting/conference of 14 July 2018²⁴ that the meeting was convened as a result of the concerns of the QwaQwa Radio

²² Paragraph 5.20 of the applicants heads of argument

²³ Supra, para 21

²⁴ Page 492 of the indexed papers

Listeners' Forum, based on rumours that all was not well at QwaQwa Radio. It is evident that the deponent to the founding and replying affidavits, Mr Letsela, is an attorney by profession²⁵ who is described as an advocate in the Minutes, took an active part in the said meeting. He advised the community that it would be best to elect an interim board that would have to do its best to save the community radio station. No mention was made that the applicant and/or its office bearers were invited to the said meeting.

[23] It is clear that the special general meeting was not lawfully convened in terms of its constitution and that neither the QwaQwa Radio Listeners' Forum nor the community members had the necessary *locus standi* to convene a special general meeting contrary to the provisions of the applicant's constitution. Alternatively, no evidence was presented to show that the convenors of the said meeting had the necessary authorisation to do so. It follows that all the decisions and resolutions passed at such meeting were invalid and of no force. I therefore find that the special general meeting held on 14 July 2018 in respect of the affairs of Qwaqwa Radio was not properly constituted. The parties are *ad idem* that should I find that the meeting was not properly convened, the main application must fail and the counter application should succeed.

[24] The respondents submitted that the applicant approached the court on an urgent basis represented by the deponent and the

²⁵ Para 1: Applicants replying affidavit

alleged interim board. The deponent, Mr Letsela, did not disclose to the court the manner and circumstances in which the special meeting was convened and did not disclose the true and correct facts regarding the composition of the board of directors. Furthermore, the applicant relied on a totally different constitution in its replying affidavit. The respondents, in view of the above sought and order directing Mr Letsela to pay the costs of the application, including the costs of the counter application on an attorney and client scale. Bearing in mind that the deponent is an attorney who should have advised and was in a position to do so or adopted a prudent approach to the circumstances and litigation in this matter, the request is not inappropriate.

[25] I grant the following order:

Order

1. The *rule nisi* granted on 7 September 2018 is discharged and the application is dismissed.
2. It is declared that the special meeting which was held on 14 July 2018 at Phuthatditjhaba Multi-Purpose Hall (*“the special general meeting”*) did not constitute a special general meeting convened by or in respect of the affairs of the applicant, alternatively the special meeting is declared *ultra vires* and void.
3. All the decisions taken at the special general meeting which concerned the affairs of the applicant, including the decision to dissolve the board of directors to the applicant and to appoint an interim board of directors on behalf of the applicant, are declared to be *ultra vires*, alternatively unlawful and void *ab initio*.

4. The board of directors, which was in office as at 14 July 2018, consisting of the first to fourth respondents, Sello Patrick Lebeko and Mathulo Jane Mofokeng, is declared not to have been lawfully dissolved and remains in office until the appointment of a new board of directors in accordance with the provisions of the applicant's constitution.
5. The first respondent, alternatively the respondents in their capacities as members of the board of directors of the applicant, are directed to take any or all steps necessary to convene an elective annual general meeting of the applicant as contemplated in article/clause 6 of the applicant's constitution, which should be held within a period of 60 days from the date of the granting of this order.
6. Any or all decisions taken since 14 July 2018 until the date of the granting of this order by the purported interim board of directors, regarding the affairs of the applicant are declared to be null and void, including but not limited to the decision to:
 - 6.1 withdraw any or all disciplinary proceedings instituted against Mr Veli Moloi and Mr Tumelo Ernest Mahlaba; and
 - 6.2 appoint any persons as managers or presenters of Qwaqwa Radio since July 2018.
7. Mr Nako Stanley Letsela, the deponent to the founding and replying affidavits to the applicant's application, is directed to pay the costs of the application and counter application on a scale as between attorney and client.

MHLAMBI, J

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