

IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 637/2016

In the matter between:

MOTHEO MULTIMEDIA

1st Applicant

MOTHEO FM

2nd Applicant

And

KONSTABLE SELEBEDI

1st Respondent

PULE MANGONYANE

2nd Respondent

DINEO DISEKO

3rd Respondent

MOTSATSI MOTHUPI

4th Respondent

FIRST NATIONAL BANK (FNB)

5th Respondent

CORAM: A KRUGER, J

HEARD ON: 03 MARCH 2016

DELIVERED ON: 10 MARCH 2016

[1] This matter served before me as an urgent application. Part A of the notice of motion dealt with the Banking Account of the Applicants and the freezing thereof and the signatories thereto. Part B of the Notice of Motion dealt with the issue as to who the Directors of the first applicant are.

[2] The first applicant is Motheo Multimedia Institute and Motheo FM is the second. In the founding affidavit the first applicant is described as an association incorporated under section 21 of the 1973 Companies Act, not having a share capital. The Articles of Association of the first applicant, which constitute its Constitution, are contained in Annexure KS2 to the founding affidavit.

[3] The second applicant is Motheo FM, an association not for gain incorporated under section 21 of the Companies Act, which does business from the same premises as the first applicant. The first applicant was granted a broadcasting licence by the Independent Communications Authority of South Africa (ICASA) to provide community broadcasting services known as MOTHEO FM, being the second respondent. The licence was effective from 8 December 2008. Control of the licence vests in the first applicant under clause 2.1 of the licence.

[4] According to the form CM26 attached to the founding affidavit dated 2 February 2009 the directions of the first applicant are:

- (i) Lekhotla Simon Sethole
- (ii) Motladile Frank Kitsa.

Sethole is the deponent to the founding affidavit.

[5] According to form COR39 the director of the second applicant are:

- (i) Lekhotla Simon Sethole
- (ii) Bernice Seipati Dichabe
- (iii) Molefi Sullivan Monei.

THE DISPUTES

[6] The dispute about the control of the Banking Account appears to have been resolved in accordance with the court order of 25 February 2016.

[7] The dispute is whether the first four respondents are directors of the first respondent, or whether the persons listed in the CM26, including the deponent to the founding affidavit, are the directors. The four respondents launched a counter-application seeking an order that the persons elected as directors at the meeting of 6 December 2015 (being the four respondents) are the directors of the first respondent. The fifth

respondent did not feature in the application before me.

MEMBERS

[8] The Constitution deals with membership in clause 2. Application for membership is subject to conditions prescribed by the Board. Full and Associate Members must pay annual subscription fees as determined by The Board. The first applicant keeps a register of members at its Head Office as provided in section 105 of the 1973 Companies Act. That list is prima facie proof of who the members of the first applicant are. Any list prepared by anyone else has no status, prima facie.

DIRECTORS

[9] Directors are elected at an Annual General Meeting (AGM). At each AGM at least half of the Directors must retire and make their positions available for re-election.

They are eligible for re-election (clause 15.14 and 15.15).

THE HISTORY

[10] At a meeting of 19 September 2015 it was decided that:

- (i) a Special General meeting be held on 24 October 2015 to discuss amendments to the constitution
- (ii) that the Annual General Meeting be held on 28 November 2015.

The applicants' deponent Sethole points out that the respondents attended the meeting on 19 September 2015, their names did not appear on the membership list. A task team was appointed by the meeting of 19 September 2015 to deal with the aspect of membership. The applicants say the meetings of 25 October 2015 and 28 November 2015 could not proceed due to disruptions caused by the respondents. The respondents deny that they caused disruptions.

THE MEETING OF 28 NOVEMBER 2015

[11] It is not in dispute that the AGM was properly scheduled for 28 November 2015.

It is in dispute what happened at that meeting. In the founding affidavit the applicants' deponent says that the meeting could not proceed on 28 November 2015 due to disruptions caused by the first, second and third respondents, and possibly also the fourth respondent. In the answering affidavit the first respondent denies that

he or the other respondents attempted to disrupt the meeting. In the replying affidavit the deponent of applicants reiterates that the respondents disrupted the meeting and snatched the microphone from him. In the respondents' replying affidavit in the counter-application the first respondent refers to the fact that the Board had a voters' roll of 320 members, whereas the list of the task team had 178 names. The first respondent says that there was a discussion between the two groups on this discrepancy. It is significant that the first respondent refers to the "two groups". There was a degree of animosity. The first respondent says the meeting decided unanimously that the Board be dissolved, while the deponent to the founding affidavit, Mr Sethole was present and "participated to the very end". In the answering affidavit the first respondent says that because of Sethole's accusations the AGM on 28 November 2015 was "reduced to a battle stage" between the two groups of leadership. I presume he means battlefield. The first respondent says the meeting of 28 November 2015 decided to dissolve the Board with immediate effect. An interim committee was elected.

[12] In the replying affidavit Sethole denies that he and Pilliso and Monei, the Board Members, were part of the meeting after the scuffle (this must be the "battle stage") between the Board Members and the respondents. Sethole said the task team usurped the Board's powers and continued with the meeting.

[13] The respondents seek an order in the counter-application that they be declared the proper directors of the first applicant. The applicant disputes that they were validly elected.

THE CHAIR

[14] In his very useful and practical book, The Conduct of and Procedure at Public and Company Meetings 9th Ed (1927) Albert Crew sets out the qualifications of a chairperson:

"The ideal chairman should be a man of infinite tact and patience, possess a judicial mind, be able to command the respect of the meeting, be absolutely impartial in his rulings—never allowing the latter to be questioned—and always ready and resourceful

when difficulties arise. He should be firm, yet courteous, able to govern men, not allow himself to be carried away by party or other feelings, able to endure bores cheerfully and circumvent mere obstructionists skilfully.

A chairman should possess a calm, placid temperament, have a proper sense of the dignity of his position, not be garrulous, and be accustomed to rule without fussiness, hauteur, or bullying. A remarkable feat by a woman was recorded in the Press in 1926. This lady who is not only single but singular has the unique record of being in the chair of a committee for some eight years without having spoken for more than half an hour in the aggregate during the whole of her term of office. She is rightly regarded by the members of this committee as an ideal chairman, and her example might be followed with advantage by other chairmen.

A good chairman should be able to govern a meeting with genial domination and be a benevolent autocrat—not overbearing or brusque in manner, but determined in a quiet way to have the business of the meeting transacted in an orderly and expeditious manner. He should have a wide knowledge of men, and some acquaintance with the subject under discussion. He should remember that men at meetings are often but children of a larger (sometimes not much larger) growth, and should combat their petulance, unreasonableness, and pettiness by common sense, sweet reasonableness, and quiet determination. He must believe in himself, but not allow his masterfulness to obtrude too much. A chairman should have some strength of character; hearing and seeing all things, but conveniently and quietly ignoring at times those matters which might better have been left unsaid or not done. Occasionally he may be subjected to rude or personal remarks; if these are unjust, it is generally well to leave them unnoticed. On the other hand, should there be some cause for such ill-natured criticism, he might change his manner or tactics. Nothing impresses a meeting so much as strict impartiality—especially the minority, the strength of whose opposition is often in inverse ratio to their numbers. Above all, he should not lean over-much to the popular side; a little judicious praise or approbation of the other side will tend to disarm and counteract the suspicious and quell the incipient disorder of the opposition. At all events he should never allow the unpopular side to feel that ‘minorities must suffer.’ In fine, he must get his own way in the conduct of the meeting, and get it—if he can—peacefully and without friction, making it appear that his will and that of the meeting are one and the same.”

[15] Disorder can be caused at a meeting by organised opposition:

“Organised opposition is very difficult to deal with, especially when the conveners of the meeting are unprepared for it. Generally, there is some indication beforehand, when it is folly not to be fully ready for it. People who merely come to disturb a meeting generally prefer the back of the room, so that, should their courage fail them, there is a convenient exit for escape in time of trouble. It is a good plan to put probable disturbers in the front of the room, keeping them apart as much as possible. If they know there is a stronger force in the rear they will often come to the conclusion that discretion is the better part of valour.” (Crew p65)

[16] If the Chair is firm, competent and impartial, trouble can be avoided. The Chair should always be careful to observe the spirit and temper of the audience and act accordingly, “quelling at the instant any signs of incipient disorder” (Crew p. 67).

“At the same time he should allow the audience to have a little of their own way. An audience objects to being domineered over, but does not mind being dominated in a pleasant yet masterful way. When disorder appears to be imminent it is unwise for the chairman to get angry and talk about expulsion and the police; rather, he should endeavour to soothe the audience by a few well-chosen remarks, and appeal for fair play; above all, not appear to be injured or insulted. In a public meeting, when he has ruled on a point of order, he should abide by his decision, even though he may be wrong. The chairman, again, can remove one not uncommon cause of disorder, by seeing that the meeting commences at the duly appointed time.

As to well-conducted opponents, it is a great mistake to browbeat them; courtesy to them costs little, and is worth much.”

PEJUDICE

[17] Mr Steenkamp, who appeared for the first four respondents, stressed, with reference to the Jockey Club of South Africa and Others v Feldman 1942 AD 340 at 359 and Jonker v Ackerman en Andere 1979 (3) SA 575 (O) at 603B-F that courts will not set aside decisions of private tribunals unless prejudice is shown. In my view the prejudice to the applicants in this case is manifest. The applicants had to come to court to regularise the banking account. The first four respondents believed that they were properly elected directors of the first applicant and acted as such. It is

essential that certainty be obtained as to who the true directors of the first applicant are.

CONCLUSION

[18] The meeting of 6 December 2015 was not validly held because the Constitution requires that not less than seven days written notice be given to all members (Clause 10.6). In the answering affidavit it appears that only the 83 persons who attended the meeting of 28 November 2015 were “formally invited”. There is no allegation that they were given seven days’ written notice. All members were not invited and the meeting could take no valid resolution - See LAWSA, s.v. “Meetings” Vol 17 part 2 para 189 page 159. On 3

December 2015 Sethole received a sms from the first respondent that the AGM would proceed on 6 December 2015. The invitation is dated 3 December 2015. That was not proper timeous notice.

[19] It is clear that there was a situation in which the AGM scheduled for 28 November 2015 could not continue. That is why a follow-up meeting was scheduled for 6 December 2015. No valid decisions were taken on 28 November 2015. The respondents were never validly elected as directors.

[20] The counter-application must fail because the respondents have not shown that they were properly elected. The result is that the persons who were directors of the first applicant remain as directors.

COSTS

[21] As to costs, the problems addressed in this application arose due to the manner in which the Board of first applicant managed its affairs. The Annual General Meetings were not held as required by the Constitution and a proper membership register was not kept. The manner in which Sethole conducted the meeting on 28 November 2015 led to the uncertain situation which arose as to who the directors are, and necessitated this application. No order as to costs should be made.

ORDER

1. The election of the first, second, third and fourth respondents as directors of the first applicant at the meeting of 6 December 2015 is set aside.
2. All decisions taken by the first, second, third and fourth respondents in their purported capacity as directors of the first applicant are set aside.
3. The counter-application is dismissed.
4. The fifth respondent, First National Bank, is directed to re-activate the account number [6.....] in the name of the second applicant, Motheo FM.
5. All the current signatories are removed and replaced by the Station Manageress, Manko Tsoehlisi and Finance Manageress, Shiiwe Malukazi.
6. Both the signatories Manko Tsoehlisi and Shiiwe Malukazi shall operate the account subject to prior written approval of the applicants' attorneys of record, Mr Khang.
7. No order as to costs is made.

A KRUGER, J

On behalf of applicants:

Mr M Khang

Instructed by:

Mphafi Khang Inc.

Bloemfontein

On behalf of first to fourth respondents: Adv MDJ Steenkamp

Instructed by:

Azar & Havenga Inc.

Bloemfontein