IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA27/2020

MINISTER OF HIGHER EDUCATION, SCIENCE AND TECHNOLOGY — **Appellant**

and

CONSTRUCTION EDUCATION AND TRAINING AUTHORITY — **First Respondent**

WEBSTER MFEBE N.O — **Second Respondent**

DIRECTOR GENERAL, HIGHER EDUCATION AND TRAINING — **Third Respondent**

NATIONAL SKILLS AUTHORITY — **Fourth Respondent**

Heard: **14 September 2021**

Delivered: **20 October 2021**

Coram: Waglay JP, Davis JA and Coppin JA

JUDGMENT

DAVIS JA

<u>Introduction</u>

[1] In January 2020, the appellant placed the first respondent under administration pursuant to s 15 (4) of the Skills Development Act 97 of 1998 (‘SDA’).

[2] Prior to taking these decisions on 14 December 2019 the appellant addressed correspondence to the chairperson of the first respondent, Mr Raymond Cele indicating his intention to act in terms of s 15 (4) of the SDA. In his letter, the appellant raised some 10 allegations which he considered illustrated a profound lack of governance in the operations of the first respondent, including gross financial management, irregular payment of pension benefits and salary increments and serious lapses of governance in procurement processes. He expressed the view that the first respondent was on the brink of collapse and it was incumbent upon him to restore good governance to the operations of the first respondent. He requested that representations be made to him by no later than 10 January 2020; in particular, as to why he should not act in terms of s 15 (4) of SDA.

[3] A response was generated by the first respondent on 10 January 2020 which the Minister did not consider to be particularly helpful. Under the circumstances, he decided to act in terms of s 15(4) of SDA, and ordered an independent investigation to be conducted into the operations of the first respondent.

[4] On 30 January 2020, a notice placing the first respondent under administration and appointing Mr Sabelo Wasa as administrator as well as a suspension of board members was published in the Government Gazette. This action elicited a response from the first respondent, who, through its attorneys Werkmans Attorneys, sought an undertaking from the appellant that he would not implement a decision to place the first respondent under administration, pending the outcome of an urgent application to review and set aside this decision which was launched on 3 February 2021.

[5] The application was heard as a matter of urgency by Moshoana J, sitting in the court *a quo,* on 20 February 2020. The learned judge determined that there was

one issue to be decided, namely whether the appellant had acted within the scope of the SDA to place the first respondent under administration. The learned judge found that this decision had been taken without the appellant consulting with the first respondent or the National Skills Authority as required in terms of s 15 (1) of SDA. Accordingly, Moshoana J upheld the review application and declared the decision to place the first respondent under administration to be invalid and ineffective in law. He also set aside the appointment of the administrator Mr Wasa, and lifted the suspension of the board members of the first respondent.

[6] With the leave of this Court, the appellant has appealed against this judgment of the court *a quo*. The critical issue on appeal which requires determination, prior to evaluating the legality of the appellant's decision, is whether the appellant was correct to contend that a valid resolution had not been passed on 29 January 2020 to appoint Werkmans as attorneys to act on behalf of the Accounting Authority, being the Board of the first respondent.

<u>The appellant's case with regard to *locus standi*</u>

[7] In a supplementary answering affidavit, Ms Phumudzo Nethengwe, the Board secretary of the first respondent, set out in detail the reasons why a valid resolution had not been passed on 29 January 2020 to appoint Werkmans as attorneys to act on behalf of the Accounting Authority.

[8] She referred to paragraph 2 of the founding affidavit deposed to by the second respondent in support of the notice of motion seeking to interdict the appellant from placing the first respondent under administration. In this affidavit, the second respondent said the following:

> '[He was] duly authorised to depose to [the founding affidavit] on behalf of the applicant on the basis of being the initiator of the resolution passed by the majority of the board through a round robin resolution passed on 29 January 2020 pursuant to the Minister's decision in terms of s 15 (4) of the Skills Act. The members of the board resolved to institute this application and to appoint Werkmans Attorneys to act on its behalf.'

[9] In her supplementary answering affidavit, Ms Nethengwe contested this averment in the following manner: She referred to the appellant's denial that a valid round robin resolution had been passed on 29 January 2020. She then referred to the second respondent's email which had been addressed to the Board proposing a round robin resolution in which the following was said:

> 'The [Accounting Authority] hereby resolves to instruct Werkmans Attorneys to urgently interdict and review Minister Dr Blade Nzimande's decision of placing the CETA under administration and to write a letter to the Minister asking him not to go ahead publishing in the government gazette his decision of invoking s 15(4) by placing CETA under administration.
>
> The AA further resolves to urgently review and set aside the Minister's letter 24 January 2020, instructing the AA not to make any decision with financial implication as this effectively renders the AA redundant.'

[10] It was common cause that, at that time, the Board was comprised of eleven members, including the second respondent. However, according to Ms Nethengwe, the second respondent, as proposer of the resolution, did not cast a vote. She concluded that only five valid votes had been cast in favour of the proposed resolution. Initially, she had thought that seven members had supported the resolution but:

> 'With the benefit of hindsight, I have come to the realization that the two proxies were incorrectly counted as valid votes in support of the resolution, when they ought not to have been counted. I draw the court's attention to clause 15 (4) (e)(ii) which states that "votes by proxy are not allowed". Decisions are taken by 50% plus one of members.'

[11] She also pointed out that on 30 January 2020 four of the members who had cast their vote in favour of the resolution, Sunday Mlangeni, Romeshni Govender, Vangile Manzini and Thembi Ndlovu, had revoked their earlier support for the litigation, a development of which, according to her, the second respondent was aware.

[12] Pursuant to this affidavit, the appellant filed a notice in terms of the Uniform Rule 7 (1) disputing the authority of Werkmans Attorneys to act on behalf of the first respondent and requesting Werkmans to produce proof of its authority in terms of Rule 7(1). At the hearing on 20 February 2020, Moshoana J issued a ruling regarding the dispute as to *locus standi* of the first respondent. He noted that there was 'a notice of motion signed by the attorneys suggesting that they are acting on behalf of a party which is the applicant CETA I have no doubt in my mind that I have the right parties before me and that will be the order of the court.'

[13] The issue of *locus standi* and thus correctness of this ruling becomes critical to the disposition of this dispute. Hence before entering the terrain of the merits of the dispute between the parties, it is necessary to deal fully with the appellant's objection as set out in Uniform Rule 7 (1).

<u>Evaluation</u>

[14] It is clear from the founding affidavit deposed to by the second respondent that he had deposed to this affidavit not in his personal capacity but on behalf of the first respondent. So much is clear from the passage of his affidavit to which I have made earlier reference when I dealt with the supplementary answering affidavit of Ms Nethengwe.

[15] However, the first respondent contended that the approach taken to the voting by Ms Nethengwe was incorrect as is apparent from the contents of a further affidavit to which the second respondent deposed on 11 February 2020 stating thus:

> 'When Part A was argued on 6 February 2020, the respondents took issue with those board members who had authorised me to bring this application. I submit that the majority of the board members, namely eight board members, had in fact authorised the bringing of this application. This excluded myself as the proposer. The point was taken that two votes were case as proxies and this was impermissible in terms of the Constitution of CETA. This then left six members of the remaining eleven board members, and a majority.

> The purported withdrawal of a further four board members after the resolution was adopted is incompetent in law because this was not done in terms of any resolution. Section 65(6) of Companies Act provides that once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it did not satisfy subsection (4).'

[16] There does not appear to be any evidence that the second respondent voted in support of the resolution. It follows that the averment regarding his non-participation in the voting, as set out in the affidavit of Ms Nethengwe, cannot be gainsaid. In the second respondent's own supplementary founding affidavit, he states that the majority of the Board members, namely, eight 'had in fact authorised me to bring this application. This excluded <u>myself</u> as the proposer.'

[17] Absent a vote from the second respondent, it appears that only five members of the board cast votes in favour of the proposed resolution. Unsurprisingly therefore, respondents' counsel submitted that the claim that the inclusion of the two votes by proxy was an error and had to be ignored had no legal foundation. In his view, the two board members, who voted by proxy, were entitled to vote in this way and their votes could not be discounted. If their votes are included then, notwithstanding that no vote was cast by the second respondent, the majority of the Board members (six out of eleven) would have authorised Werkmans Attorneys to act on the first respondent's behalf in launching the review application.

<u>The Constitution of the First Respondent</u>

[18] As the status of proxy votes became central to whether they were a majority in favour of the Resolution of 29 January 2020 much of the debate before the Court concerned clause 15.4 of the Constitution of the first respondent which provides for the procedure to be adopted at meetings. It reads thus:

> 'Meeting Procedure for All Committees

In respect of the Executive Committee or any other committee established by the Accounting Authority listed in Annexure 5, whether in the form of a physical meeting or by using electronic medium, the relevant Chairperson must –

(i) give at least 10 working days' written notice of the proposed meeting to members' and

(ii) include an agenda with such notice.

(e) The voting procedures and decision-making procedures at meetings are as follows:

(i) Each member present has a single vote on any matter serving before a meeting for its decision.

(ii) Votes by proxy are not allowed.

(iii) Any decision at a meeting requires the support of at least 50 per cent plus one of the members present.

(iv) Decisions must be taken by way of a show of hands or, if at least 50 per cent of the members present so require, by way of a closed ballot.

(v) In the event of an equality of votes, the chairperson has a casting vote.'

[19] The appellant's counsel relied on Clause 15.4 (e) (ii) to contend that the voting procedures and decision making procedures of all committees of the first respondent precluded voting by proxy. On this view, clause 15.4 (e) (ii), which related to the exclusion of votes by proxy, was equally applicable to meetings of the Accounting Authority in addition to committees of the Authority. Clause 15.4 refers to meetings of all Committees. The question arises to whether this clause covers meetings of the Accounting Authority.

[20] The only other reference to meetings is to be found in clause 15.3. Clause 15.3 of the Constitution provides thus:

'(3) Special Meetings of Accounting Authority, Executive Committee and Other Committees

(a) The Chairperson may, on grounds of urgency, call a special meeting of the Accounting Authority or Executive Committee on at least 48 hours' notice, whether in the form of a physical meeting or by using any electronic medium.

(b) If the Chairperson receives a request for a meeting, signed by at least 50 per cent of the members of the Accounting Authority or the Executive Committee, the Chairperson must, as soon as is practicable, give notice of a special meeting of the Accounting Authority or the Executive Committee, as the case may be, and that special meeting must be held within 15 working days of receiving such request.

(c) The Chairpersons of any committee of the Accounting Authority may, on grounds of urgency, call a special meeting on at least 48 hours' notice, whether in the form of a physical meeting or by using any electronic medium.'

[21] This clause is silent on the legal status of proxy votes. However, it is headed 'Special meetings of Accounting Authority, Executive Committee and other Committees' and thus needs to be read within the context of Clause 15.

[22] There is no other provision in the Constitution which deals with voting procedures. Thus, read together, clauses 15 (3) and (4) provide no authority for the argument that a proxy vote could lawfully be taken into account in determining whether the majority of the Accounting Authority had passed a valid resolution to appoint Werksmans Attorneys to act on behalf of the first respondent. There is no reason to infer that a different system of voting would apply to Committees as opposed to the Board, particularly since clause 15.3 deals with meetings of both the Board and Committees and is followed by an express provision dealing with voting procedures

[23] As a further alternative submission, the respondents' counsel contended that the second respondent had a substantial and direct interest in the matters of the Board as a member thereof and was cited before the court. The basis upon which the second respondent expressly approached the court was not in his individual

capacity but rather as a party acting on behalf of the first respondent. But there is nothing in the founding affidavit to support this submission. The second respondent expressly stated that he had brought this application on behalf of the first respondent. Nowhere does he claim that he acted in his personal capacity.

<u>Conclusion</u>

[24] The critical question was whether the first respondent had lawfully authorised the legal proceedings to take place by way of a majority vote. I accept readily that once a resolution is passed by a director, it is binding on him or her, save in circumstances where the resolution is rescinded by a later resolution. So much, in my view is clear from s 65 (6) of the Companies Act 2008. Once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the ground that it does not express with sufficient or clarity and specificity or was not accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and seek to influence the outcome of the vote and resolution. It appears to follow from this wording that, where shareholders have changed their mind, subsequent to having voted in favour of the resolution, they would have had to rescind it by way of a fresh resolution. See *Lipschitz v Estate Olivier* 1917 CPD 582.

[25] But, even if the votes of these directors, who did not wish to proceed with the application are included in the calculation, the two proxy votes could not be taken into account. Once it is accepted that the second respondent did not cast a vote, there were insufficient votes to pass the resolution and thus to have authorised the launching of the relevant application. Six votes were required in favour of the resolution and only five were so cast.

[26] A further argument was advanced by the first respondent's counsel, based on *Giants Concert v Rinaldo investments (Pty) Ltd* 2013 (3) BCLR 251(CC) that the interests of justice require a court to be hesitant to dispose of cases on standing alone, where broader concerns of accountability and responsiveness may require

investigation and determination of the merits. See also *Smit v Minister of Justice and Correctional Services and others* 2021 (1) SACR at 582 (CC). Following upon this approach, the respondents counsel sought to invoke the just and equitable remedy as provided for in terms of s 172 (1)(b) of the Constitution of the Republic of South Africa, 1996, namely, when deciding a constitutional matter a court may make any order that is just and equitable.

[27] It is here that the decision of four directors who withdrew their approval subsequent to the resolution and who clearly articulated that the second respondent was on a frolic of his own does become important. In short, on the basis of such skeletal support for this litigation, there would appear to be little justification upon which to exercise a discretionary just and equitable remedy in order to come to the aid of the first respondent, where authority from the Board was clearly lacking to support these review proceedings.

[28] In the circumstances, a resolution appointing Werkmans Attorneys to act on behalf of the first respondent and in furtherance of its interests which purported to be passed on 29 January 2020 was not a valid resolution. There is thus no need to examine any other aspect of this dispute. Without a valid resolution, the appeal must be upheld.

[29] Accordingly, the following order is made:

1. The order of the Labour Court of 25 February 2020 is set aside and replaced with the following order:

   'The application is dismissed.'

2. There is no order as to costs.

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Davis JA

Waglay JP and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT:	T Motau SC and R Tshelto
	Instructed by Norton Rose Fulbright SA Inc.
FOR THE RESPONDENTS:	Mr M Morgan
	Instructed by Werksmans