

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: **1522/2022**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
22 JULY 2024 DATE	

In the matter between:

**SIYAKHULA SONKE EMPOWERMENT
CORPORATION (PTY) LTD**

First Applicant

FREDERICK SAM ARENDSE

Second Applicant

VELILE NHLAPHO

Third Applicant

and

REDPATH MINING (SOUTH AFRICA) (PTY) LTD

First Respondent

REDPATH AFRICA LIMITED

Second Respondent

LAWRENCE MINING (SOUTH AFRICA)(PTY) LTD

Third Respondent

STEPHEN JOHN HODGSON

Fourth Respondent

GEORGE BURTON FLUMERFELT

Fifth Respondent

STEPHEN JAMES LYTHGOE

Sixth Respondent

JUDGMENT

SENYATSI, J*Introduction*

- [1] This is an opposed application to review, alternatively to declare that the decision to review Mr Arendse as a director of Redpath Mining South Africa Pty Ltd (“RMSA”) due to the alleged dereliction of his duty or the alleged negligent conduct by Mr Arendse (“Arendse”) as a director of RMSA is unlawful and invalid and should be set aside. The application is brought in terms of section 71(5) of the Companies Act¹, 2008 read with read with s 6(2) of the Promotion of Administrative Justice Act², and s 1(c) of the Constitution. Alternatively, s 71(5) of the Companies Act read with s 21 of the Superior Courts Act³, and s 1(c) of the Constitution⁴.
- [2] The applicants challenge the lawfulness and validity of the determination made by the first respondent’s (RMSA) board of directors on 20 December 2021 that the second applicant (Arendse) had been negligent or derelict and could not serve on RMSA’s board of directors (the decision) along with such steps as may have been carried out by RMSA’s board to implement the decision. Alternatively, the decision should be declared unlawful and invalid, and set aside.

¹ Act 71 of 2008 (Companies Act)

² Act 3 of 2000 (PAJA)

³ Act 10 of 2013 (SC Act)

⁴ FA 001-12 par 20

- [3] The applicants contend that the decision was not only unlawful and baseless, but also stands to be reviewed in terms of s 71(5) of the Companies Act. Furthermore, the applicants contend that the decision was taken inappropriately, in bad faith and with intent of avoiding accountability for the respondents' unlawful conduct
- [4] The applicants furthermore contend that Arendse's removal took place as part of a broader set of manoeuvres implemented by the third to seventh respondents (the RPA directors). The RPA directors serve on RMSA's board at the behest of the second respondent (RPA), the majority shareholder of RMSA. Arendse's removal was part of a broader strategy adopted by the respondents to avoid the applicants holding the respondents accountable for various unlawful acts, including managing RMSA to benefit RPA to the detriment of RMSA's minority BEE shareholder, being the first applicant (SSC).
- [5] The applicants contend furthermore that in removing Arendse as a director of RMSA, the board deprived him of his most basic rights. It denied him the right to a fair hearing; elementary questions were not clarified; foundational pieces of documentation that were to be used as evidence against him were withheld; the board approached the meeting as little more than a formality, without any genuine intention of affording Arendse an opportunity to put forward his version to persuade the board otherwise.
- [6] The respondents oppose the application and contend that when Arendse was given the notice about his alleged misconduct, the notice recorded that Mr Arendse was alleged to have been negligent or derelict in the performance of his functions as a non-executive director for failing to exercise his powers and functions as a director in good faith and for a proper purpose, as contemplated under section 76(3)(a) of the Companies Act and for

exercising his powers and perform his function as a director in the best interest of RMSA, as contemplated under section 76(3)(b) of the Companies Act and had to refrain from using his position as a director or information obtained in his capacity as a director to gain an advantage for another person other than RMSA or to cause harm to RMSA, and as contemplated in section 76(2)(a)(i) and (ii) of the Companies Act. They contend that as a director of RMSA, Arendse had failed to act in the best interests of RMSA and that this was evidenced by his conduct following the termination of a stipend that was paid by RMSA to him.

- [7] The respondent contend that Arendse was not entitled to more than the three weeks afforded to him to prepare for the meeting in question. They claim that the board was entitled to render Arendse's rights conditional by stating that he had to give various undertakings before he could enjoy these rights. They say that the s 71 notice was specific and Arendse could not ask for clarity or request the evidence that would be used against him. They argue that the board's decision was not biased, and that each director exercised their judgment independently and impartially.

Background

- [8] RMSA and Redpath Africa Limited ("RAL") are a part of a group of companies trading under the name 'Redpath'. RAL is based in Mauritius and acquired its shareholding in RMSA from its holding company, JS Redpath Holdings, a Canadian based company which, in turn, acquired that shareholding from Deilmann Haniel International, a German based company in or about 2007.
- [9] The RMSA's core business is to provide mining and tunnelling services and goods to the South African mining industry. As a primary services company to mining companies in South Africa, RMSA is obliged, amongst

others, to comply with various legislative prescripts including the Broad-Based Black Economic Empowerment Act; the Mineral and Petroleum Resources Development Act; the codes of good practice for the South African Mining and Minerals Industry (the Codes); and the Broad-Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry (the Charter) (BEE legislation)

[10] On 26 October 2006, SSC and RMSA (then named Deilmann-Haniel (SA)) concluded a BEE transaction to give effect to and comply with the requirements of the BEE legislation. The BEE transaction concluded between the parties was set out in a written sale of shares and shareholders agreement (the shareholders agreement). The parties concluded the shareholders agreement voluntarily and with the express purpose of promoting the achievement of the transformation objectives set out in the BEE legislation.¹³ They did so with the clear expectation that SSC would derive financial value from those shares through the payment of dividends. I need to add that the expectation is premised on the expectation that RMSA was going to declare dividends if it operated profitably.

[11] Over the years RMSA was funded through its Canada based shareholder on the basis of interest free shareholders agreement and the loans were not called up. Arendse and Mr Nhlapo, were the nominated directors on the board of RMSA and participated in the non-executive functions as board members. Arendse claims that he was excluded from participating in the day-to-day decision making processes of RMSA. This is to be expected because he was not an executive director thereof. Arendse claims that he was entitled to receive a monthly payment of R 60 000 which had started at an aggregate of above R18 000 per month. Arendse refers to the payment as management fee whilst the respondents called it a stipend. It was later, according to Arendse, called consultancy fee and he contends that this was

in accordance with the financial benefit the first applicant was entitled to receive as a BEE shareholder.

- [12] Upon the cancellation of payment of the fee, Arendse allegedly embarked on a crusade, whilst he was still a director of RMSA, to put pressure on RMSA to reinstate the payment. When the shareholders agreement was concluded during 2007, RAL owned 74% of equity in RMSA and the first applicant, Siyakhula Sonke Empowerment Corporation (“SSC”) owned 26% for the consideration of R630 000 and the price was not payable until the year 2022 in accordance with the shareholders agreement. Arendse is the CEO of SSC and has an interest therein. During 2020, Arendse was asked by RMSA to motivate the increase of payment and he came back with the proposal to increase the amount to a monthly aggregate of R 60 0000. Following the legal advice to RMSA, the payment was terminated during late 2020 as no dividend had been declared.
- [13] On 15 February 2021, SSC, represented by Arendse, sent a letter to RMSA and in the letter, SSC and Arendse rejected RMSA’s decision to cease payment to SSC and allegedly levelled a series of false, defamatory and highly prejudicial allegations of unethical business practices and racism against RMSA and its management. SSC and Arendse threatened to publish the unlawful allegations to the clients of RMSA and to take appropriate legal steps, if required², involving all affected parties, such as the current clients of RMSA, auditors, contractors, supplier and indicated that they would request all the clients of RMSA to set aside all the agreements concluded with RMSA and alleged that the agreements were unlawfully concluded.
- [14] On 16 April 2021, SSC, represented by Arendse and Nhlapo, the third applicant, addressed a letter to Dentons Canada LLP (“Dentons”) (“the

Dentons letter”). Dentons were representing the global bankers of the Redpath group, which RMSA is a member. The Repath group was at the time engaged in the negotiations for the renewal of its global banking facility. In the Dentons letter, Arendse wrongfully objected to the RMSA resolution that had been adopted supporting the conclusion of the global banking facility. Arendse wanted to put the global banking facility at risk and allegedly made false, defamatory and unlawful allegations of unethical business practices and racism by RMSA and RAL.

- [15] During May and June 2021, Arendse approached Northam Platinum Ltd-Zondereinde Division(“Northam”), a client of RMSA with whom RMSA had a income generating agreement. He alleged orally and falsely to Northam, that RMSA was a racist company and that SSC and Arendse had been treated in a racist manner by Redpath group and their puppet directors in South Africa.
- [16] On the 16 August 2021, SSC represented by Arendse, wrote a letter to RMSA’s auditors, Deloitte (“the Deloitte letter”) and allegedly made false, defamatory and unlawful allegation of unethical business practices, fronting, racism and fraud by RMSA and its management. The respondents aver that the intention of the letter was for Deloitte to delay or qualify their audit report of RMSA which would have harmed RMSA and impeded its ability to secure contracts.
- [17] During August 2021, SSC and Arendse addressed a letter to African Rainbow Minerals Ltd(“ARM”), a customer of RMSA, and falsely accused RMSA of oppressive treatment of SSC and that RMSA was guilty of B-BBEE fronting and that RMSA had submitted fraudulent resolutions to tenders.

- [18] In September 2021, SSC represented by Arendse addressed a letter to RMSA B-BBEE verification agency known as Mpower (“the Mpower letter”) and demanded that Mpower should withdraw its B-BBEE certificate that it had issued RMSA. The false basis of the demand was that the certificate had been improperly issued. Arendse made the demand with the full knowledge as a director of RMSA that if the B-BBEE certificate was withdrawn, the business of RMSA would be harmed as RMSA had warranted to its clients that it was B-BBEE compliant.
- [19] In October 2021, Arendse approached Anglo American Platinum (“Anglo American”) another customer of RMSA, uninformed Anglo American that he had launched its complaint with B-BBEE commission. Arendse falsely accused RMSA of racism, fronting and asset stripping. The accusation, so contend the respondents were, is with other approaches, intended to interfere with RMSA’s contractual relationship with Anglo Platinum.
- [20] The respondents contend that each of the lectures and approaches by Arendse to RMSA’s customers and service providers constituted breaches by Arendse of his obligation as a non-executive director of RMSA. They contend that by sending the letters referred to above, Arendse failed:
- (a) to exercise the powers and perform the function of a director in good faith and for a proper purpose, contemplated in section 76(3)(a) of the Companies Act;
 - (b) to exercise the powers, on his function as a director in the best interest of the company, and as contemplated by section 76(3)(b) of the Companies Act;
 - (c) not to use his position as a director or information obtained while acting in his capacity as a director either to gain an advantage for another

person other than the company, or knowingly cause harm to the company, and as contemplated by section 76(2)(a) (i) and (ii) of the Companies Act.

- [21] Despite being called upon to do so by the respondents, Arendse never raised his concerns internally within RMSA board meetings or particularised them in a way that the alleged issues could be properly investigated, but instead, he chose to address third parties to ventilate the claims. The respondents contend that the claims were made with malicious and ulterior objective of inducing RMSA to restore the SSC stipend or as a reprisal for its refusal to do so.
- [22] Following his alleged violation of his fiduciary duty as a director of RMSA, a notice was sent to Arendse in terms of which charges were preferred against him by the board of directors of RMSA. At that time, RMSA which had over many years received shareholder funding from the Redpath group, had ceased to receive funding due to the alleged false allegations made by Arendse.
- [23] The respondents aver after receiving the notice wherein charges were preferred against him, Arendse and his legal sought a postponement of the meeting of the board of directors scheduled for 13 December 2021 on the ground that his chosen counsel to represent him was not available. The respondents further aver that the RMSA board was willing to accommodate Arendse's chosen counsel availability provided Arendse would give undertakings inter alia that he would not continue with his approaches to third parties at least until board meeting had been held. Arendse refused to give such undertaking and consequently RMSA accordingly informed him that the board would proceed with the board meeting would proceed on 13 December 2021.

- [24] Arendse appeared at the board meeting on 13 December 2021 and was represented by two attorneys from Cliffe Dekker Hofmeyr (“CDH”) who had requested by way of a letter and on behalf of Arendse, the postponement of the board meeting. The RMSA board proceeded to vote on the request and refused to grant postponement of the meeting. Arendse chose not to remain at the meeting to answer allegations against him and withdrew his proxy and that of Nhlapo. The board meeting did not quorate and as a result was postponed to 20 December 2021.
- [25] Arendse again requested a postponement of the board meeting, which was again refused as he remained unwilling to give any undertakings to desist from making unlawful approaches to third parties concerning RMSA. On 20 December 2021, the board meeting was reconvened. Arendse and Nhlapo did not attend. The board deliberated Arendse’s procedural concerns and rejected them. A resolution to consider Arendse’s removal as a director was considered by the board. The representations on behalf of the board were made by Mr Hodgson (“Hodgson”), after which he recused himself from the meeting for the board to consider the removal of Arendse as a director. The resolution for Arendse’s removal was voted on unanimously by those directors present and Arendse was removed from the RMSA board of directors.
- [26] The respondents contend that the requests for postponement were without merit and were unwarranted. They aver that Arendse, and his attorneys were intimately familiar with the contents of the notice and claims against Arendse. Arendse and SSC had initiated through CDH, summons against RMSA for alleged oppression, racism and fronting by RMSA- the purported basis for his approaches to third parties. The notice had allegedly even featured in an affidavit deposed to by Arendse a week before 13

December 2012 board meeting. They contend therefore that the application is without merit and that it should be dismissed with costs.

Issues for determination

- [27] Firstly, the respondents contend that there is no legal basis to review the removal of Arendse as a director of RMSA. They aver that the Promotion of Administrative Justice Act⁵, (“PAJA”) nor the principle of legality applies to the application. They contend that this is so because RMSA is a private company, engaged in private activities, not of an administrative nature. They furthermore contend that the review is a narrow statutory review where the court is limited to determine whether RMSA’s board complied with the procedural and jurisdictional requirements of section 71 of the Companies Act.
- [28] Secondly, the respondents furthermore contend that the papers are prolix.
- [29] Thirdly, does the third applicant, Nhlapo, have any entitlement to seek a review of the removal of Arendse?
- [30] Fourthly, were Arendse’s rights to procedural fairness as entrenched in section 71 of the Companies Act compromised? The respondents contend they were not.
- [31] Fifthly, was the notice stated with sufficient particularity for Mr Arendse to prepare to make a presentation at the 13 December meeting?
- [32] Sixthly, did the removal of Mr Arendse breach any of the RMSA board member’s fiduciary duties?

⁵ Act 3 of 2008

- [33] Finally, were the allegations made against Mr Arendse allegations relating to his functions as a director of RMSA?

Legal principles and reasons

Whether there is no legal basis to review the removal of Arendse as a director of RMSA and the contention that the papers are prolix and whether were Arendse's rights to procedural fairness as entrenched in section 71 of the Companies Act compromised?

- [34] Section 71(5) of the Companies Act allows a director that is removed by a company's board under section 71(3) to apply to a court to review the determination of the board within 20 business days.
- [35] This review remedy is not a PAJA review or a legality review. It is a self-standing statutory review.⁶We point this out because the ambit and grounds of a statutory review is determined by the legislation giving rise to the statutory review and not by PAJA. A statutory review can have broader grounds of review (closer to an appeal) or narrower grounds of review limited to, for instance, questions of law or questions of procedure.
- [36] It is possible for conduct by an organ of state when removing a director to constitute either administrative action under PAJA or the principle of legality, in which event both section 71 of the Companies Act, and PAJA or the principle of legality is engaged. This occurred in *Minister of Defence and Military Veterans v Motau and Others*⁷ where the Constitutional Court held that the removal by the Minister of Defence and Military Veterans of two directors of Armscor did not constitute administrative action under

⁶ see the discussion in Hoexter and Penfold Administrative Law in South Africa 3rd at 143-144. Examples of statutory reviews include reviews of the Master's decisions, rulings, or taxations under section 151 of the Insolvency Act, 24 of 1936, reviews of arbitration awards by the CCMA under section 145 of the Labour Relations Act, 66 of 1975, or reviews of arbitration awards under section 33 of the Arbitration Act, 42 of 1965.

⁷ 2014 (5) SA 69 (CC)

PAJA but was subject to the principle of legality. In contrast, in *Steenkamp v Central Energy Fund SOC Ltd*⁸ 2018 (1) SA 311 (WCC). Steenkamp, the Court held that PAJA was engaged when the Central Energy Fund SOC Ltd, a state owned and publicly funded enterprise concerned with national-energy matters, removed directors.

[37] In the instant case, when a board (or shareholders) act to remove directors, there is no conduct by an organ of state acting under a statutory power and the provisions of PAJA and the principle of legality do not apply to section 71 removals of directors.⁹ Without the company in question being state-owned or established by statute, it will almost never be the case that the removal of a director constitutes administrative action for the purposes of PAJA since:

- (i) the board in question is not exercising a public power or performing a public function when removing the director; and
- (ii) the removal of a director is not administrative in nature.¹⁰

[38] Section 71 sets out in clear terms what the requirements are for the board of a company to remove one of its members. Section 71(3) and (4) of the Companies Act provides:

“(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company-

(a) has become-

⁸ 2018 (1) SA 311 (WCC)

⁹ *Miller v Natmed Defence (Pty) Ltd and Others* 2022 (2) SA 554 (GJ) para 37 distinguishing *Motau* on this basis.

¹⁰ And accordingly, PAJA would not apply in terms of elements (a) and (c) of the definition of administrative action as distilled by the Constitutional Court in *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) at para 33.

- (i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69 (8) (a); or
 - (ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or
- (b) has neglected, or been derelict in the performance of, the functions of director, the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.
- (4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given-
 - (a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and
 - (b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.
- (5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66 (4) (a) (i), if applicable, may apply within 20 business days to a court to review the determination of the board.”

[39] The Companies Act merely states that a removed director (or the person that appointed them) may ‘review’ the determination of the board to do so. The Companies Act does not detail on what grounds a litigant may review a decision or what the powers are of the court when determining the review under section 71(5). The statute does not indicate whether the review is to

be a 'wide' review (akin to an appeal) or a narrow review, limited to setting aside irregularities or illegalities¹¹.

- [40] The applicants mostly limit their grounds of review to those cognisable under a narrow review (although, it should be stressed, the evidence advanced by them is closer to that which would be appropriate for appeal proceedings). This is quite proper. It is a long-standing principle of company law that the boards of companies, and not the courts, should take decisions involving the management of the company, and that courts will defer to the business judgment of a board or a majority shareholder. In *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* ¹² in confirming this approach the Court said:

“[64] It is not necessary in this case to attempt to state with precision the parameters for judicial intervention under s 163. However, and as in England, a South African court should in my opinion take the principle of majority rule and the binding nature of the company's constitution as its starting point. In *Sammel & Others v President Brand Gold Mining Co Ltd* Trollip JA said that the 'principle of the supremacy of the majority is essential to the proper functioning of companies' Where matters are left by the constitution to the judgment of the general meeting or the directors, and the shareholders or directors as the case may be have exercised the power within the parameters of any express or implied limitations, a court should be wary of substituting its own business judgment for that of the persons entrusted with that decision by the corporate constitution.”

- [41] The decision whether or not to remove a director from the board of a company is imminently one taken by the company's shareholders or the majority of the board and not one that a court enjoys, either the expertise or local knowledge appropriate to take such a decision.

¹¹ *Nel and Another NNO v the Master (Absa Bank Ltd and Others Intervening)* 2005 (1) SA 276 (SCA) paras 22-23.

¹² 2014 (5) SA 179 (WCC) para 64

- [42] When regard is had to the scheme of the Companies Act, it is evident that the legislature anticipated a review in the narrow sense rather than the broader review. This is because the removed (concerned) director or affected shareholder must bring the review in a very limited period – four weeks. This mandatory expedition is appropriate for a mechanism where the court will be expected only to consider questions of procedure and legality but ill-suited to a wide review where new evidence on the merits of the decision is to be considered by the court. The statute also requires that the removed director or affected shareholder ‘apply’ to review the decision. Since application proceedings are not intended to resolve factual disputes, this again points towards an interpretation of the review in section 71(5) as being a narrow, not broad, review.
- [43] This interpretation is also consistent with the Companies Act’s recognition in sections 172(4)¹³ and 196(5)¹⁴ of the distinction between reviews and appeals, which suggest that if the legislature wished to create a wide-review akin to an appeal then it would have done so with clear language simply by permitting an appeal.
- [44] It is therefore impermissible, in my view, that the applicants can bring the review application in a broader sense. What is permissible is for the applicants to bring the review in terms of section 71(5) which is a narrow review, then they are limited to raising grounds of review that turn only on whether the decision was procedurally compliant with the requirements of sections 71(3)- (5) and legally compliant ,which is to say, within the

¹³ Which reads: “(4) A decision by the Companies Tribunal or the Takeover Special Committee in terms of this section is binding, subject to any right of review by, or appeal to, a court.”

¹⁴ Which reads: ‘A decision by the Companies Tribunal with respect to a decision of, or a notice or order issued by, the Commission is binding on the Commission, subject to any review by, or appeal to, a court.’

jurisdictional ambit of section 71 and not otherwise unlawful which is what the applicants are alleging in their papers.

[45] What the applicants cannot do is convert this review into an appeal.¹⁵ This is because section 71(3) gives the board of a company the power to remove negligent or derelict directors, and to determine whether they have been negligent or derelict in their functions. This is a power to be exercised by the board, not by the court. Indeed, the Companies Act is so attuned to ensuring that specialised bodies determine whether to remove directors that less-than-three member boards, the removal of a director must go to the Companies Tribunal, and the court only becomes involved if a review is then brought once that specialist body has taken a decision.

[46] In *Dumani v Nair and Another*¹⁶ the court held that :-

“[32] In none of the jurisdictions surveyed by the authors have the courts gone so far as to hold that findings of fact made by the decision-maker can be attacked on review on the basis that the reviewing court is free, without more, to substitute its own view as to what the findings should have been — ie an appeal test. In our law, where the power to make findings of fact is conferred on a particular functionary — an ‘administrator’ as defined in PAJA — the material error of fact ground of review does not entitle a reviewing court to reconsider the matter afresh. This appears, in the context of the particular ground of review being considered, from para 48 of *Pepcor*, quoted in para 29 above; and in the context of review generally, from the following passage in the judgment of O’Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*¹⁷:

¹⁵ *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) para 487

¹⁶ (144/2012) [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA) (30 November 2012)

¹⁷ [2004] ZACC 15; 2004 (4) SA 490 (CC) para 45

‘Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.’

The ground must be confined to the situation, as in the English law as set out in *E* para 66, to a fact that is established in the sense that it is uncontentious and objectively verifiable. Examples appear from the cases decided in this court to which I have already referred:

(a) In *Pepcor* the Registrar of the Financial Services Board had granted statutory approvals, to effect the ‘unbundling’ of the appellant fund, relying on actuarial calculations that the high court categorised as ‘arbitrary and indefensible’ and in respect of which no justification was attempted on appeal (paras 4 to 6). The challenge by the appellants that the Registrar’s decision would have been no different had the correct information been furnished, was rejected by the high court and this finding was confirmed on appeal (para 29).

(b) In the *Chairperson’s Association* case the Minister of Arts and Culture took a decision to approve the change of name of the town Louis Trichardt to Makhado. The Minister was influenced (see para 47) by a memorandum from the Director General that contained an assurance from the Names Council that proper consultation about the name change had occurred, when it plainly had not (para 46).

(c) In the *Chairman, State Tender Board* case the State Tender Board resolved to restrict a company, Sneller Digital (Pty) Ltd, and its directors from doing business with all three spheres of government institutions for a period of ten years. It did so because it concluded that the directors had been appointed after a tender had been submitted by the company, and that

the company had accordingly made a fraudulent misrepresentation to it and been guilty of ‘fronting’ so as to claim equity ownership points, to which it was not entitled, in order to obtain a tender (para 12). As a matter of objective fact, the directors had been appointed before the tender was submitted. This court concluded (para 36) that had the State Tender Board taken its decision based on the proper facts it could not have concluded that the company and directors had made fraudulent misrepresentations to it; and that this factual error was material because it was the direct cause of the decision to blacklist the company and directors.

[47] For these reasons, even if there was a misdirection by the presiding officer in regard to the evidence of Claassen, the convictions would not be reviewable on the ground of material error of fact, nor under the guise of the provisions of s 6(2)(e)(iii) of PAJA viz ‘because irrelevant considerations were taken into account or relevant considerations were not considered’. That leaves the following grounds of review relied upon by the appellant, namely that the presiding officer acted arbitrarily (based on s 6(2)(e)(vi) of PAJA) and that the presiding officer’s decision was so unreasonable that no reasonable person could have reached it (based on ss 6(2)(f)(ii)(cc) and (h) of PAJA). (The alleged misdirection to which I have referred would be relevant, if established, to the latter ground in considering whether, on the facts before the presiding officer as disclosed in the record, no reasonable person could have found the appellant guilty.) These grounds are dealt with in the judgment of my colleague Theron JA in whose judgment I concur.”

[48] Arendse contends that he was not given a reasonable opportunity to defend himself against the charges preferred by the RMSA board against him. He contends furthermore that when he approached the third parties as he did, he did so on behalf of the SSC and accordingly, there was no basis for the

respondents to remove him from the board. He contends furthermore that his removal was a stratagem to avoid accountability by RMSA and that in any event, he was not given sufficient time to defend himself in the absence of Arendse who had received sufficient notice about the charges.

[49] The allegations of bias and bad faith made against the RMSA board has rendered it necessary to canvass a lengthy background that did not serve before the RMSA board when it removed Arendse, but which had to be addressed to dispel any suggestions of racism and bias. Nevertheless, since this is a review and not an appeal, most of the evidence is simply irrelevant. It is not for the court to determine whether Arendse was, in fact, negligent or derelict in the discharge of his functions as a director of RMSA. That is a factual matter for determination by RMSA's board. To the extent that the evidence remains relevant (to questions of bias and the like), the ordinary principles under *Plascon-Evans*¹⁸ applies, but which have been disregarded by the applicants. The principle set out in *Plascon-Evans* is that our law allows the court to make determinations on disputes of fact in application proceedings without hearing oral evidence. The rule furthermore states that in motion proceedings, a final order may be granted if the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order. There are exceptions to the rule, such as when the allegations or denials are far-fetched or clearly untenable.

[50] The contentions are without merit. This is so because neither the Promotion of Administrative Justice Act¹⁹, (PAJA) nor the principle of legality applies to these proceedings. This is a private company, engaged in private activities, not of an administrative nature. The review is a narrow statutory

¹⁸ *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984)

¹⁹ Act No 3 of 2008

review, where the court is limited to determining whether RMSA's board complied with the procedural and jurisdictional requirements of section 71 of the Companies Act. The various allegations of the alleged unlawful actions by RMSA are of no application under the narrow review in terms of section 71. The claims contained in notice to Arendse concerned what the RMSA board considered serious enough to put the removal of Arendse on vote. Consequently, it is impermissible for the court to intervene under the circumstances of the case. There was procedurally nothing inappropriate for the board to consider the charges.

Whether the third applicant, Nhlapo, have any entitlement to seek a review of the removal of Arendse.

[51] In the papers before me, it is not apparent as to why Nhlapo joined the proceedings as the third applicant. There is reference in the applicants' supplementary affidavit to the alleged approach adopted by RMSA board, which the applicants contend is an additional ground of review in those relevant considerations such as the papers in case numbers 51107/21 and 57639/21, the views of Nhlapo and the alleged deferred response from Hodgson refused to provide outside of RMSA board meeting were allegedly disregarded and not considered. I have not seen any supporting affidavit in the papers from Nhlapo supporting the application. Accordingly, I hold the view that he does not have standing in the application because he is not the one that was removed from the RMSA board but Arendse. The legislature intended that only the director who is removed from the board is permitted in terms of section 71, to bring the application.

Whether the notice stated with sufficient particularity for Mr Arendse to prepare to make a presentation at the 13 December meeting and whether the allegations were contained in the notice?

[52] The respondents aver that due to the conduct of Arendse during 2021, it became increasingly clear that his ongoing position as a director of RMSA was causing considerable harm to RMSA. It was for those reasons that the RMSA board invoked the provisions of section 71 to remove Arendse as its director. The notice of RMSA board was issued on 22 November 2021.

[53] The notice of the gave the details of the charges by, *inter alia*, referring to the letters authored by SSC and Arendse to various third parties and the resolutions sought to be taken about his removal. I will not quote verbatim the content of the notice of board meeting in order to avoid prolixity of this judgment. On the reading of the notice, it was apparent to Arendse what those charges were and the supporting information related thereto. Accordingly, I am of the view that there was nothing unlawful or procedurally unfair about the process relating to the notice of the board meeting dated 22 November 2021.

Did the removal of Mr Arendse breach any of the RMSA board member's fiduciary duties?

[54] I have already found that in the section 71 removal of a director process, the court is never called upon to assess the decision of the board in privately owned companies, but rather a narrow review of the decision to remove a director based on procedural fairness. Although Arendse contends that it was procedurally unfair to expect him to appear before the board during the festive season in the absence of his counsel of choice who was unavailable, he had access to other counsel in Johannesburg. In any event he was already ably assisted by two directors from CDH and his assertion that he ought to have been given postponement when he was eventually removed *in absentia*, fails to take into account that he continued to position as a director of RMSA was not in the interest of the company given its dire

funding needs. Consequently, the contention by Arendse on this aspect is without merit.

- [55] The removal of Arendse as a director of RMSA was therefore in fulfilment of the other board members of RMSA of their fiduciary duties. In my view, an further in action on their part would have been in breach of their fiduciary duties. This is so given the length of time it took for the board to act since becoming aware of Arendse's conduct. In my view, Arendse clearly used his position as a director to pressurise RMSA to re-introduce the monthly payment to SSC and by extension to himself and Nhlapo.

Conclusion

- [56] Having considered the papers before me which run into thousands of pages, I am of the view that the applicants have failed to make out a case for the reliefs sought in terms of the notice of motion.

Order

- [57] Consequently, the following order is made:-
- (a) The application is dismissed with costs including the costs of two counsel.

ML SENYATSI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be **22 July 2024**.

Appearances:

For the applicants: Adv IV Maleka SC

Adv T Scott

Adv T Pooe

Instructed by Cliffe Dekker Hofmeyer Inc

For the first respondent: Adv S Symon SC

Adv D Watson

Instructed by Kampel Kaufmann Attorneys

For the second respondent: Adv J Blou SC

Adv A Friedman

Instructed by Werksmans Attorneys

Date of Hearing: 06 November 2023

Date of Judgment: 22 July 2024

