

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: 2023/005460

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
<u>7.10.24</u>	
DATE	SIGNATURE

In the matter between:

SIPHESIHLE PATRICK MKHIZE

First applicant

NORA FINANCE (PTY) LTD

Second applicant

NORASPACE (PTY) LTD

Third applicant

**COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Fourth applicant

and

KWANDILE RESOURCES (PTY) LTD

Respondent

This judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 7 October 2024.

JUDGMENT

VAN DER WALT AJ

Introduction

- [1] This is an interlocutory application about whether Kwandile Resources (Pty) Ltd, the respondent, authorised the institution of the main application. The main application issued out of this court on 21 December 2022. Up to that date, no one disputed who the directors of Kwandile were. They were accepted to be Mr Mkhize, the first applicant. Ms Modise, the deponent to the founding affidavit in the main application. And Ms Balfour and Mr Mngadi, the signatories of a round-robin resolution purporting to authorise the institution of the main application. The main application is based on an acknowledgement by Mr Mkhize of a debt owed to Kwandile. It includes a prayer to have Mr Mkhize declared a delinquent director in terms of the Companies Act (the Act).¹
- [2] Mr Mkhize, Nora Finance (Pty) Ltd and Nora Space (Pty) Ltd (the applicants in this interlocutory application) gave notice of their intention to oppose the main application on 9 February 2023. On that day and on 15 February 2023, they caused to be delivered notices in terms of Rule 7 of the Uniform Rules of Court. In the first notice Kwandile was asked to produce a power of attorney to prove the authority of the attorneys acting on its behalf. Kwandile replied, producing a power of attorney signed by Ms Modise. Not satisfied, the applicants put Kwandile on notice in terms of Rule 30A of the Uniform Rules of Court. If Kwandile did not comply with the first Rule 7 notice, an application would be made to have its claim struck out. The second Rule 7 notice was based on arguments that the round-robin resolution was invalid and that, even if it were

¹ Act 71 of 2008.

valid, it did not authorise Ms Modise as intended. As to the invalidity of the notice, the applicants said, firstly, that the directors of Kwandile serve for only three years, and that Ms Balfour and Mr Mngadi ceased to be directors of Kwandile long before they signed the resolution. Secondly, the resolution was not taken at a duly constituted and quorate meeting of Kwandile's board. And, thirdly, the resolution did not carry with more than a 50% majority as required by Kwandile's memorandum of incorporation. As to the ineffectiveness of the resolution, they said what was required for Kwandile to have properly authorised the main application, was a special resolution by Kwandile's shareholders. Kwandile replied, standing by its reply to the first Rule 7 notice and asserting that applicants' reliance on Rule 7 was a delaying tactic. The applicants proceeded to file a second Rule 30A notice.

[3] In this interlocutory application the applicants ask for an order in the following terms:

- "1. The [respondent's] response to the Rule 7 notice dated 9 February 2023 is declared inadequate to satisfy this Court that he [respondent's] attorneys of record have the requisite authority to represent Kwandile Resources in these proceedings.
2. The [respondent] is directed, within five days of service of this order, to comply with Rule 7(1) of the Uniform Rules of Court by delivering to the registrar and the [applicants] its response to the Rule 7 notice dated February 2023.
3. The proceedings in [the main application] be stayed until such time as:
 - 3.1 the [respondent's] attorneys of record have satisfied this Court that they are so authorised to act on behalf of Kwandile Resources; and
 - 3.2 the [the respondent] has complied with paragraph 2 of this order.
4. In the event that the [respondent] fails to comply with paragraph 2 of this order, the [applicants] may return to court on the same papers, duly supplemented, for further relief, including an order striking out the [the respondent's] claim.
5. The [respondent is] to pay the costs of this application on the attorney and client scale."

[4] Kwandile asks that the late filing of its answering affidavit be condoned. For this relief, it relies on, among other things, the delay caused by an urgent application brought by Mr Mkhize under a different case number, steps the

company had to take because of its inability to access its bank account, and the fact that no prejudice was suffered by the applicants because of the late filing of the affidavit. Kwandile also took steps to resolve any problems there might have been with the initial authorisation of the main application and it appointed another firm of attorneys. The validity of those actions is not in dispute before me. The applicants placed no facts before the court in opposition to the application for condonation. An order condoning the late filing of the answering affidavit will follow.

- [5] It seems to me that, because of the open-ended nature of the relief sought by the applicants in prayer 4, the issues between the parties remain very much alive. That certainly is the applicants' view. I intend to deal with their arguments in the context of three main issues. Firstly, who were Kwandile's directors at the time of the institution of the main application? Secondly, was a special resolution by its shareholders required to authorise the institution of the main application? Thirdly, did the round-robin resolution do so? These questions require an interpretation of the memorandum of incorporation.

- [6] Wallis JA, in the seminal judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,² held:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."³

² 2012 4 SA 593 (SCA) par. 18.

³ Ibid.

Shortly after delivering the *Endumeni* judgment, Wallis JA also had occasion to address whether the conduct of the parties to an agreement in implementing the agreement, is relevant to its interpretation. He held that, as the enquiry is not about the intention of the draftsman of the document or what the subjective contemplation of those responsible for it might have been, there is no reason not to consider the conduct of parties in implementing the document. Where these parties have taken the same approach to the agreement's implementation, their conduct provides clear evidence of how reasonable businesspeople situated as they were and knowing what they knew, would construe the document.⁴

- [7] A memorandum of incorporation is, of course, not merely a contract between two parties, intended only to bind them. It "sets out the rights, duties and responsibilities of shareholders, directors and others within and in relation to a company".⁵ It is binding between the company and its shareholders, between shareholders, between the company and its directors, and between the company and any person serving the company as a member of a committee of the board.⁶ The people who fulfil these roles may change over time. A memorandum might also be in existence for a long time; time enough, one might imagine, for directors, shareholders and committee members' conduct to become uniformly inconsistent with the text. All this while third parties may, as of right, rely on the text.⁷ Caution is therefore called for in considering directors, shareholders and committee members' conduct, uniform as it might be, as evidence of how reasonable businesspeople would construe the document. That said, I have before me an application that involves directly only the directors and shareholders of a company, uniformly implementing an amendment to a memorandum of incorporation, relatively shortly after it took

⁴ *Comwezi Security Services (Pty) Ltd v Cape Empowerment Trust* 2012 ZASCA 126 par. 15 and *Capitec Bank Holdings Limited and another v Coral Lagoon Investments 194 (Pty) Ltd and others* 2022 (1) SA 100 (SCA) par. 36.

⁵ Section 1 of the Act.

⁶ Section 15(6) of the Act.

⁷ Section 20(7) of the Act.

effect. In these circumstances, I believe, their conduct is relevant to the document's interpretation.

Kwandile's directors at the time of the institution of the main application

- [8] Kwandile was incorporated in 2018. Its memorandum of incorporation, as it read when the company was incorporated, determined that directors serve for indefinite terms. The minimum number of directors of the company, it provided in accordance with the Act, must be at least one.⁸ Ms Balfour, Ms Modise and Mr Mkhize were appointed to the Board on 20 June 2018. Mr Mngadi was appointed on 14 January 2019. All were appointed in terms of the original memorandum, i.e. with indefinite terms.
- [9] The memorandum was amended on 10 December 2019. The amendment was of such an extent that the resultant document could fairly be described as a new memorandum of incorporation. It provides that directors' terms of office are limited to three years. The applicants rely on this provision for their argument that the directors involved in the round-robin resolution, were in fact no longer directors of Kwandile at the time. According to the argument the new memorandum, upon coming into force, automatically changed the terms of office of Kwandile's directors who were incumbent at the time of the amendment.
- [10] The argument is, however, not supported by the text of the new memorandum. First, the text does not contain a provision that supports the argument. If it were to have such an effect on existent directors, it surely would have said so expressly. Secondly, such a provision would in any event have been at odds with the rest of the text. The text suggests an approach that would not have events, which would require a removal or appointment of directors,

⁸ Section 66(2)(a) of the Act.

automatically have that effect. A further positive step is required by the company's shareholders to bring the composition of the company's board in line with the memorandum. For instance, shareholders are empowered to appoint and remove directors according to their shareholding. Should the equity interest of any shareholder change, changing the shareholders' respective entitlements to appoint directors, then a shareholder whose entitlement is reduced is obliged to procure the removal of directors commensurate with the change in its entitlement. It does not happen automatically upon the change in entitlement. Thirdly, the provision that limits directors' terms of office, is found immediately below the provisions that provide how directors are to be removed and appointed. This suggests that the term limits as contained the new memorandum, are of application only to directors appointed in terms of it.

- [11] The argument is also inconsistent with how the shareholders and directors of the company conducted themselves after the amendment. As it did prior to its amendment, the memorandum, in accordance with the Act, requires Kwandile always to have at least one director. On the applicants' argument, Kwandile would have been left with no directors since 19 June 2022. This is inconsistent with Mr Mkhize's conduct until the notice of motion in the main application issued. Not only did he consider himself to be a director until then, he also conducted himself as if Ms Modise, Ms Balfour and Mr Mngadi were directors. As for the shareholders, none of them attempted to appoint new directors to the company, as they would have been required to do if the amendment had the effect contended for by the applicants. Kwandile's directors and shareholders uniformly conducted themselves as if the terms of office of the incumbent directors were unaffected by the amendment. Their conduct was in accordance with the effect of the amendment and the ultimate meaning of the memorandum.

- [12] On the facts before me, including the records of the Companies and Intellectual Property Commission attached to the papers, I find that at the time of the

institution of the main application, the directors of Kwandile were Ms Balfour, Ms Sibongile, Mr Mkhize and Mr Mngadi.

Was a special resolution by its shareholders required to authorise the institution of the main application?

- [13] The memorandum requires a special resolution by Kwandile's shareholders for the "the commencement, defence or settlement of any litigation, arbitration or other proceedings, which may give rise to a claim or liability in excess of 10% of the value of the company". The applicants argue that the "commencement" of the main application is the commencement of litigation or proceedings which "may give rise" to a claim or liability in excess of 10% of Kwandile's value. The argument, however, fails both in law and in fact. According to the applicants, the value the clause requires one to look to, is the value of the claim instituted, rather than the value of the claim which it "may give rise to". That is simply not what the clause says. The clause aims at the value of the claim which may arise because of the initial commencement of litigation. It is not a clause about the actual claim instituted, but about the risk or exposure it may give rise to.
- [14] As for the argument's failure in fact, firstly, the court has not been shown what the value of the company was at the time of the institution of the main application. Therefore, no case has been made out that could be successful even on the applicant's interpretation of the clause, let alone the correct one. Secondly, no facts are before the court to show that the main application "may give rise" to a claim against or a liability for the company. The main application is based primarily on an acknowledgement of debt in favour of Kwandile. On the papers before me, the facts put up in support of the primary claim, are the same facts intended to support the prayer to have Mr Mkhize declared a delinquent director. It is therefore in any event difficult to imagine how the commencement of the proceedings in the main application, hold any risk of a claim against or liability for Kwandile. I find that the institution of the main

application did not require a special resolution by Kwandile's shareholders to be properly authorised.

Did the round-robin resolution authorise the institution of the main application?

[15] What remains to be considered is whether the round-robin resolution properly authorised Ms Modise to have the main application instituted. According to the memorandum Kwandile's board has the "full power of administration of the business and affairs of the company." That encompasses the power to determinate that the company is to institute or defend legal proceedings.⁹ The board sought to do so by way of a round-robin resolution. In corporate decision-making the term "round-robin resolution" is of wider import than what the moniker might suggest. It refers to a procedure whereby directors make decisions other than at a formal board meeting. The sequence in which directors assent to a decision, and the places and times at which they do so, are irrelevant.¹⁰ That notwithstanding, a decision made in this way is of no less effect than one that is approved by voting at a meeting.¹¹ Section 74(1) of the Act, an alterable provision, requires only that this type of resolution be adopted by "written consent of a majority of the directors" and that each director of the company "should have received notice of the matter to be decided".¹²

[16] The memorandum also provides for round-robin resolutions. Its clause 46 provides that "a resolution in writing received by the Directors and signed by the requisite majority of the directors shall be as valid and effectual as if it had been passed at a meeting of the Board duly convened" and that "unless

⁹ Cf. *Nampak Products Ltd t/a Nampak Flexible Packaging v Sweetcor (Pty) Ltd* 1981 (4) SA 919 (T) 942G.

¹⁰ *Southern Witwatersrand Exploration Co Ltd v Bisichi plc and Others* 1998 (4) SA 767 (W).

¹¹ Section 74(2) of the Act.

¹² Section 74(1) of the Act.

otherwise stated in the resolution, it shall be deemed to have been passed on the date upon which it was signed by the last signatory.”

[17] The applicants, while they mentioned it, did not take issue with the fact that the resolution is undated in their founding papers. Nor could they. Marking the resolution with a date is not a prerequisite to its validity. For present purposes, all that is relevant in this regard is that the resolution was made prior to the institution of the main application. The applicants also do not dispute that all Kwandile’s directors received notice of the resolution. As I have found that Ms Balfour and Mr Mngadi were at all relevant times directors of Kwandile, and that a special resolution by its shareholders was not necessary to authorise the main application, only two of the applicants’ arguments remain to be dealt with. They are the argument that the resolution was not taken at a properly constituted and quorate meeting of Kwandile’s board, and the argument that the resolution did not carry with a 50% majority. The first argument is easily disposed of. The decision was taken through a round-robin resolution, a means of making decisions by the board other than at a meeting. No meeting was required for the resolution to be valid, let alone a quorate one.

[18] As to the argument that the resolution was not carried with a 50% majority, it too failed to convince me. The Act, in unalterable provisions, prohibits directors like Mr Mkhize, of companies such as Kwandile, from being in attendance at meetings while matters in which they have a personal financial interest are to be considered.¹³ They are obviously also prohibited from voting on matters in which they have a personal financial interest.¹⁴ What is more, the Act provides that they are “not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted.”¹⁵ These provisions relate expressly only to “meetings”, which may be a mistake by the legislature. On its face, the Act excludes from these provisions decisions

¹³ Section 75(5)(d) of the Act.

¹⁴ Section 75(5)(d) read with section 75(5)(f) of the Act.

¹⁵ Section 75 of the Act.

taken other than at a meeting, such as decisions taken by way of round-robin resolution. I can see no reason why the underlying rationale for these provisions, that directors cast their votes in the best interests of the company rather than their own personal financial interests, should not apply to all board actions, whether at a formal meeting or otherwise. This is a matter for the legislature to consider.

- [19] The memorandum provides that for a round-robin resolution to pass, it must be signed by “the requisite majority”. “Requisite majority” is not defined in the document, but it is to be interpreted in context. The memorandum’s foundations, it is clear, are in principles of good corporate governance. There is no reason to think that the memorandum allows directors with personal financial interests to circumvent the restrictions imposed on them at formal meetings, by way of round-robin resolutions. The only sensible meaning to be attributed to the definition of “requisite majority” is therefore one that refers to the majority required for decisions taken at formal meetings. The calculation of that majority is one subject to the restrictions on directors who have personal financial interests in matters to be considered by the board. Those directors are to be disregarded for the purpose of determining whether a resolution on the matter has sufficient support to carry. It follows that at the time of the adoption of the round-robin resolution, Kwandile had 4 directors. One, Mr Mkhize, had a personal financial interest in the matter being considered. Three directors were eligible to vote in favour of the resolution. Two did. The round-robin resolution, therefore, carried with more than a simple majority.

- [20] I make the following order:

1. The respondent’s application for condonation is granted.
2. The interlocutory application is dismissed.
3. The costs of both applications are costs in the cause.



Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Heard: 24 April 2024

Judgment: 7 October 2024

Appearances:

For the applicants

Adv Anthonie J van Vuuren

Instructed by Van Zyl Johnson Inc

For the respondent

Adv Paul Carstensen SC

Instructed by Edward Nathan Sonnenbergs