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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 7651/2024

In the matter between:

RENÉ JOSEF PETER

Applicant

and

MIMOSA COURT SHAREBLOCK RF (PTY) LTD

1st Respondent

LANCE FANAROFF

2nd Respondent

ANDREW RUSSEL

3rd Respondent

JANET MALLEY

4th Respondent

CONNY KRAUSS

5th Respondent

Date of hearing: 22 August 2024

Date of Judgment: 5 September 2024

JUDGMENT

PANGARKER AJ

Introduction

1. Mimosa Court is a block of flats in Seapoint. The first respondent, the company, is a shareblock company in respect of which shareholders' shares are allocated to units and other areas in Mimosa Court. The applicant is a Swiss citizen who resides at Unit 3[...] and along with his wife, owns units or residential flats which equates to 6% shareholding in the share block. He is a director in the company.

2. The second to fifth respondents are also directors in the company who are also shareholders. The second respondent is the chairperson of the Board of directors. According to the applicant, the CIPC records still reflect the erstwhile directors as being the company's directors and for all intents and purposes the second to fifth respondents are the *de facto* directors of the company. The directors were appointed to the company's board at an AGM held in August 2022.

The application in terms of section 71(5) Companies Act 71 of 2008

3. The applicant delivered this review application on 16 April 2024 and seeks the following relief:

1. *Dispensing with the provisions of the rules of the above Honourable Court relating to the time and manner of service, and disposing of this matter as one of urgency in accordance with the provisions of rule 6(12) of the rules of this Honourable Court.*

2. *That the decision taken after the board meeting of the First*

Respondent on 11 March 2024 is reviewed, declared invalid and contrary to section 71 of the companies Act 71 of 2008, and the resolution be set aside.

3. *The First Respondent and/or its office bearers are directed forthwith to reinstate the Applicant as a director of the First Respondent.*

4. *The Second and Third Respondent, alternatively, the First Respondent shall pay the costs of this application, jointly and severally, the one paying the other to be absolved.*

5. *The Applicant to be granted such further and/or alternative relief as the Honourable Court may deem fit and appropriate.*

4. The applicant was removed as a director of the company in terms of section 71 (3)(b) of the Companies Act 71 of 2008 (the Act) and launched this review application in terms of section 71(5) of the Act. Section 71 states the following:

71. Removal of directors

(1) *Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, subject to subsection (2).*

(2) *Before the shareholders of a company may consider a resolution contemplated in subsection (1)—*

(a) *the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a*

shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

- (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.*

(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—*

- (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.

(My emphasis)

5. The applicant thus seeks a review of the Board's decision as well as reinstatement as director of the company and further relief. It is evident from the affidavits filed in the application that the Board of Directors held a meeting on the Zoom platform at 16h00 on 11 March 2024 whereby it was resolved to remove the applicant as a director of the company.

Chronology of main events

6. The applicant had received a notice of the meeting of the Board of directors in terms of section 71(2)(a) of the Act accompanied by the Board's resolution in terms of section 71(3)¹. The Notice was accompanied by a statement addressed to the applicant and I summarise the detail of the Notice and statement as follows:

¹ RJP1, RJP2

- 6.1 at the company's AGM in September 2023, it was discussed and agreed that the applicant would procure quotations for renovations intended for the reception area of Mimosa Court;
- 6.2 these quotations were to be presented to the Board members for consideration;
- 6.3 on 9 January 2024, the applicant indeed emailed three quotations from three contractors, namely Mazz Interior and Projects, The Design Empire (LCRK Designs) and Joinery Marble Worx for the Board's consideration, and indicated his preference for the quotation of Joinery Marble Worx on the basis that the latter had done work at Mimosa Court previously and was reliable ²;
- 6.4 it then came to light that Mr Higgins of Joinery Marble Worx had procured a quotation from The Design Empire (as opposed to the applicant procuring it himself) and that Mazz Interior and Projects was a company based in Thailand;
- 6.5 subsequently, on 30 January 2024, the second respondent emailed the Board members including the applicant wherein he requested an explanation as to why the quotations presented and provided by the applicant were obtained by Mr Higgins, and why Joinery Marble Worx was suggested as the preferred contractor³;
- 6.6 following on from various correspondence exchanged between the Board and the applicant, the view was held that the explanation provided by the latter regarding the quotation issue, was

² RJP6

³ AA13, AA14

inadequately explained and/or unsatisfactory;

6.7 the section 71(4)(a) statement subsequently alleged that in view of the implausible explanation provided, it appeared to the Board that the applicant had provided *“contrived comparative quotes in an effort to entice the Board to select your preferred contractor to carry out the renovations to the foyer”*⁴;

6.8 the directors alleged that the applicant was derelict in the performance of his duties in that his conduct was unethical and dishonest, and it was thus proposed that he could not continue as a director of the company and was to be removed.

7. From the numerous emails between the directors, it becomes apparent that the applicant was queried at the end of January as to the reason why the size of the stone top needed for the reception area in Mimosa Court had increased but the price on the quotations had not also increased⁵, to which the applicant replied that the increase in the size of the stone top did not affect the price⁶. The applicant admitted in an email dated 31 January that he had a preferred contractor when it came to quotes⁷. The second respondent subsequently on 2 February gave him an opportunity to rectify the view which he (the second respondent) held that contrived comparative quotes amounted to unethical, dishonest and fraudulent behaviour⁸.

8. On 7 February, the applicant informed the Board members of his denial of the allegations that the quotes were manipulated or influenced, and furthermore, denied that he had committed any unethical or dishonest conduct. It is important to indicate at this stage that the email correspondence indicates that it was the

⁴ RJPI, p51

⁵ AA13

⁶ AA16

⁷ AA16

⁸ AA18, AA19

fifth respondent who discovered via her investigation that one contractor was based in Thailand and she agreed with the second and third respondents that it was unethical to manipulate or set up quotes, and emphasised that the rules of the company's Memorandum of Incorporation were to be complied with⁹.

9. As for the fourth respondent's stance at the time, her email dated 6 February indicates that there was no manipulation of quotes, and that the other Board members were to consider opening a dialogue with the applicant in order to reach an understanding of the circumstances surrounding the applicant's acceptance of quotes procured by Mr Higgins¹⁰

10. The second respondent proceeded to email the Notice of Meeting of the Board of directors, the proposed Directors' resolution and the section 71(4) (a) statement providing reasons for the resolution on 22 February 2024. On 28 February, the applicant indicated per email to the Board members that he was unavailable for the 11 March meeting as he would be abroad, and requested that the meeting be postponed until mid-May to give him an opportunity to consult with his legal team on this very serious matter¹¹, the allegations of which he clearly denied.

11. The second respondent's response was to afford the applicant a few days more but not a postponement of the meeting to May¹². It was made clear in the email of 1 March that the Board had held several meetings via Zoom and that the applicant could consult with his legal representatives in this manner too, and thus, that the meeting date of 11 March was retained.

12. The fourth respondent made clear that she would not participate in the meeting which according to her, was "*designed*" by the second respondent, and

⁹ S2 to second respondent's supplementary affidavit

¹⁰ AA22

¹¹ AA25

¹² AA26

she advocated for a more collaborative and conciliatory approach amongst the Board members. On this score, she deposed to an affidavit wherein she indicates that she does not side with the applicant nor with the second respondent, but in respect of the latter, makes it clear that the third respondent supports the second respondent. She raises certain concerns about the inaccuracies in the opposing affidavit and states that she is being pressurised to resign as elected shareholder and director as she does not support the second respondent's actions against the applicant.

13. The second respondent has deposed to a confirmatory affidavit to the first respondent's affidavit. The fifth respondent, also a director and shareholder, has not deposed to an affidavit in this application.

Submissions regarding the 20 business days' period in section 71(5) of the Act

14. The first to third respondents raise in the opposing affidavit that the application is brought out of time in that section 71(5) requires that an application for review must be brought within 20 business days after the Board has determined that the director was, *inter alia*, negligent or derelict. The second respondent states that the decision was taken by the Board on 11 March and the application was brought on 16 April, outside the 20 business day period, which would have lapsed on 11 April.

15. The second respondent's averment is that despite warnings to the applicant's legal representative regarding compliance with the time limit as aforesaid, the applicant failed to comply and as the Act does not allow a Court to grant condonation for non-compliance with the time period, for that reason alone, the application falls to be dismissed.

16. The applicant's reply to the averment that the application is out of time is

that the application was indeed launched within 20 business days of it coming to his notice that the Board had apparently resolved to remove him as a director. His version is further that he was at sea on 11 March 2024 and only *“became aware of the purported decision several days after the Board meeting”*¹³. The applicant states further that he never received the resolution apparently passed on 11 March 2024. He questions whether a vote was actually taken at the March meeting to remove him as a director and that nobody saw fit to inform him of the Board’s decision.

17. In support of his view and the argument that he never received the resolution timeously, the applicant relies on correspondence that his legal representative requested the resolution and transcript of deliberations in the meeting. This request was directed to the second respondent and the property agent.¹⁴ The further email correspondence relied upon in the replying affidavit indicates that Mr Meltz had already been provided with the actual recording of the entire meeting but that a link sent allowing for a download of the meeting did not contain the deliberations. The applicant thus states that by 19 March a copy of the recording of the meeting was still not available and he thus denies non-compliance with the time period referred to in section 71(5) of the Act.

18. Counsel for the applicant argued that the 20 business days commence to run from the time that the applicant obtains formal knowledge of the Board’s decision and this would only occur once he received the resolution and deliberations or record of the meeting. Until the formal notification occurs, so the argument goes, the 20 day period referred to in section 71(5) is not triggered. The applicant’s counsel motivated this submission on the basis that if the applicant is unaware of the outcome or determination of the meeting, then he would not know whether to take the decision on review or not.

¹³ Replying affidavit, par 4, p345

¹⁴ AA2

19. Accordingly, it was thus submitted that with reference to section 71(5) and the time period referred therein, the Court should adopt a purposive approach to statutory interpretation as a failure to do so would result in an absurdity and prejudice the applicant's rights to utilise the section 71(5) review mechanism.

20. The counter argument presented by the first to third respondents is that section 71(5) does not allow a Court to grant condonation for non-compliance with the 20 business day period. Counsel referred to an unreported decision of ***Langeni and Another v South African Women in Mining Association and Others***¹⁵ and submitted that this is the only authority which he could find on this issue and as it is a decision of a single Judge, it is not binding on this Court. To clarify, the first to third respondents submit that Senyatsi J's view in ***Langeni***¹⁶ that the 20 day period may be condoned by a Court faced with a section 71(5) review application, was not based on any binding authority.

21. The further argument by these respondents is that the applicant wishes the Court to interpret the words "*determine*" and "*determination*" in section 71(5) as meaning formal knowledge of the Board's decision but that this interpretation is incorrect as there is nothing in the Act which states that upon receipt of a resolution of the Board's decision, the time period in the section is then triggered. The argument is that while the applicant does not ask for condonation for the late review application, the Act in any event does not allow for the granting of condonation, and that the applicant has nonetheless admitted knowledge of the decision shortly after the 11 March meeting. The Court is thus requested to dismiss the application on the basis of its lateness.

Discussion

22. Having regard to the differing views on the question of compliance with the

¹⁵ [2023] ZAGPJHC 1309

¹⁶ *Langeni* supra, paragraphs 27 and 28 of the judgment

20 business day time period, the discussion commences with a consideration of the wording of section 71(5), which clearly states that once a Board of a company *determined*, in terms of section 71(3), that the director is ineligible or disqualified or, *inter alia*, negligent or derelict, the director concerned may apply within 20 business days to a Court to review the *determination*¹⁷. It is apparent from the arguments submitted that there is no dispute that the word “*determine*” (and similarly “*determination*”) means to come to a decision¹⁸. The decision would relate, *inter alia*, to the director’s ineligibility, negligence, and/or dereliction of his/her fiduciary duties as referred to in section 71(3)(a).

23. Secondly, the director against whom such decision is made is vested with a discretion to approach a Court to review the determination made by the Board. Insofar as the reference to applying “*within 20 business days to a court to review the determination of the board*”, in terms of section 5(3) read with section 1 of the Act, business days would by definition exclude weekends and public holidays. Thus, if the respondents’ argument is found to be correct, then in terms of section 71(5) read with section 5(3), the 20 business days to apply to Court to review the Board’s decision would have lapsed on 11 April. The application was delivered on 16 April 2024.

24. Thirdly, and quite tellingly, section 71(5) does not speak of condonation for a late review nor can I find any reference to condonation in the wording of the Companies Act. Put differently, the language of the sub-section does not vest a Court hearing a review with a discretion to *mero motu* grant condonation. However, in **Langeni**, on the question as to whether the applicants were entitled to have the matter reviewed outside the 20 business day period, the Court held as follows:

¹⁷ The section also refers to the person who appointed the director as contemplated in section 66(4)(a)

¹⁸ See, for example, <https://www.merriam-webster.com> “determine” – “to fix conclusively or authoritatively; to settle or decide by judicial sentence; to settle or decide by choice of alternatives or possibilities; resolve”

“[27] The respondent contended that the application for review should not be entertained because it was launched after the 20-day period as prescribed by section 71 of the Companies Act. They contend that the application for review of the determination could not have been launched prior to 2 December 2022 which was the actual date of removal and not 15 November 2022 as contended by the applicant. The latter date, so the argument continues, was a date of resolution to commence the steps to remove them and that the removal took place after an urgent court application was launched by the applicants.

[28] The defence as raised by the respondents is of a technical nature and in exercise of the court’s discretion, it will not be in the interest of justice not to entertain the merits of the application simply because the filing of the application was out of time. In any event, the litigation that has been pursued by the applicants had started way before the removal.”

(my emphasis)

25. I gather from the above finding that the decision in **Langeni** to condone the lateness of the review application was based on the interests of justice and that the removal of the applicants as directors occurred after the applicants had brought an urgent application. In my view, the facts in **Langeni** are distinguishable from the facts in this matter, but more so, the judgment does not discuss the wording of the Act, specifically section 71(5), in relation to the commencement of the running of the time period to launch the review application.

26. In view of these findings, I therefore agree with the respondents’ counsel’s submissions regarding the binding nature of **Langeni** on this Court as it is noted that no authority is relied upon in that judgment to sustain a finding that section 71(5) allows for the granting of condonation in circumstances where an

application is brought out of time. In the result, I thus respectfully decline to follow the findings at paragraphs 27 and 28 of **Langeni** regarding the lateness of a section 71(5) review and the granting of condonation for such lateness.

27. Turning then to the submission that a purposive approach to interpretation of a statute must be adopted, I agree with the applicant's submission on this aspect but the argument requires further consideration. In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others**¹⁹, Ncqobo J stated that:

[91] "The technique of paying attention to context in statutory construction is required by the Constitution, in particular, section 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights."

*In Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others,*²⁰ this Court explained the meaning of the interpretive role of section 39(2) in our constitutional democracy as follows:

This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion form the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the

¹⁹ 2004(4) SA 490 (CC) par 91

¹⁸ 2001 (1) SA 545 (CC) par 21 – footnote retained

Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

(my emphasis)

28. Thus, the approach to adopt to statutory interpretation is that regard must be had to the spirit and object of the Bill of Rights. In ***Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security and Others***²¹, a later decision of the Constitutional Court, Mokgoro J stated that a purposive approach must remain faithful to the actual wording of the legislation, and with reference to ***Bato Star***²² and ***Jaga v Donges NO and Another***²³, the learned Judge emphasised that a purposive approach would entail a consideration of the purpose and scope of the particular legislation and its background²⁴.

29. Thus, in embarking upon a purposive approach to interpreting section 71(5), the exercise involves a consideration firstly of the purposes of the 2008 Companies Act, which are to be found in section 7, to wit:

7. Purposes of Act

The purposes of this Act are to—

- (a) *promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;*

²¹ [2009] ZACC para 19-23

²² Supra

²³ 1950 (4) SA 653 (A) 662G-H

²⁴ See *Bertie van Zyl Pty Ltd* supra, at para 20-21 and the authorities referred to therein

- (b) promote the development of the South African economy by—
 - (i) encouraging entrepreneurship and enterprise efficiency;
 - (ii) creating flexibility and simplicity in the formation and maintenance of companies; and
 - (iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;
- (c) promote innovation and investment in the South African markets;
- (d) reaffirm the concept of the company as a means of achieving economic and social benefits;
- (e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;
- (f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;
- (g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
- (h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

- (i) balance the rights and obligations of shareholders and directors within companies;
- (j) encourage the efficient and responsible management of companies;
- (k) *provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and*
- (l) *provide a predictable and effective environment for the efficient regulation of companies.*

30. It is evident from the above highlighted section 7(a) that the enactment of the new Companies Act sought to promote compliance with the Bill of Rights in the field of company law, and in so doing, the legislature sought to include company law in the constitutional framework. Section 7(b)(iii), (i) and (j), which I also highlight above, speak to the promotion of high standards of corporate governance, balancing the rights and obligations of shareholders and directors and encouraging efficient and responsible management of companies.

31. Furthermore, and within the context of what needs to be determined in this matter from a statutory interpretation perspective, it is apparent from the Act's Preamble read with Part F, that the Act seeks to define the relationships between companies and its respective shareholders and directors. To elaborate: Part F of the Act, which includes section 71, deals *inter alia*, with governance of companies²⁵, shareholders and Board meetings, representation of shareholders at meetings, the procedure for the removal of directors from within a company, and the remedy available to a director who has been removed in terms of section 71(3). From the above, it is apparent that the 2008 Act is very detailed, and its

²⁵ Sections 57 to 78 fall under Part F of the Act

scope and purpose as set out in section 7, encompasses a variety of aspects relative to the field of company law and the economy.

32. Following on from the consideration of the purposes and objects of the Act and specifically section 71, I return to the interpretation issue raised in relation to section 71(5). The applicant wishes the Court to interpret the section so as to effectively read in the words that the director concerned *“may apply within 20 business days after receiving the board’s Resolution as provided for in section 71(3), to a court to review the determination of the board”*²⁶ or words along those lines.

33. The applicant thus invites the Court to interpret the section in such a way that the time period starts running once the director who was removed receives the resolution and the record of deliberations of the Board’s meeting, and not from the date of the Board’s decision or determination. The latter interpretation would lead to absurd results, says the applicant. I must emphasise that having found that the section and Act are silent on condonation, it is so that a director who then applies for review outside the 20 business day period, would have no further recourse in terms of the Act to set aside the Board’s decision.

34. In my view, a purposive approach to the interpretation of section 71(5) bears in mind the purpose and aims of the 2008 Act and the inter-relationship between the company and its shareholders and directors, including the need for a high standard of corporate governance. Yet, such approach as advocated in ***Bertie van Zyl (Pty) Ltd***, must remain faithful to the language of the statute, and in this regard the sub-section states that the director *“may apply within 20 business days to a court to review the determination of the board”*²⁷.

35. The language of the sub-section, in my view, makes it quite clear that the

²⁶ My summary of the applicant's request regarding the interpretation issue

²⁷ Section 71(5)

significant moment or event which triggers the commencement of the time period is the determination or decision of the Board of the company as referred to in section 71(3) to remove the director. Section 71(5) does not refer to nor does it mention that the time period starts running from the moment when the particular director receives the resolution and/or the record of the deliberations of the section 71 meeting, whereby he/she was removed from office.

36. My understanding of the respondents' argument is that the section does not speak of knowledge of the Board's determination (which triggers the 20 day period) but as the submissions continued, it seemed that the respondents acknowledged that were the Court to follow the applicant's interpretation that the running of the time period is triggered by the director's knowledge of the Board's determination, then it should be interpreted as actual knowledge and not formal knowledge. In other words, not knowledge obtained via receipt of the resolution taken after the Board's meeting and/or receipt of the record of deliberations at the meeting.

37. In the course of my research to answer the interpretation question, I have found no other authority on this topic aside from *Langeni* and counsel have not provided any further authority on the question of the interpretation of the commencement of the 20 day period in section 71(5). *Henocheberg on the Companies Act 71 of 2008*²⁸ has unfortunately also proved to be of little assistance. However, a discussion and analysis titled "*A Critical analysis of the judicial review procedures under section 71 of the Companies Act 71 of 2008*" by Professor Rehana Cassim, Senior Lecturer in the Department of Mercantile Law at UNISA²⁹, has proved to be helpful in that it has assisted to clarify my view.

38. In the abovementioned academic work, Professor Cassim analyses

²⁸ Service issue 20, September 2019

²⁹ 2018 SA Merc LJ 302 at p312-313

section 71 in detail and in respect of the 20 business day requirement in section 71(5), she states the following:

“The period of 20 business days places a cap on the time allowed a director to contend that he has been improperly removed from office by the board of directors.”³⁰

“Section 71(5) does not, however, specify when the period of 20 business days commences. Presumably, the period of 20 business days would commence from the date that the board of directors takes the decision to remove the director from office. It is submitted that section 71(5) should specify when the period of 20 business days commences.”³¹

(my emphasis)

39. In light of the Professor’s reading of the sub-section I can safely say that I believe that she also understands that the time period commences from the date on which the Board makes the decision to remove the director from office. My view is that any uncertainty is remedied by having regard to section 5(3) read with section 1 of the Act, which would require that the *dies* is to be calculated from the day after the Board’s determination was made. In a scenario where the director contends that he had no knowledge of the determination by the Board to remove him, for whatever reason, then in my view, it could be argued that he had no knowledge that he could approach a Court for review, and hence, was not aware or did not appreciate that he had 20 business days to do so.

40. How is this peculiar or exceptional scenario resolved within the context of section 71(5) and when does the time period start running? I must emphasise that the purposive approach to statutory interpretation would require that where a

³⁰ At p312

³¹ At 313

director was simply unaware of the determination made to remove him, his section 34 constitutional right of access to a Court, should not be infringed nor curtailed³². I am of the view that in an exceptional scenario such as this, the argument in favour of actual knowledge of the Board's determination should prevail, because to do otherwise would or could lead to an absurdity and an infringement of the director's constitutional right of access to Court and remedy under the Act.

41. In respect of the director who has no knowledge of the determination, as in the above scenario, such knowledge of the decision should and must, in my view, be limited to actual knowledge and not receipt of the resolution and/or receipt of the transcript of the section 71 meeting. By this I mean that the 20 day period is then triggered from the date on which the director obtained actual knowledge, in whichever manner including informally, of the Board's determination³³. This peculiar or exceptional situation would depend on the facts of the case. The "*actual knowledge interpretation*", in my view, would only apply where the facts indicate that the director in question did not know or was not aware of the Board's determination.

42. In the normal course, to interpret section 71(5) in the manner which the applicant advances, in other words, that the time period starts to run only once the director receives the resolution and/or the transcription of the Board's deliberations at the meeting, would lead to an absurdity and potential abuse of the section 71(5) procedure. It would also do nothing to encourage the efficient and responsible management of companies. In my view, this interpretation was never what the legislature intended in section 71(5) and it would not be faithful to the wording of the sub-section. **Put simply, section 71(5) must be understood to mean that the 20 business day time period is triggered by the Board's**

³² An example would be where the director is incapacitated due to being hospitalised (for example, in a coma) at the time of the Board meeting and not aware of the decision taken to remove him, and only becomes aware at some later date

³³ The calculation of the dies is in terms of section 5(3) read with section 1 of the Act

determination and commences to run from the consecutive business day/date after the day on which the Board's determination is made, having regard to section 5(3) read with section 1.

43. In addition, the Act does not define "*resolution*" but it is safe to say that a resolution of a company is proof or evidence of the determination or decision of the Board of the company. There is a further problem with the argument of the applicant as to the commencement of the time period: having regard to ***Pityana v Absa Group Limited and Others***³⁴, I share the view that there seems to be no reason to seek the record of the deliberations in order to launch a review as the reasons for the removal were or would have been known to the director prior to the meeting in terms of the section 71(4) procedure.

44. Furthermore, nothing in my mind would prevent a director such as the applicant from launching a section 71 review in the absence of a record or transcription of the deliberations of 11 March, as he would already have known the reasons for the removal from the section 71(4) statement and could always supplement his review application on receipt of the record in terms of rule 6.³⁵ I thus hold the view that the receipt of the record of the deliberations of the 11 March meeting, was not first needed before the 20 day period was triggered.

45. At the risk of repetition, the applicant's stance is that he did not have knowledge of the determination and that there was a requirement that he be formally informed of the decision before the time period runs. Applying the purposive approach to interpretation in relation to the facts of this matter, the applicant states in his replying affidavit that he only became aware of the decision "*several days after the Board meeting*"³⁶ and later at paragraph 208 of the same affidavit, he states that he became aware informally "*more or less two*

³⁴ [2023] JOL 61223 (GP) para 61-87

³⁵ It goes without saying that the applicant is entitled to utilise rule 53 to seek the record of the meeting for purposes of the section 71(5) review

³⁶ Par 4, p345

*days after the Board meeting*³⁷. Thus, while the earlier paragraph is unclear, the later paragraph indicates his version is that he obtained informal knowledge of the Board's decision two days after such decision.

46. However, the letter written by Mr Meltz dated 12 March 2024, indicating that in terms of section 71(5), the applicant is obliged to take the Board's decision on review within 20 business days, confirms my view that Mr Meltz was aware if not on the day of the meeting, then certainly the next day (12 March), of the Board's determination. It is also common cause that the applicant was represented by his attorney and counsel at the meeting but that they left the meeting prior to the Board's deliberations³⁸. For all intents and purposes then, it must be the most probable explanation that his legal representative informed him of the Board's determination.

Conclusion

47. The applicant is afforded the benefit of the doubt and in view of the above findings, I thus conclude that in all probability he obtained knowledge of the Board's determination on 12 March 2024, which was the day after the meeting. In the ordinary determination of section 71(5), as referred to earlier in the judgment, the 20 business day period is triggered on the Board's determination (11 March 2024) and the calculation of the period thus commenced on 12 March 2024. Thus, having regard to section 5(3), the last day to have delivered the review application was 11 April 2024.

48. In light of this finding, it is clear that the application was delivered late and thus outside the prescribed 20 business day period, and as the section and the Act do not afford the Court a discretion to condone the non-compliance, the argument by counsel for the first to third respondents that the application falls to

³⁷ P422

³⁸ Record, p55 (p274)

be dismissed is thus sustained. Accordingly, I make no findings on the lateness of the fourth respondent's affidavit nor on the merits or demerits of the review application. Insofar as costs are concerned, there is no reason why the costs should not follow the result in the ordinary course.

Order

49. In the result, the following order is granted:

The application is dismissed with costs on scale B.

M PANGARKER
ACTING JUDGE OF THE HIGH COURT

For applicant: Adv A Maher
Instructed by: Meltz & Associates
Mr J Meltz

For first to third respondents: Adv D van Reenen

Instructed by: Nirenstein Attorneys Inc.
G Nirenstein

For fourth respondents: No appearance (affidavit filed)

For fifth respondent: No appearance