



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case no: 6481/2023

In the matter between

NELISA MABENGE

APPLICANT

and

MEALS ON WHEELS COMMUNITY SERVICES

SOUTH AFRICA (MOWCS – SA)

1ST RESPONDENT

DR. DINGINDAWO PAUL SHONGWE

2ND RESPONDENT

MANDLA LUPHONDWANA

3RD RESPONDENT

TONY NEERINGS

4TH RESPONDENT

SIBONGILE GOBILE

5TH RESPONDENT

JUMARA NETSHIFULANI

6TH RESPONDENT

IAN GROBLER

7TH RESPONDENT

NTANDOYENKOSI GAQA

8TH RESPONDENT

EFFORT BHEBHE

9TH RESPONDENT

GERSHON NAIDOO

10TH RESPONDENT

MPHO RANTSOABE

11TH RESPONDENT

BOICHWARELO MASHISHI

12TH RESPONDENT

JEREMY VLOTMAN

13TH RESPONDENT

ANEL BOSMAN

14TH RESPONDENT

LUNGILE SIWISA

15TH RESPONDENT

ZELDA MOODLEY

16TH RESPONDENT

DIRECTOR FOR NON-PROFIT ORGANIZATIONS

17TH RESPONDENT

Heard: 25 July 2024

Delivered: 13 November 2024

Summary: Suspension of Applicant by board of directors of 1st Respondent whose term of office had already and allegedly lapsed - issue no longer relevant in view of agreement that Applicant would appear in disciplinary hearing under auspice of the CCMA

ORDER

1. In respect of prayers 2, 3 and 4 of the notice of motion, no order is made, and each party to pay their own costs
2. In respect of the remainder of the prayers in the notice of motion, it is confirmed that they have been abandoned by the Applicant, and each party is to pay their own costs

JUDGMENT

LOUBSER PJ

[1] The Applicant in this application approached the Court on a semi-urgent basis for the following relief:

1. That the matter be heard on a semi-urgent basis given the ongoing non-compliance of the 1st to 16th Respondents with the constitution of the 1st Respondent and its implications on ongoing governance for the organization.
2. Declaring that the term of the 5th to 16th Respondents has, in accordance with clause 6.1.3 of the 1st Respondent's constitution, lapsed and terminated as of the 28 February 2023.
3. Declaring further that, in consequence of prayer 2 above, the Meals on Wheels Community Services – SA (MOWCS) board is and has not been validly and properly constituted since 1 March 2023 and therefore, has since 1 March 2023 lacked the required quorum to transact business as contemplated in clause 6.1
4. Declaring the decision taken by the improperly constituted MOWCS board from the 1st March 2023 to be *ultra vires*, invalid and of no force and effect and set aside.

5. Directing the 2nd Respondent (in his capacity as chairperson of the 1st Respondent) to convene the Annual General Meeting (AGM) of the 1st Respondent as contemplated in clause 11 of the MOWCS constitution within 60 days of the date of this Order, to *inter alia*, constitute a new board in accordance with the MOWCS constitution.

6. Directing the 2nd Respondent and/or newly constituted board pursuant to the AGM contemplated in prayer 5 above to:

6.1 Institute and finalize processes for the compilation and presentation of audited financial statements for all the years where no audit was conducted, namely 2020/2021; 2021/2022.

6.2 Institute a forensic investigation into alleged and general financial management within MOWCS, audit of all MOWCS bank accounts, contracts, governance and procurement processes within MOWCS as well as specific allegations of impropriety and/or corruption levelled against the 9th and 10th Respondents and/or the organization at large.

6.3 Do all things necessary to compile and present the NPO reports for submission to the Department of Social Development (DSD) as prescribed in terms of the Social Development Act of 1997 and clause 10.4 of the constitution.

6.4 Collate and give account of all bank statements, financial activities including income and expenditure on all bank accounts created and operated under MOWCS and same to be furnished to independent forensic investigators.

6.5 Regularize signatories onto MOWCS bank accounts by enlisting appropriately authorized signatories and removing those not properly authorized.

7. The 2nd Respondent is directed to report in the form of an appropriate affidavit, to this Court concerning all the steps taken to comply with paragraph 5 to 6 above by no later than 60 calendar days from the date of this order.

8. The Court will issue further directions in relation to supervision of the execution of paragraphs 5 and 6 of this order as circumstances may require.

9. Thereafter, the matter is to be re-enrolled on a date to be fixed by the Registrar in consultation with the presiding Judge for consideration and determination of the aforesaid report, and reply, to enable the Court to make a just and equitable order.

10. Declaring the 5th Respondent a delinquent director in accordance with section

162(5)(f) of the Companies Act of 2008, as amended.

11. An appropriate cost order against the 2nd to 16th Respondents in their personal capacities in accordance with clause 7.6 of the MOWCS constitution.

[2] Soon after the filing of this semi-urgent application, the parties agreed to remove the matter from the urgent roll and to have the matter heard in due course. The matter eventually came before this Court for adjudication. A reading of the founding affidavit of the Applicant revealed the wide scope of the application. The founding affidavit and its annexures alone comprised of some 253 pages.

[3] In the founding affidavit dated 23 November 2023, the Applicant introduces herself as the national director and chief executive officer of the 1st Respondent non-profit registered organization. The 2nd Respondent is the chairperson of the 1st Respondent board of directors, and the 3rd to 16th Respondents are all directors of the board. The constitution of the 1st Respondent indicates that MOWCS-SA is a recognized, welfare service owned and operated by the Seventh-Day Adventist Church, Southern African Union Conference. The main objectives of the 1st Respondent is to provide poverty alleviation by means of cooked meals, food gardens, feeding of children, meals on wheels and the provision of meals at service centers and various service points.

[4] It is further alleged in the founding affidavit that the board of directors have neglected to ensure that an AGM is convened, to ensure that MOWCS operates on a budget approved by the AGM, to ensure that there are audited financial statements for the past two financial years, to ensure a forensic investigation regarding the financial affairs of the organization and the serious allegations levelled against the 9th and 10th Respondents, and to ensure that the directors whose term of office has expired, are duly replaced through a proper process of an AGM as contemplated by the constitution. The applicant also wants the Court to declare the 5th Respondent a delinquent director in view of the fact that he was a director of another entity which was found guilty of fraud and sentenced to pay a fine by a court of law.

[5] As far as the term of office of the board is concerned, the Applicant points out that the 5th to 16th Respondents were elected to serve as non-executive members of the board by the AGM on 1 March 2022. In terms of the constitution, their term of office expired one year later, namely on 28 February 2023, unless they became re-elected as board members. They were not re-elected, because an AGM has not been held since, and they simply

continued as board members. As a result, the board lost its quorum after 28 February 2023. In terms of the constitution, the quorum needed for the board to conduct its business, is 51 percent of the board members.

[6] On 22 April 2023 the board met and placed the Applicant on suspension. Because there was no quorum present in the circumstances, the decisions taken at the board meeting were *ultra vires* and invalid, the Applicant contends. It is clear that the Applicant is mainly challenging her suspension by the board on that day, which suspension she says was invalid and of no force and effect. She alleges that she was suspended because she had dared to raise the issue of the 5th Respondent being a delinquent director with the board. There were also additional, but bogus reasons for the decision to suspend her, she says.

[7] The Applicant further claims that she was the chairperson of the action committee of the 1st Respondent, which committee is acting in-between board meetings. The 2nd, 3rd, 4th, 9th and 10th Respondents served on this committee. According to the Applicant, she was sidelined and outvoted in this committee on several governance concerns she sought to bring to the attention of the committee. For instance, she wanted a review of contracts to be done, and she also raised the failure of the chief financial officer to facilitate her enlistment as a bank signatory to various MOWCS accounts, without any success.

[8] The Applicant alleges that the last audited financial statements were for the 2019 financial year, as the directors failed to take any action in this respect. She says the directors do therefore not know the extent of donations received and how the donations were used. She was denied access to bank statements, and they failed to institute investigations into serious allegations of financial irregularities, corruption and fraud. The Applicant contends that the board members have displayed an utmost failure of their duty of care as directors.

[9] The answering affidavit dated 22 December 2023 was deposed to by the 10th Respondent on authority of the board. He stated in the affidavit that there were allegations on 22nd November 2022 that the Applicant had falsified her CV by claiming that she was previously employed at the office of the Presidency and at Vodacom. As a result the board resolved on 14 December 2022 to engage Mazars Forensic Investigators to investigate this issue. On the basis of the report presented by Mazars after their investigations, the board suspended the Applicant as a member of the board on 22 April 2023.

[10] The Applicant then took the decision to suspend her, to the CCMA on 11, 12 and 13 October 2023. There the parties came to an agreement that a disciplinary hearing of the

Applicant would be held under the auspices of the CCMA in due course. This arbitration was set down for 23 to 26 January 2024 for hearing. On 7 December 2023 the Applicant launched the present application, the 10th Respondent states in the affidavit.

[11] The 10th Respondent further denies that the term of office of the directors mentioned had expired on 28 February 2023. They have remained in office because of circumstances beyond their control. He said that an AGM could not be convened because they were still waiting for the audited financial statements, without which they could not proceed. Meanwhile, the board remained properly constituted. As far as the 5th Respondent is concerned, the deponent points out that the 5th Respondent was never personally charged or convicted, but only in his representative capacity.

[12] The 10th Respondent went on to deny that there were any governance issues or a dereliction of duties by the board members. In addition, the Applicant was indeed a signatory to the 1st Respondent's accounts, and she had access to the payroll information. In the Mazars report it is suspected that the Applicant had misrepresented her employment history and professional affiliations. A confirmatory letter from the office of the Presidency indicates that she had not worked there, as listed on her C.V. The 10th Respondent further points out that the Applicant had refused to undergo any induction when she joined the 1st Respondent, and as a result, she had no understanding as to how the organization operates.

[13] In her replying affidavit dated 15 January 2024, the Applicant calls the report of Mazars biased, incomplete and reviewable. She claims that she was only granted signatory powers after her suspension. She further denies that the AGM cannot be held in the absence of audited financial statements. She, however, stood by her stance that the board was not properly constituted after 28 February 2023. She also informed that she would attend the pre-dismissal arbitration in the CCMA from 23 to 26 January 2024.

[14] At the commencement of the hearing of the application, counsel for the Applicant made a surprise move by announcing that prayers 5, 6, 7, 8, 9 and 10 of the notice of motion are abandoned, and that the application would only proceed in respect of prayers 2, 3 and 4. Counsel for the 5th Respondent immediately moved for an order that prayer 10 dealing with declaring the 5th Respondent a delinquent director, is abandoned and that each party should be ordered to pay his own costs. The Court made such an order as a consequence, which order will be repeated at the end of this judgment for the sake of clarity.

[15] These developments meant that only the question of the composition of the board

of directors after 28 February 2023, and the validity of decisions made by the board after this date, remained to be adjudicated.

[16] On the date of hearing of this application, there was nothing on the papers before the Court indicating how far the disciplinary hearing had progressed. In order to update the Court on recent developments, a supplementary affidavit was filed by the 1st Respondent, dated 10 April 2024. In the supplementary affidavit, the 1st Respondent indicates that an AGM was held on 17 February 2024, at which meeting a new board of directors was elected for the 1st Respondent. In response hereto, the Applicant filed an answering affidavit in which she denies that the AGM was lawfully convened in terms of the 1st Respondent's constitution. In a subsequent replying affidavit, the 1st Respondent denied this allegation on 27 May 2024, and mentioned in passing that the disciplinary action in the CCMA was still ongoing. Meanwhile, the new board has not been joined in the present proceedings, and the 1st Respondent has submitted at the hearing of the application that this represents a misjoinder in the proceedings.

[17] Be it as it may, the Applicant subsequently took a decision to abandon most of the prayers in the notice of motion, and to proceed only with prayers 2, 3 and 4. She is, in other words, still persisting with her case that the old board was not properly constituted when they made decisions after 28 February 2023. At the same time, it is clear to this Court that the Applicant is actually only aggrieved by the decision to suspend her, because that is the decision that she has taken to the CCMA.

[18] The problem is that the agreement of the parties that this issue would rather be resolved at a disciplinary hearing at the CCMA, had brought about a total change in the dynamics of the point in question. The focus has now shifted away from the suspension itself to a proper disciplinary hearing, where a decision will be made in due course whether the Applicant's relationship with the 1st Respondent is terminated or not. The question whether the decision to suspend was lawful, has now become entirely moot. This is so because a suspension is usually only a precautionary measure to accommodate further investigations, which could result in the ultimate step of a disciplinary hearing.

[19] In the circumstances, this Court cannot make any order in terms of prayer 2, 3 and 4 as prayed for, because those prayers have become irrelevant and of no consequence. Court Rule 6(6) empowers this court to make no order in application proceedings, save for any orders as to costs.

[20] As for costs, the present situation has been caused by an agreement between the parties to rather proceed to a disciplinary hearing of the Applicant. In my view, it would therefore be improper to order any of the parties to pay the costs of the other. Each party should pay their own costs. As far as the remainder of the prayers are concerned, which have been abandoned by the Applicant, it is clear to this court that this application has been overtaken by the recent events alluded to above. I am of the view that the Applicant should not be burdened by a costs order in such circumstances. Again, each party should pay their own costs as far as the remainder of the prayers are concerned.

[21] The following orders are made:

1. In respect of prayers 2, 3 and 4 of the notice of motion, no order is made, and each party to pay their own costs.
2. In respect of the remainder of the prayers in the notice of motion, it is confirmed that they have been abandoned by the Applicant, and each party is to pay their own costs.



PJ LOUBSER, J

Appearances

For the Applicant:

Adv. BM Mkhize

Instructed by:

Matee Attorneys, Bloemfontein

For the 1st Respondent:

Adv. L. Moreland

Instructed by:

Joubert Attorneys, Wellenvreden Park
c/o Hendrè Conradie Inc., Bloemfontein

For the 5th Respondent:

Adv. VM Mndebele

Instructed by:

KMNS Attorneys, Sandton
c/o Blair Attorneys, Bloemfontein