



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)**

**NOT REPORTABLE
Case No126/2022**

In the matter between:

OMPHILE RAMELA

APPLICANT

AND

SIMPHIWE FERRINGTON NDZUNZU

1ST RESPONDENT

BORDER CRICKET NPC (2000/012072/08)

2ND RESPONDENT

BOARD OF DIRECTORS OF BORDER CRICKET NPC

3RD RESPONDENT

MEMBERS' COUNCIL FOR BORDER CRICKET NPC

4TH RESPONDENT

CRICKET SOUTH AFRICA

5TH RESPONDENT

JUDGEMENT

PIENAAR AJ

THE PARTIES

1. This is a cricketing dispute. The applicant essentially and through an application seeks that the 1st respondent's occupation of office as a director of the 2nd respondent be declared unlawful.
2. The applicant is Mr. Ramela and according to him, he is the current chief executive officer (CEO) of Border Cricket NPC, the 2nd respondent. It is disputed that the applicant is the current CEO.
3. The applicant has an impressive resumé. He is a former professional cricketer for some of the best cricketing teams in the world and has simultaneously obtained four degrees, the highest being a Master of Economics.
4. In what follows 1st to 4th respondents shall collectively be referred to as "the respondents".
5. The 1st respondent is Mr. Ndzundu, the director and chairperson of the 2nd respondent.
6. The 2nd respondent is Border Cricket NPC (non-profit company), a community-based sports organization serving the needs of the Border cricket community.
7. The 3rd respondent is the board of directors for Border Cricket NPC (the 2nd respondent). The board exists to ensure that the 2nd respondent's corporate governance policies incorporate corporate strategy, risk management, accountability, transparency, and ethical business practices.
8. The 4th respondent is the members' council for Border Cricket NPC (the 2nd respondent).
9. The 5th respondent is Cricket South Africa, a non-profit company with its primary objectives to promote and grow the game of cricket in South Africa.

RELIEF SOUGHT

10. On 5 September 2024 the applicant brought a semi-urgent application before Stretch J. The application was divided into part A and part B. Part A served before Stretch J.

11. Stretch J granted the relief sought in part A including the following provisions:

11.1 The applicant is granted the interlocutory relief sought in prayers 1, 2, 3, 4, and 5 of part A of the notice of motion, pending the finalisation of the relief sought in part B thereof.

11.2 The costs of the application are reserved for the court dealing with the relief set forth in part B of the application.

12. Prayers 1-5 of part A of the notice of motion read as follows:

1. Dispensing with normal forms and service provided for in the normal rules of this Honourable Court and disposing of this matter by way of urgency in terms of rule 6 (12).

2. Interdicting and restraining the 1st respondent from participating as a director in the affairs of the 2nd respondent pending finalisation of the order sought in part B of this notice of motion.

3. Interdicting any deployment of the 1st respondent to attend any meeting acting in his status as such and as a director of the 2nd, 3rd, and 4th respondents.

4. Interdicting and restraining the 1st respondent from attending all meetings in his capacity as a director and taking decisions on behalf of the 2nd respondent pending the finalisation of the order sought in part B of the notice of motion.

5. Interdicting and restraining the 1st respondent from forming part of any decision-making in the affairs of the 2nd respondent either as a director or in his personal capacity pending finalisation of the order sought in part B of the notice of motion.
13. Provision was made in the order for the further conduct of the matter.
14. At the time the respondents brought an application for condonation for their failure to deliver their notice of opposition during the 10-day period prescribed by the rules of the court as well as an application for a postponement or a further extension of time to deliver answering papers. Such relief sought was refused by Stretch J.
15. Part B now serves before me.
16. In part B the following relief is requested by the applicant:
 1. That the continued occupation of the 1st respondent as an office bearer, in his capacity as director of 2nd respondent, is contrary to clauses 20.21 and 20.22 of the 2nd respondent's memorandum of incorporation first adopted on 22 August 2013.
 2. Declaring the 1st respondent's occupation of office as a director and chairperson of the 2nd respondent as unlawful.
 3. Directing that the name of the 1st respondent be removed from the 2nd respondent's COR39 by the office of the commissioner of companies and intellectual property commission.
 4. That any of the respondents shall pay the costs of part B of this application only in the event of their opposition being unsuccessful in respect of part B of the notice of motion.
 5. Further and/or alternative relief.

17. The respondents have in the interim filed answering papers and the applicant replying papers.

THE ISSUES

18. Although the papers are relatively voluminous, the issues are crisp and are the following:

18.1 A lack of urgency, contended by the respondents as a point *in limine*.

18.2 A material nonjoinder, contended by the respondents as a point *in limine*.

18.3 A lack of *locus standi*. The applicant contends that the deponent on behalf of the respondents does not have the necessary authority to defend the application and depose to an answering affidavit on behalf of the respondents.

18.4 Whether the applicant is entitled to his main relief sought inter alia whether the 1st respondent's occupation of office as a director of the 2nd respondent is unlawful.

19. I shall deal with points 1 and 3 first and thereafter with points 4 and 2.

20. Advocate Skoti appeared on behalf of the applicant and attorney Mr Van Zyl appeared on behalf of the respondents. I am indebted to them for providing me with bundles of authorities when the matter was heard.

LACK OF URGENCY

21. I alluded to above that on 5 September 2024 Stretch J issued an order dispensing with normal forms and service provided for in the normal rules of court and disposing of the matter by way of urgency in terms of rule 6 (12).

22. Part B of the application was entertained by me on 3 October 2024.

23. The respondents inter alia argue that the memorandum of incorporation of the 2nd respondent provides that only urgent matters may be heard by a court and sets out a dispute resolution mechanism for matters that are not urgent, which should be followed. The applicant was therefore precluded from approaching the court in the circumstances and the rule nisi for this reason should be struck from the roll with costs and the rule nisi discharged.

24. Section 36.1 of the memorandum of incorporation, more fully, states that subject to the Constitution of the Republic of South Africa, and save in circumstances where there is a need for urgent relief of the sort which cannot be obtained through the dispute prevention or resolution procedures contemplated by the memorandum of incorporation, no club, club members, official, prescribed officer, office bearer or affiliate shall approach a court of law to decide the dispute it has with the body or individual falling under the jurisdiction of the company.

25. I am of the view that there was a need for urgent relief as contemplated in section 36.1. The dispute resolution procedure provided appears to be laborious and I cannot fault the applicant for bringing his application, on a semi-urgent basis.

26. The certificate of urgency filed by Mr Skoti alludes to various grounds of urgency, which are persuasive.

27. The horse bolted, all the papers were filed, and full argument was addressed to me. To now strike the application of the roll appears not to be in the interests of justice.

28. On behalf of the applicant, it was argued by Mr Skoti that the issue of urgency was decided by Stretch J and is *res judicata*.

29. I do not agree with Mr Skoti and believe that the issue of urgency may be revisited by me.¹ I have, however, no reason to differ from Stretch J in respect of urgency.

30. This point *in limine* by the respondents can accordingly not be upheld.

LACK OF LOCUS STANDI

31. The applicant contends that the deponent on behalf of the respondents does not have the necessary authority to defend the application and depose to an answering affidavit on behalf of the respondents.

32. The applicant submits that the deponent does not allege and prove that he is authorised to act on behalf of the 1st to 3rd respondents, and neither does he possess the authority to oppose the proceedings. The deponent does not pertinently make the crucial averment alleging that he has the authority to act and oppose the proceedings for the respective respondents. Nor has a resolution been filed.

33. In his replying affidavit the applicant alleges that he spoke to one Monty Williams who is also a director of the 2nd respondent, telephonically. Mr Williams told him that the board had not sat and taken a resolution on authority to act and oppose the proceedings. The applicant also spoke to one Mr Rubushu, a member of the 4th respondent, who confirmed what Mr Williams had said.

34. The applicant accordingly applied for admission of such hearsay evidence through section 3 of the Law of Evidence Amendment Act 45 of 1988. Even if I do allow such evidence, it is of limited value being untested.

35. On the respondents' part Mr Van Zyl correctly submitted that the applicant has not utilised the provisions of uniform rule 7 (1). Rule 7.1 states that the power of

¹ Compare *Metsimaholo Local Municipality v Unlawful Occupiers of and Persons intending to Unlawfully Occupy the Land* (6054/2022 [2023] ZAFSHC 146 (26 April 2023) paragraph 26; and *Kena Media (Pty) Ltd v Mangaung Metropolitan Municipality* [2022] 4 All SA 791 (FB) (10 October 2022) paragraphs 16-20

attorney to act need not be filed, but the authority of anyone acting on behalf of the party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgement, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised to do so, and to enable him to do so the court may postpone the hearing of the action or application.

36. Be that as it may, I am of the view that the respondents have proven (on a balance of probabilities) that the deponent, Mr Beyer has the necessary authority to act on their behalf and to oppose the application.

37. In his answering affidavit Mr Beyer states that he is the acting CEO and a director of the 2nd respondent. He further states that he deposes to his affidavit on behalf of the 1st to 4th respondents, by whom he is duly authorised, in response to the application by the applicant.

38. Of importance is that Mr Beyer is the CEO of the 2nd respondent. Further, the words “in response to the application by the applicant” can only mean that he is authorised to oppose the applicant’s application.

39. Further, as to a lack of a resolution the Appellate Division held in *Tattersall v Nedcor Bank Ltd*² that the resolution of a company authorising the bringing of an application need not always be annexed to the founding affidavit and that the court may be satisfied that authority is proved if there is sufficient *aliunde* evidence appearing from the affidavits and annexures.

40. I accordingly conclude that Mr Beyer has the necessary authority to represent the respondents.

WHETHER THE APPLICANT IS ENTITLED TO THE MAIN RELIEF SOUGHT

² 1995 (3) SA 222 (A) (28 March 1995) at 228G-229D

41. The main relief sought is essentially that the 1st respondent's occupation of office as a director of the 2nd respondent is unlawful. The salient challenges in the application are centered on the following clauses of the memorandum of incorporation.

42. Clause 20.21 which provides that a director (including the sitting President and Vice President) shall be entitled to serve as a director for longer than 2 terms on condition that:

(a) No director shall be eligible to serve for more than 9 consecutive years in aggregate ³ and/or for 2 consecutive terms as President and/or Vice-President; and

(b) One of the terms in the period of 9 years is served as President or Vice- President.

43. Clause 20.22 which provides that a director having served as a director for the maximum term permissible in terms of clauses 20.20, 20.21, 20.24 and 20.25, and 20.26 (as applicable) shall only be eligible for re-election as a director after a "cooling-off period" of 2 years, determined from the date of his removal or resignation as a director until the date of his reappointment. ⁴

44. Moreover, as alluded to by the applicant and most importantly, section 66 (4) (i) of the Companies Act 71 of 2008 (the Act) states that a company's memorandum of incorporation may provide for the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the memorandum of incorporation.

45. The CIPC documents attached show that the 1st respondent has been a director since August 2013 without any cooling off period, thus a period of 11 years.

³ Own emphasis

⁴ Own emphasis

This is quite apparently in contravention of the above provisions and appears to be common cause.

46. In the answering affidavit it is stated that the memorandum of incorporation is in the process of being amended, amongst others by removing the general limitation of a maximum of 9 years as a director.

47. However, in my view, without being amended, the proposed memorandum of incorporation cannot have legal effect. The prescripts of clause 7 of the memorandum of incorporation read with sections 16 (1) and 16 (4) of the Act, dealing with amendments to the memorandum of incorporation, have also not been followed.

48. The respondents further submitted that the suspension and removal of directors are dealt with in sections 71 and 162 of the Act, which are all-encompassing. As such, a director may not be removed using the provisions of the memorandum of incorporation.

49. Section 71 (1) states that despite anything to the contrary in the 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 may⁵ be removed by an ordinary resolution adopted at the shareholders meeting by the persons entitled to exercise voting rights in an election of that director...

50. The reference to the memorandum of incorporation in the section, in my view, entails that one can have regard to the memorandum of incorporation, in removing a director. This aspect is further dealt with below.

51. Section 162 deals with the removal of a delinquent director by the court. This is clearly not the case here nor has the applicant made out a case therefore in the papers.

⁵ Own emphasis

52. A delinquent director is someone who has for example grossly abused the position of director or is guilty of serious misconduct.⁶

53. Do sections 71 and 162 oust a reliance on the memorandum of incorporation in respect of the removal of a director? Nowhere is it so stated.

54. Such ousting will render the provisions of the memorandum of incorporation superfluous. Also, *Ubi ius ibi remedium*. Where there is a right there must be a remedy. On 1st respondent overstaying his welcome, the applicant was entitled to act.

55. The memorandum of incorporation can be regarded as subordinate (legislation) to the Act, such as for example a proclamation.

56. I believe that a court should attempt, as far as possible, to reconcile the provisions of the memorandum of incorporation with the provisions of the Act.

57. The courts will interpret subordinate legislation in such a way as to render it in conformity, rather than in disconformity, with existing law (legislation).⁷

58. In *R v Maseti*⁸ the following was stated:

“Now it seems to me that the Act and Proclamation are in *pari materia* and in terms of *R v Palmer* ..., should therefore be read ‘as forming one system and as interpreting and enforcing each other’”

59. The Act and the memorandum of incorporation should therefore not be read as excluding one another but rather as including one another.

⁶ See section 162 and *Giwhala v Grancy Property Ltd* [2018] 2 All SA 649 (SCA) (24 March 2016) paragraphs 142-144

⁷ *Parow Municipality v Joyce and McGregor Ltd* 1974 (1) SA 161 (CPD) (19 September 1973) at 165H

⁸ 1958 (4) SA 52 (ECD) (Full Bench) (12 August 1958) at 53 G-H

60. Most importantly however, is section 66 (4) (i) of the Act which states that a company's memorandum of incorporation may provide for the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the memorandum of incorporation. This section in my view, puts paid to the respondents' argument

61. I accordingly hold that the applicant is entitled to the main relief.

NON-JOINDER

62. The respondents submit, about the third prayer sought, that the applicant seeks an order that the commissioner of the companies and Intellectual property commission (the CIPC) remove the name of the 1st respondent from its records but fails to cite the CIPC.

63. The respondents further submit that an order directing the CIPC to remove the 1st respondent cannot be sustained without being cited as the removal of directors is a material part of the CIPC's processes in which it has a material interest. There has accordingly been material non-joinder.

64. I do not agree.

65. In his heads of argument, Mr Van Zyl referred to the Supreme Court of Appeal case in *Absa Bank Ltd v Naude NO*,⁹ where it is stated that the test whether there has been non-joinder is whether the party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined.

66. I do not believe that the CIPC has an interest in the subject matter of the litigation nor that it will be prejudiced by its non-joinder. I agree with Mr Skoti that what the CIPC is merely requested to do is perform an administrative function of removing a director's name from its records.

⁹ 2016 (6) SA 540 (SCA) (1 June 2015) at paragraph 10

67. What would the CIPC have done if the papers were served on it? Probably, nothing.

68. Often entities such as the Sheriff or the South African Police Services are ordered by the court to do certain things without them having been joined.¹⁰

69. This point *in limine* can accordingly not be upheld.

COSTS

70. There is no reason why costs should not follow the event.

ORDER

71. I accordingly issue the following order:

1. It is declared that the continued occupation of the 1st respondent as an office bearer, in his capacity as director of 2nd respondent, is contrary to clauses 20.21 and 20.22 of the 2nd respondent's memorandum of incorporation first adopted on 22 August 2013.
2. It is declared that the 1st respondent's occupation of office as a director of the 2nd respondent is unlawful.
3. It is ordered that the name of the 1st respondent be removed from the 2nd respondent's COR39 by the office of the commissioner of companies and intellectual property commission.

¹⁰ See for example *Mthatha Mall (Pty) Ltd v Motion Fitness (Pty) Ltd* (2305/2019) [2019] ZAECGHC 89 (17 September 2019) where the Sheriff, with the assistance of the South African Police Services, was ordered to execute and give effect to the order by the court

4. It is ordered that the 1st to 4th respondents pay the costs of the application, in respect of both parts A and B, jointly and severally, including the costs of counsel on scale B.

B PIENAAR
ACTING JUDGE OF THE HIGH COURT

Date heard: 3 October 2024

Date of judgement: 30 October 2024

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