



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: no
(3) REVISED. ✓

DATE: 09/03/2026

SIGNATURE [REDACTED]

Case No: 2021/64258

In the matter between:

SIPHO MILA PITYANA

Applicant

and

ABSA GROUP LIMITED

First Respondent

ABSA BANK LIMITED

Second Respondent

PRUDENTIAL AUTHORITY

Third Respondent

JUDGMENT

Summary; Review in terms of Section 7(5) of Companies Act of resolution of board of company adopted in terms of Section 7(3) of Companies Act to remove director from board of directors. Held that review, being a special statutory review, is neither a review "sui generis" or "narrow" or "wide". Importance of considering the difference between an appeal and a review, in relation to a review in terms of section 7(5) of companies act, considered. Held that court should avoid stepping into the shoes of the board of directors. Factors to consider during review in terms of Section 7(5) of Companies Act considered.

The judgment and order are published and distributed electronically.

PA VAN NIEKERK, J

INTRODUCTION:

[1] The Applicant is a previous director of First Respondent and Second Respondent. First Respondent and Second Respondent are public companies with limited liability registered in accordance with the Company Laws of South Africa. Second Respondent is a wholly owned subsidiary of the First Respondent. Third Respondent is the Prudential Authority ("PA"), a statutory entity established in terms of section 32 of the Financial Sector Regulation Act 9 of 2017 which is clothed with wide supervisory powers over the banking industry.

[2] Applicant instituted review proceedings against First- and Second Respondents (collectively hereinafter referred to as "Absa") wherein the Applicant seeks the following relief:

- "1. Reviewing and setting aside the decision by the First and Second Respondent to remove him from their Boards of Directors in terms of section 71(3) of the Companies Act 71 of 2008.

2. *Reinstating the Applicant as a director of the Boards of Directors of the First and Second Respondents; alternatively, awarding the Applicant just and equitable compensation;*
3. *Directing that any of the Respondents who oppose this application be ordered to pay the costs of this application, including the costs of two counsel; and*
4. *Granting further and/or alternative relief".*

[3] The Applicant was appointed and served as a director on the Board of Directors of Absa (both Respondents) with effect from 1 May 2019. During June 2020 the Applicant was elected as the Lead Independent Director of the Absa Board and was also the chairperson of the Remuneration Committee of the Absa Board. On 24 November 2021 Applicant received written notice of his removal as a director of the Absa Board, which removal was pursuant to a resolution of the Absa Board adopted in terms of section 71(3) of the Companies Act, 71 of 2008 ("the Act").

[4] As will be elaborated on *infra*, Absa Board resolved to remove the Applicant as a director after the PA informally gave notice to the chairperson of the Absa Board (who has since been succeeded) that the PA will object to the nomination of the Applicant as chairperson of the Absa Board. This issue culminated in an application which the Applicant launched against the Prudential Authority for a declaratory order that their "*informal process*" was unlawful and which had the result that Absa Board decided that there was a conflict of interest between the Applicant and Absa, as a result of which it was resolved to remove the Applicant as a director.

- [5] The application was brought in terms of the provisions of Rule 53 and a dispute ensued between the parties whether the Applicant was entitled to a record of the proceedings. In summary, Absa argued that the proceedings, not being a review under the provisions of the Promotion of Administrative Justice Act and the decision to remove the Applicant as a director not constituting "*administrative action*", that the Applicant followed an irregular step by instituting the application in terms of Rule 53 and requesting the record for the decision. Absa then applied to set aside the notice in terms of Rule 53 under the provisions of Rule 30.
- [6] The Rule 30 application was disposed of in favour of the Applicant in a judgment of Snyman AJ¹ who *inter-alia* held that in substance the application is a statutory review, and that Applicant is entitled to the record. Absa thereafter filed a record, part of which is regarded as "*confidential*" and which *inter-alia* contains the minutes of relevant board meetings.
- [7] In Applicant's founding affidavit, the Applicant relied essentially on two grounds for review being firstly, that there was no basis for the removal of the Applicant as a director and secondly, that the decision to remove the Applicant was made beforehand. After the record was filed, the Applicant filed a supplementary founding affidavit wherein the grounds were expanded to include a ground that the decision to remove the Applicant as

¹ *Pityana v Absa Group Limited and Others* 2024 (1) SA 491 (GP).

a director was based on impermissible considerations of untested allegations against the Applicant.

- [8] An answering affidavit was filed on behalf of Absa which serves to set out facts to illustrate the development of a conflict of interest between Applicant and Absa, and the reasons for the decision to remove the Applicant as a director. Considering the contents of the Applicant's founding affidavit, the record as filed by Absa, and the answering affidavit filed on behalf of Absa, although certain factual averments of the Applicant are denied, such disputes do not go to the root of the matter and there are no material factual disputes between the parties on the relevant facts. It transpires from a reading of the respective affidavits and supporting documents, mostly consisting of correspondence exchanged between the Applicant and functionaries of Absa, that the main contention lies in their respective interpretation of, and conclusions drawn from, common cause facts.
- [9] In heads of argument filed on behalf of Absa, and relying on the judgment of Snyman AJ referred to *supra*, it was submitted that the nature of the review contemplated in terms of section 71(5) of the Act is a review *sui generis* and "in the narrow sense" while Applicant's legal representatives argued that the review is akin to an appeal, also stated as a "review in the wide sense" and in support of which reliance was placed on authorities which *inter alia* held that the judgment of Snyman AJ is incorrect. For purposes of this judgment it is therefore necessary to analyse the nature and scope of a review in terms of section 7(5) of the Act.
- [10] This judgment will therefore proceed to identity the applicable legal framework, determine the nature and scope of a review in terms of section 7(5) of the Act, the applicable facts,

and thereafter consider the merits of the review based on the aforesaid principles and applicable facts.

SECTION 71 OF THE COMPANIES ACT: ("The ACT")

[11] Section 71 of the Act provides a remedy for the removal of a director, either by the shareholders or by the board. A director is removed by shareholders in terms of section 71(1) and section 71(3) provides a remedy to the board of directors to remove a director. Section 71(3), provides that a director may be removed by a resolution adopted by the board having determined that the jurisdictional requirements as set out in section 71(3)(a) and/or (b) are present. Prior to voting for such a resolution, the director must be provided notice and be afforded an opportunity to respond in terms of section 7(4). Where a director is removed by resolution of the board, the director may apply to court to review the determination of the board in terms of section 7(5).

[12] The relevant sections of the Act as referred to *supra* reads:

"71. Removal of directors.

...

(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.*

...

- [13] The provisions of section 71(4) provide that notice of the meeting and a copy of the proposed resolution with sufficient specificity to enable the director to prepare and

present a response be provided to the director, as well as a reasonable opportunity to make a presentation, either in person or through a representative, to the meeting before the resolution is put to a vote. Clearly, section 71(4) of the Act envisage compliance with the *audi alteram partem* rule.

- [14] It was held in the authorities referred to *infra* that the review under section 7(5) of the Act is a statutory review, and during argument of the matter it was common cause between the parties that the review is a statutory review. The legally correct term is a special statutory review, because PAJA is also a review remedy provided by statute. It appears from authorities that it has become practice to refer to a special statutory review as a statutory review, however this judgment will refer to a special statutory review.

NATURE AND SCOPE OF THE REVIEW:

- [15] Relying on the judgment of Snyman AJ² it was argued on behalf of Absa that a review in terms of section 71(5) of the Act is a limited re-hearing, with or without additional evidence /information to determine, not whether the decision was correct but whether the hearing at first instance was properly conducted. As referred to above, this type of review was referred to as a review in the narrow sense and it was submitted that section 71(5) of the Act falls under this category of reviews. In such a review, so it was submitted, the court will intervene only if the removal was affected by unlawfulness, bad faith or a clear breach of the rules of natural justice – none of which, so it was argued, arise on the facts in this

² *Pityana v Absa Group Limited and Others supra*

matter. For this proposition Respondents relied on paragraph [81] of the judgment by Snyman AJ which reads:

"[81] It is clear that the review foreseen in section 71(5) falls into the third category listed in Tikly v Johannes N.O. referred to above, i.e. a limited re-hearing with or without additional evidence / information to determine, not whether the decision was correct, but whether the hearing of first instance was properly conducted".

[16] In that judgment of Snyman AJ, referring to a publication of the learned author Rehana Cassim³ it was held that this review procedure is *sui generis* and in the heads of argument filed on behalf of Absa the following submission was made:

"[10] At the centre of the review application, therefore, is the question of procedural compliance with the legislative provisions, specifically that in section 71(4) of the Companies Act.

[11] The secondary question is whether the 'trigger for the process' – that being the allegation that there has been negligence or dereliction on the part of the director concerned, as contemplated in section 71(3) of the Companies Act, is rationally grounded in applicable facts".

³ *Contesting the removal of a director of a board of directors under the Companies Act*, Rehana Cassim, Senior Lecturer, Unisa, SALJ, 2016 p 133 at 153.

- [17] It must be noted that Senyatsi J, in an unreported judgment⁴ held a similar view which was stated as follows:

"When regard is had to the scheme of the Companies Act, it is evident that the legislature anticipated a review in the narrow sense rather than the broader review. This is because the removed (concerned) director or affected shareholder must bring the review in a very limited period – four weeks. This mandatory expedition is appropriate for a mechanism where the court will be expected only to consider questions of procedure and legality but ill-suited to a wide review where new evidence on the merits of the decision is to be considered by the court..."

- [18] The learned Judge in the Siyakhula judgement *supra* then concludes in paragraph [44] of his judgment that it is impermissible to bring a review application *"in a broader sense"*. The learned Judge held thus:

".....What is permissible is for the applicants to bring the review in terms of section 71(5) which is a narrow review, then they are limited to raising grounds of review that turn only on whether the decision was procedural compliant with the requirements of sections 71(3)-(5) and legally compliant, which is to say, within the jurisdictional ambit of section 71 and not otherwise unlawful which is what the applicants are alleging in their papers".

- [19] In that judgment the learned Judge further held in paragraph [45] that the Applicant cannot convert the review into an appeal.

⁴ *Siyakhula Sonke Empowerment Corporation (Pty) Ltd and Others v Redpath Mining (South Africa) (Pty) Ltd and Another* (9234/2022) [2024] ZAGPJHC 680 (22 July 2024) paragraph [42]

- [20] The Applicant's counsel, on the contrary, referred to a judgment of Oosthuizen AJ⁵ in this court where it was held that the judgment of Snyman AJ is incorrect in the sense that it refers to a review in the narrow sense. In that judgment it was held by Oosthuizen AJ as follows:

"[40] It accordingly follows that I do not agree with Mr Williams that the court is only obliged to consider whether the peremptory requirements in section 71(4) have been complied with and not whether the determination in terms of section 71(3) was correct. I concur with the finding in Wait that the court is entitled, depending on the facts, to 'undertake a complete reconsideration, in the wide sense, of the board's determination'".

- [21] The decision of Wait referred to by Oosthuizen AJ is a judgment of Potgieter J⁶ in the Eastern Cape Local Division, Port Elizabeth where it was held that the term "review" in section 71(5) of the Act requires the court to undertake a complete reconsideration, in the wide sense, of the board's determination as envisaged in authorities referred to by the learned Judge in that judgment.⁷

- [22] In support of the finding that the review envisaged in section 71(5) is a review in the "wide sense", the learned Judge in the Wait matter referred *inter alia* to the learned author Hoexter who indicated (with reference to a special statutory review) as follows:

"... legislature may and often does confer on the courts a statutory power of review. This is 'special' because it differs from 'ordinary' judicial review in the administrative law sense (as now governed

⁵ *Jones and Others v Delpont and Others* 2025 (2) SA 193 (GP).

⁶ *Wait v Marais and Others* 2022 JDR 3202 (ECP).

⁷ *Vide: Wait v Marais and Others supra, para [39] – [48].*

by the PAJA). It is sometimes a wider power than ordinary review, and thus more akin to an appeal; but may well be narrower, with the court being confined to particular grounds of review or particular remedies. While Innes CJ spoke of the statutory review power as being 'far wider' than the first two kinds of review mentioned by him, it is clear that the precise extent of the power always depends on the particular statutory provision concerned (Administrative Law in South Africa (2nd ed) p 113 para 5)".

- [23] A perusal of the aforesaid authorities display a tendency to refer to the review in terms of section 71(5) of the Act as a review either in the "*narrow sense*" or in the "*wide sense*" and the divergent opinions on the scope of the review are based, in both instances, on stated authorities and principles in relation to administrative law. I am of the view that it is, with respect to the aforesaid judgments, incorrect to refer to a review in terms of section 71(5) of the Act (or for that matter, any special statutory review) as a review either in the narrower sense or in the wider sense as such vague and generic references do not assist in the proper determination of the scope of a review which is conducted in terms of a statutory provision. Attaching a label such as "narrow" or "wide" detract from the fact that it is a special statutory review, which may require a re-determination of facts on review, and/or a determination purely of procedural rationality, and/or a determination purely of rationality of the impugned decision itself, depending on the issue under review and the provisions of the empowering statutory provision. The review may thus, if required, have the elements of an appeal in the sense that the facts underlying statutory jurisdictional requirements and/or procedural requirements for the impugned decision is placed under review, or it may be narrowed to the issue of rationality on the decision or procedure alone, but that does not imply that all reviews under section 7(5) of the Companies Act will be similar, either in the "narrow" or the "wide" sense. In my view, that

is the essence of the opinion of the learned author Hoexter as quoted supra in paragraph [22].

[24] I am further of the view that it is also of no assistance and legally untenable to refer to the review as a "*sui generis* review". Using terms such as a "*sui generis* review" serves to create confusion. It is a special statutory review. In the process of evolving administrative law our courts, guided by the Constitutional Court and Supreme Court of Appeal, have developed administrative law in the era of constitutional democracy to certain clearly identified categories of review. In the publication of the authors Hoexter and Penfold, "*Administrative Law in South Africa*" (3rd ed) the learned authors explain the development of judicial review after 1994 (compared to before 1994)⁸ and points out that there are now five different "*pathways*" to review, being the PAJA, section 33 (of the Constitution), special statutory reviews, the constitutional principle of legality and the common law.⁹ To refer to a "*sui generis*" review is, in my view, tantamount to creating a further pathway to review which falls outside the scope of the acknowledged pathways to review identified by the aforesaid learned authors, serves to create confusion, and is legally untenable.

[25] As set out above, Section 71(5) of the Companies Act is a special statutory review. In this regard the authors Hoexter and Penfold explains the nature of a special statutory review as follows:¹⁰

⁸ *Administrative Law in South Africa*, pp 145-148.

⁹ *Administrative Law in South Africa*, p 148, para 3.3.

¹⁰ *Administrative Law in South Africa supra*, p 143.

"The legislature may and often does confer on the courts a statutory power of review. This is 'special' because it differs from 'ordinary' judicial review in the administrative law sense. The adjective also helps to distinguish other statutory reviews from PAJA review, which is of course statutory too. Statutory review is often a wider power than ordinary review, and thus more akin to an appeal, but it may well be narrower, with the court being confined to particular grounds of review or particular remedies. While in Johannesburg Consolidated Investment Co Innes CJ spoke of the statutory review power as being 'far wider' than the first two kinds of review mentioned by him, it is clear that the precise extent of the power always depends on the particular statutory provision concerned. This proposition was endorsed by a unanimous Supreme Court of Appeal in Nel NO v The Master and again by the same court in Fesi v Ndabeni Communal Property Trust".

- [26] In the judgment of *Nel NO and Another v Master of the High Court*¹¹ referred to by the learned authors Hoexter and Penfold *supra*, the learned judges of the SCA held as follows in relation to the discretionary power of the Master under section 384(2) of the Companies Act:

"... this means that where, in the Master's view, there is 'good cause' for departing from the tariff, the Master has the power to do so. The concept of 'good cause' is very wide and there is nothing in s 384 of the Act which indicates that it should be interpreted so as to exclude any factor which may be relevant in determining what constitutes reasonable remuneration for a liquidator's services in the circumstances of each case. Obviously, what factors are relevant will vary from case to case, but may certainly include aspects such as the complexity of the estate in question, the degree of difficulty encountered by the liquidator in the administration thereof, the amount of

¹¹ *Nel NO and Another v Master of the High Court Eastern Cape and Others* 2005 (1) SA 276 (SCA).

work done by the liquidator and the time spent by him or her in the discharge of the duties involved.”¹²

- [27] In the *Nel NO* judgment *supra* the rationality test was applied to determine whether the Master considered relevant factors in the exercise of its discretion to determine what reasonable remuneration for liquidator’s services are. The court held as follows in paragraph [31]:

“I agree with the finding of the court a quo that, while it is neither desirable nor possible to define ‘good cause’ in this regard, the Master’s opinion as to what constitutes good cause must have as its purpose the determination of a reasonable remuneration for the liquidators’ services:

‘This implies some objectively determinable limits to the exercise of the Master’s discretion informing his or her opinion. If the factors that lead the Master to the opinion are not rationally related to the object of determining a reasonable remuneration for services rendered or done by the liquidator, the exercise of the discretion will not be proper and may, on those objectively justifiable grounds, be set aside on review’.

- [28] In *Nel NO v The Master* the Supreme Court of Appeal therefore held that the discretion exercised by the Master in determining reasonable remuneration must be rationally related to the object of determining a reasonable remuneration for services rendered or done by the liquidator. The importance of the judgment, in my view, is to illustrate that the SCA applied the rationality test to determine if the decision of the Master should be supplanted by a decision of the court, because “good cause” was not defined in the

¹² *Nel NO v The Master supra*, para [20].

applicable act and the Master was required to exercise a discretion based on “good cause”.

[28] Considering the aforesaid, in my view the following factors must be considered when a decision of a court to remove a director is reviewed in terms of section 71(5) of the Companies Act namely:

[28.1] Section 7(5) refers to a review and not an appeal. The legislature is aware of the clear distinction between an appeal and a review and this must therefore be considered by the court, as the legislature clearly did not intend to provide an appeal remedy to an aggrieved director. In essence, the section 7(5) remedy is provided to test the legality of the decision, and not the merits. In this regard the authors Hoexter and Penfold¹³ explain the importance of this difference as follows:

“Like judicial review, administrative appeals allow for the reconsideration of administrative decisions by a higher authority. Unlike judicial review, such appeals are established specifically to challenge the merits of a particular decision. The person or body to whom the appeal is made will step into the shoes of the original decision maker, as it were, and decide the matter anew.

Judicial review, on the other hand, focusses on the way in which the decision was reached, and not on the correctness of the decision itself. At least in theory, review tests the legality and not the merits of the decision”.

¹³ *Administrative Law in South Africa, supra, 3rd ed, p 85, para 2.3(a).*

- [28.2] The removal of a director in terms of section 71(3) of the Act is subject to a determination by the board that the director has become ineligible or disqualified, incapacitated, or negligent or derelict (as the case may be), as determined in in terms of sections 71(3)(a) and (b) of the Act. These are clearly the jurisdictional grounds for the board to invoke the provisions of section 71(3) of the Act. These factors are based on fact. If the underlying factual finding by the board is clearly wrong, the court may correct that factual finding.
- [28.3] If on the interpretation of the correct facts, the decision by the board is found to be irrational, it may be reviewed. The concept of rationality is dealt with *infra*, and implies that the court will not step into the shoes of the board and supplant its own finding simply because the court does not agree with the decision on merits.
- [28.4] Before a resolution may be adopted to remove a director, the director must be given notice in the manner and form as provided for in section 71(4) of the Act which sets out the procedural requirements to be followed for purposes of compliance with the *audi alterem partem* principle. This again may involve a factual determination whether there was compliance with the prescribed procedures. The issue of sufficient specificity and/or reasonable opportunity as set out in sections 71(4) (a) and (b) of the Act will have to pass the rationality test as there are no specified requirements in that section in relation to those requirements.

[28.5] A review under section 71(5) of the Act may therefore review compliance with the formalities required in terms of section 71(4) and/or review a board's decision under section 71(3). In both instances it may involve a determination of fact and/or whether there was a rational decision. This will be dependant on the nature of the dispute as it evolves in the pleadings.

[30] A private company and its directors find themselves in a relationship determined by the Companies Act, the code of conduct pertaining to the directors of the company, and by accepting an appointment as a director such director therefore by implication accepts the applicable norms, standards and ethos of that specific board of the company. This is so because an individual does not have a right to be appointed as a director but is appointed at the behest of the shareholders. In my view this is a factor which should be considered by a court in relation to the principle that a court must not step into the shoes of the board and supplant its own decision with that of the board. This is of importance under the rationality issue referred to *infra*.

[31] In paragraph [29.1] *supra* the fact that section 71(5) of the Act refers to a review, was dealt with. While an appeal revisits a dispute *de novo* and determine the merits, a review is primarily concerned with the reasonableness of a decision. In *Bato Star*¹⁴ O'Regan J refers to section 33 of the Constitution which requires administrative action to be "reasonable", holding that an administrative decision will be reviewable if it is one that is

¹⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para [45].

a decision which a reasonable decision maker could not reach, and explains the importance to maintain the difference between review and appeal *inter alia* as follows:

"What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution".

[32] In *Trinity Broadcasting, Ciskei*¹⁵ the learned Judge of appeal dealt with the issue of rationality¹⁶ as follows:

"In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable".

¹⁵ *Trinity Broadcasting (Ciskei) v Independent Communication Authority of South Africa* 2004 (3) SA 346 (SCA).

¹⁶ *Trinity Broadcasting supra*, para [20].

RELEVANT FACTUAL BACKGROUND:

[33] Essentially Absa avers that the Applicant allowed a conflict of interest to arise between his personal interests and those of Absa, as result of which the Applicant falls under the category referred to in section 71(3)(b) of the Act, and that the Absa Board therefore resolved to remove the Applicant as a director. The history of this dispute has its origin therein that the Applicant applied for and was considered for the position of Chairperson of the Absa Board. In the Respondent's answering affidavit the issue is concisely summarised as follows:

- "29. *It is common cause (and appears from the Record) that Pityana applied for and was duly considered for the position of Chairperson of the Absa Board. The enquiries made by the Absa Board during the process of considering Pityana for the position revealed certain facts which ultimately contributed to the decision to nominate an alternative candidate for the appointment. Contributing to this decision was the fact that the [PA] (which exercises an oversight role and is entitled to object to the appointment of a nominee in terms of section 60 of the Banks Act 94 of 1990 ('the Banks Act')) had express reservations concerning Pityana's potential nomination for the position of Chairperson of Absa.*
30. *In response to this, Pityana decided to challenge the [PA] and Absa in court proceedings, alleging that the [PA] acted ultra vires and contrary to the provisions of section 60 of the Banks Act.*

31. *The fulcrum of Pityana's case in those proceedings is that the Absa Board and the [PA] unlawfully engaged in "informal discussions" concerning Pityana's nomination, of which, on his version, ultimately resulted in the Absa Board's decision not to nominate him for appointment.*

32. *Absa was cited in those proceedings and was left without any option but to oppose the application. Amongst others, Pityana included the following allegations in the founding affidavit in that application, as appears from Item 20 of the record:*

32.1 *Pityana averred that Absa Board's decision not to nominate him for the position of Chairperson was the direct result of the [PA]'s cautionary view that the nomination may have reputational implications for both Absa and Pityana. He stated that 'the Absa Board decided not to nominate me formally because the [PA] indicated that it would object to my nomination, and they did not want to jeopardise their relationship with the Authority' (CaseLines reference 013-62). Despite having been advised that the [PA]'s preliminary view was not the sole reason for preferring another candidate (this being Absa's current Chairperson) for appointment over him, Pityana persisted that he 'cannot accept that the alternative candidate was not nominated solely because the Authority expressed reservations concerning my exit from AGA' (per paragraph 74 of the affidavit in Item 20, CaseLines reference 013-62). Absa's position is, of course, that the Board decided to nominate a more appropriate candidate in the circumstances;*

32.2 *Pityana seeks a declarator to the effect that the [PA] acted unlawfully in engaging in the informal process with Absa. That declaratory order is to serve as a 'prelude to taking further action against the [PA] including a potential claim for damages as a consequence of its unlawful conduct' (per paragraph 87 in the founding affidavit in Item 20 of the Record, CaseLines reference 013-64);*

32.3 *The role of regulators is very important and ‘the extent of their interference in governance related issues of independent private bodies must be reasonable and justifiable in terms of their mandate’ (per paragraph 88 of the founding affidavit in Item 20 of the Record, CaseLines reference 013-65).*

33. *The import of Pityana’s case in the declaratory application is that the [PA] unlawfully engaged with the Absa Board in the informal process, which of necessity embroils the Absa Board in the same alleged unlawful conduct (because any such allegedly unlawful conduct – which is denied – required the involvement of two parties, not solely the [PA]).*

[34] The affidavits filed on behalf of the parties as well as the record disclose *inter alia* the following:

[34.1] Prior to the Applicant’s appointment as a director of Absa, the Applicant was a director on the board of another listed company (“AGA”) where an allegation of sexual harassment was made against the Applicant. The Applicant resigned as a director of that company and an agreement was entered into between the company, the complainant and the Applicant. This resulted therein that the complaint was not investigated by AGA and it therefore remained purely an untested allegation. This allegation was independently investigated by a senior advocate appointed for that purpose, who filed a report which was not favourable to the Applicant. A further legal review of this report by was favourable to the Applicant.

[34.2] During the process of considering the Applicant’s nomination as Chairperson of Absa, the issue of the sexual harassment allegation arose. The Chairperson of Absa (at that time) was informally informed by the PA that, should the Applicant

be nominated as Chairperson for Absa, the PA would object to such nomination in terms of the provisions of section 60 of the Banks Act. This was conveyed to the Applicant by the Chairperson of Absa. Applicant adopted the view that the allegations against him was unfounded, persisted therein that he should be nominated by the Board of Absa, and that the PA should then formally proceed to object against his nomination in terms of section 60 of the Banks Act in which event the allegations would then be properly tested and, so did the argument of the Applicant go, he would be found to be a suitable candidate for the position of Chairperson of Absa.

- [34.3] The Applicant was informed (verbally and in writing) by the Chairperson of Absa that such a situation was untenable for Absa due to a potential of reputational harm to Absa and Applicant was specifically requested not to engage the PA on the issue. Notwithstanding, the Applicant then instituted an application against the PA seeking a declaratory order and other relief which is referred to above. This application was instituted by Applicant against the PA without prior consultation with the Chairperson of Absa or the Absa Board. It is further common cause that, prior to this application being instituted by the Applicant, he requested the Chairperson of Absa to provide an undertaking that the process of finding a substitute Chairperson for Absa will be stayed, pending the application which he intended to institute. In the answering affidavit filed on behalf of Absa it was explained that such request was unreasonable in the sense that there was urgency in proceeding with the process of finding a succession Chairperson due to the term of the serving Chairperson almost having reached its expiry date.

[34.4] Apart from the institution of the application against the PA, the Applicant embarked on a, what is referred to in the application as “roadshow”, which consisted of a lengthy press release, and various media interviews including talkshows on radio stations. The purpose of this was mainly to save his reputation (according to the Applicant) and this public relations exercise resulted therein that various publications carried articles where Absa was directly or indirectly criticised for allowing alleged interference by the PA in its board of directors, where the PA was *inter alia* accused of acting “unconstitutionally”, and as a result whereof the Applicant brought the issue that he was accused of sexual harassment into the public domain.

[35] The report is replete with correspondence exchanged between Applicant and the PA, as well as Applicant and the Chairperson of Absa. The correspondence confirms that the Applicant was insistent on the fact that he had to be nominated as Chairperson for Absa, which he realised and accepted would then result in an objection from the PA and subsequent litigation, and that he expected the Absa Board to assist him and/or protect his interest in the evolving dispute against the PA. The correspondence further displays a deteriorating relationship not only between the Applicant and the PA on the one hand, but also between Applicant and the Chairperson of Absa, and the Absa Board.

[36] On 2 September 2021 Applicant was provided with an email wherein the possible issues that would arise for discussion at a meeting of the Absa Board scheduled for 3 September 2021 was sent to the Applicant. Therein he was *inter alia* required to be prepared to discuss issues relating to the reputational risk to himself and the Absa group, the

responses given to the selection committee (of the Absa Chairpersonship) during his interview in April 2021 concerning the circumstances surrounding his resignation from the AGA board, and whether the Absa Board had reason to be concerned about their circumstances, his decision to address correspondence to the PA despite a request from the Chairperson not to do so, and the content and tone of his letters to the PA (which Absa perceived to be adversarial), and their possible effect on the relationship between Absa and the PA considering Applicant's position as Lead Independent Director of the board.

[37] The Applicant responded to these issues at the meeting of the Absa Board on 3 September 2021 and attached speaking notes prepared by him pertaining to that meeting to the founding affidavit. From the speaking notes it transpires that the Applicant was of the view that he was "*compelled to take steps to protect my reputation*" after the Absa Board decided not to proceed with his nomination. The steps taken to protect his reputation referred to therein are in fact the steps taken by the Applicant against the PA. Applicant further explained that his "*engagement*" with the PA was a continuation of a process that he initiated because he considered the dispute to be a dispute with the PA and not with the Absa Board. For that reason, so explained the Applicant, he thought that it was not necessary to consult the Absa Board on the correspondence that he engaged in with the PA.

[38] Following that meeting, and on 6 September 2022, Applicant was informed by the Chairperson that the Absa Board took a formal resolution not to nominate the Applicant as Chairperson of the Absa Board. The Applicant then requested the Absa Board to hold back any nomination of an alternative candidate pending his challenge to the PA's action. Absa Board and the Chairperson declined to provide the undertaking not to proceed with

the nomination of an alternative candidate. It was explained that this would have seriously prejudiced Absa, as the chairperson succession process had to be finalised within an imminent timeline.

- [39] On 25 October 2021 the Applicant launched an application for declaratory relief under case no. 538291 in this court. Applicant cited the PA as well as Absa Group Ltd and Absa Bank Ltd as respondents and explains in the founding affidavit that Absa were so joined because they have an interest in the application for declaratory relief. No substantive relief was sought against Absa.
- [40] After the application for declaratory relief was launched against the PA by Applicant and the Applicant released the press release referred to *supra*, the Applicant was informed by the Absa Board in writing *inter alia* that he: “... embarked on a public challenge of and litigation against the Prudential Authority (as the Bank’s regulator) and cited Absa as a respondent in your matter. This matter has occasioned negative publicity for Absa and it appears that your personal interest and the interest of Absa may no longer be aligned”.
- [41] Applicant was invited to attend a meeting with the Absa Board on 12 November 2021 to discuss the matter and particularly to discuss a proposed termination of his appointment as Lead Independent Director and as chairperson of the Group Remuneration Committee. Applicant declined to take up the invitation.
- [42] The invitation referred to in paragraph [41] *supra* followed on a letter dated 2 November 2021 from Absa wherein the Applicant was requested to resign from the Absa Board, and the reasons for the request were set out as follows:

- "1. As a result of recent developments, the Board of Absa Bank Limited and Absa Group Limited ('the Boards') are of the view that you have, through your conduct, created a material conflict between the pursuit of your interest and the discharge by you of your duties to the Absa Group and to the Boards and performance of your functions as a non-executive director.
2. As you are aware, Absa has filed notice to oppose your application which the Boards believe Absa is compelled to do, given the potential effect on Absa of the relief sought. In consequence, me and Absa will be engaged in litigation against each other which will be conducted in public. You have accordingly placed yourself in a fundamentally adverse relationship with the companies on which boards you currently serve".

[43] Applicant responded to the aforesaid invitation to resign by addressing a letter to the Chairperson stating that he was disappointed in the Absa Board's attempts to "punish" him for the exercise of his rights to be heard and his right of access to courts. He recorded that it appeared that the Absa Board had already decided and formed a *prima facie* view that he ought to be removed as a director without seeking his views, and recorded that he disagreed with the manner in which the Absa Board handled his nomination and maintained his view that the Absa Board insisted that the PA comply with section 60 of the Banks Act. Applicant recorded that there was no reason why Absa should have been "compelled" to oppose the application for declaratory relief and concluded that there was no misalignment between his personal interest and the interest of the Absa Board arising from his launch of the application for declaratory relief.

[44] On 8 November 2021 the Applicant received formal notice in terms of section 71(3) of the Act wherein he was informed that a resolution for his removal as a non-executive

director of the Absa Board will be voted on during a board meeting on 23 November 2021.

The material part of the section 71(3) notice reads as follows:

- "1. Mr Pityana was neither frank nor candid when responding to questions posed by the Chairperson Succession Committee members (sic) regarding the circumstances of his departure from AngloGold Ashanti, and whether such circumstances might hold any reputational risk for Absa if he were nominated for the appointment as Chairperson of Absa.*
- 2. On or a about 25 October 2021 Mr Pityana sought an application seeking a declarator against the Prudential Authority, citing Absa Bank Limited and Absa Group Limited (collectively, 'Absa') as respondents.*
- 3. In terms of Mr Pityana's application, he seeks an order declaring that the Prudential Authority acted unlawfully and ultra vires in engaging with the members of the Boards in the so-called 'informal process' described in his founding affidavit.*
- 4. Although Mr Pityana stated in the founding affidavit that no relief is sought against Absa, any finding by the Court that the Prudential Authority engaged in unlawful conduct when dealing with the Boards would necessarily mean that the members of the Boards also engaged in the same unlawful conduct.*
- 5. In the founding affidavit:*

 - a. Mr Pityana suggested that members of the Board acted improperly when engaging in the so-called 'informal process' with the Prudential Authority; and*
 - b. Mr Pityana made various material allegations which are factually incorrect.*

6. *Prior to launching the pending application for a declarator, Mr Pityana sought an undertaking from the Boards that they would stop all processes relating to the appointment of the future chairperson of Absa, thus requiring the Boards to suspend a process which is vital to the proper functioning of Absa. Absa declined to provide such an undertaking.*
7. *In various media statements, Mr Pityana has implied that the Boards are not acting with sufficient and necessary independence from the Prudential Authority, to which the members of the Boards object.*
8. *It is the opinion of the Boards that the actions of Mr Pityana detailed above have been taken in order to pursue Mr Pityana's own personal interest, to the detriment of the interests of Absa.*
9. *It is the opinion of the Boards that Mr Pityana has intentionally and inappropriately shared confidential information regarding Board decisions and Board processes with the public at large and has through his conduct created reputational risk for the Boards, Absa and the Brand.*
10. *It is the opinion of the Boards that Mr Pityana has, through his conduct, created a material and sustained conflict of interest between the pursuit of his own interests and the discharge by him of his duties to Absa and to the Boards.*
11. *It is further the opinion of the Boards that Mr Pityana has, through his actions, created a situation in which he is unable to discharge his fiduciary duties to Absa or properly fulfil his function as a director of the Boards.*
12. *It is furthermore the opinion of the Boards that the position adopted by Mr Pityana has rendered his continued and harmonious service with other members of the Boards impossible."*

[45] Applicant provided a lengthy written response to the section 71(3) notice wherein he extensively dealt with each stated ground. In that response the Applicant sets out in substantial particularity reasons and arguments why he believed that the grounds upon which Absa relied are without merit. That response has the following salient features:

[45.1] Although the Applicant avers that the first ground (not being frank or candid when responded to questions posed by the Chairperson Succession Committee who was regarding the circumstances of his departure from AGA) as set out in the notice is vague, he then proceeds to set out circumstances why, according to the Applicant, he could not disclose the circumstances of his resignation on the grounds of director confidentiality. He then proceeds to set out that all documentation in respect of that sexual harassment allegation was eventually made available. However, the Applicant's defence to that claim was made on the basis of alleged director confidentiality and it was essentially common cause that his initial response to the Chairperson Succession Committee did not constitute full disclosure.

[45.2] Insofar as paragraphs 2 to 5(a) of the section 71(3) notice are concerned, Applicant reiterated his previous stance that he was litigating against the Prudential Authority and that it does not involve Absa. This, according to Applicant, did not create a conflict of interest.

[45.3] Insofar as paragraph 6 of the section 71(3) notice is concerned, the Applicant responded by saying "*so what*". According to the Applicant, he was entitled to make the request but was denied. The implication of such request, being to stymie the succession process of the Absa Board chairperson, is not dealt with

by Applicant and his response of “so what” discloses, in my view, an attitude irreconcilable with sound governance of an institution such as Absa.

- [45.4] Insofar as paragraph 7 of the section 71(3) notice is concerned, the Applicant rationalised his conduct based on a persistent view that the Absa Board’s decision was a mistake and that he is entitled to that view. He repeated the assertion that the Prudential Authority is overreaching its mandate and he repeated his criticism of the fact that Absa Bank has not challenged this unlawful interference. The Applicant’s response to that paragraph reiterates his adversarial stance against the PA and indirectly confirms his public criticism of the Absa Board. In response to paragraph 8 of the section 71(3) notice, the Applicant joined issue by referring to his rights envisaged in the Constitution, concluding as follows:

“The message from Absa’s latest actions– removing me as the LID and remuneration committee – and its proposed removal of me as a director is clear: ‘if you take on the regulator and exercise your legal rights, you will be punished and removed’. This is most unfortunate. It punishes me and prejudices me for exercising my legal rights set out in the Constitution and the Banks Act. They cannot be right”.

- [45.5] The Applicant further joins issue with the rest of the grounds referred to in the section 71(3) notice and provided his reasons. In essence, the Applicant reiterated that the fact that he instituted proceedings against the Prudential Authority and/or followed the other conduct as complained of by the Absa Board, did not constitute a conflict of interest or a dereliction of duty.

[46] The Applicant was removed by a resolution of the Absa Board and informed in writing on 24 November 2021 of that resolution. The confidential record contains the minutes of the board meeting. A perusal of the minutes (which remains confidential by agreement between the parties) displays that the following opinions of the board members were *inter alia* raised during the meeting:

[46.1] That the Applicant displayed a belligerent attitude towards the board;

[46.2] That the relationship between Applicant and other board members have become strained;

[46.3] That the board members held the opinion that there is a conflict of interest between Applicant's own interest and that of Absa.

[46.4] That the reputation of Absa became compromised by the publicised dispute between Applicant and the PA.

[46.5] That the dispute and litigation between Applicant and the PA is not conducive to the relationship between the PA and Absa.

FIRST GROUND OF REVIEW: THE ALLEGED CONFLICT OF INTEREST DID NOT EXIST

[47] In the Applicant's heads of argument it is submitted that Absa incorrectly assumed that Applicant adopted an adversarial stance that created a conflict between the interests of the Applicant and those of Absa by exercising his rights to institute the application against the Prudential Authority. This ground of review does not impugn the facts underlying the section 7(3) resolution of Absa to remove Applicant as director but goes to the rationality

of the decision. It is further submitted that Absa sought to manufacture a conflict of interest to support its position that the Applicant's continued service as a director of Absa was untenable. These submissions were based on a cursory summary of the history of the development of the alleged conflict of interest between Absa and the Applicant which, according to the Applicant, commenced when he instituted the declaratory application against the PA.

- [48] Applicant's legal representatives further quoted from the definition of a conflict of interest in the Absa director's Policy on Conflict of Interest, which reads as follows:

"A conflict of interest, used in relation to members of the governing body and its committees, occurs when there is a direct or indirect conflict, in fact or in appearance, between the interests of such member and that of the organisation. It applies to financial, economic and other interests in any opportunity from which the organisation may benefit, as well as use of the property of the organisation, including information. It also applies to the members related parties holding such interest".

- [49] Based on the principles referred to in paragraph [31] to [32] *supra*, this court sitting as a court of review is not allowed to usurp for itself the functions of the Absa Board, but must determine whether the decision to terminate the appointment of Applicant as director of Absa, based on the assertion of Absa that there was a conflict of interest between the Applicant and the Absa Board, was reasonable by applying the rationality test. In other words, was the decision of the Absa Board to terminate the appointment of the Applicant as a director of the Absa Board, a decision which can be described as perverse or utterly irrational?

Put otherwise:

“ Is the decision so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it? ”¹⁷

[50] Assessing the rationality of the decision, I am of the view that the following considerations are relevant:

[50.1] The Absa Board is not only exclusively qualified, but mandated by law in the exclusive position to determine what is in the best interest of Absa and its shareholders, is responsible to report to the shareholders of Absa, and has the duty to safeguard the interests of Absa, their shareholders, and clientele. The Absa Board is in a far better position than this court is to make that determination which essentially amounts to a value judgment based on various considerations in the exclusive domain of the Absa board .

[50.2] The relationship between the individual directors of the Absa Board is a relationship which clearly depends on mutual trust and respect. It is a matter of logic and common sense that those qualities and traits are a *sine qua non* for the proper functioning of the board of directors, especially at an institution such as Absa.

[50.3] Conflict of interest as defined in the Absa Board’s Code of Conduct as quoted *supra* is clearly defined in a wide sense. The code of conduct as quoted *supra*

¹⁷ See *Trinity Broadcasting supra*, paragraph [21]

defines a conflict of interest, directly and indirectly, not only as a fact, but also in appearance. In my view the evidence, viewed objectively as a whole, clearly disclosed a conflict of interest as defined in the code of conduct applicable to the Absa board of directors.

- [51] The objective facts illustrate that the Applicant proceeded, against the explicit direction of the Chairperson of Absa, to engage the PA in an adversarial manner, and joined Absa in those proceedings. In my view it does not serve the Applicant to state that he did not seek any relief against Absa, as the appearance of a conflict of interest in the eyes of the public at large is unavoidable, especially in circumstances where one of the directors of Absa institutes litigation against the controlling authority and Absa. Even if this conflict of interest may be found to be more apparent than real, it is still a conflict of interest as defined in the aforesaid code of conduct.
- [52] The Chairperson of Absa reiterated in correspondence between herself and the Applicant that the situation where Applicant instituted legal proceedings against the Prudential Authority (with a clear expressed intention to later claim damages against the Authority) compromised the position of the Applicant as Lead Independent Director who has to, from time to time, step into the proverbial shoes of the Chairperson of Absa and liaise with the PA. This fact, according to the Chairperson, rendered the Applicant to be incapable to fulfil his role as lead Independent Director. In my view this fact clearly illustrate the conundrum created by Applicant. It is thus no surprise that the Chairperson of Absa as well as the remaining board of directors expressed their discomfort with the fact that the Applicant potentially prejudiced the relationship between Absa and the PA.

- [53] It was further argued on behalf of the Applicant that he was legally entitled to protect his reputation by instituting the application for declaratory relief against the PA. During the hearing counsel for Applicant disclosed from the bar that the application was successful for Applicant, albeit subject to an application for leave to appeal. That may be so, but this fact contributed to creation of a conflict between Applicant's personal interests and those of Absa. Applicant should have foreseen (and was warned by the Chairperson of Absa) that such conduct will be detrimental to Absa and notwithstanding proceeded therewith, thereby advancing his own interest to the prejudice of Absa. In this regard I am of the view that the fact that there is a contractual element in the relationship between a director and a company in the sense that the acceptance of an appointment to the board carries an implied consent to comply with the duty to place the interests of the company first. This relationship differs from a relationship regulated between an organ of state and an individual subject to state-imposed obligations. It was clearly within Applicant's right to institute legal proceedings against the PA and Absa, but the resultant fallout with Absa was foreseeable and the consequences that follow in terms of the company ethos, code of conduct, or deteriorated relationship with co-directors are binding.
- [54] The issue of the conflict of interest does not end there. As referred to *supra*, the Applicant embarked on a "roadshow" during which statements were made that had *inter alia* the recurring theme that the PA acts unlawfully, unconstitutionally, and interferes in the independence of Absa Bank. Whether or not such an allegation made in the public domain repeatedly is true or not, it placed Absa and specifically the Absa Board in an untenable position where one the directors of the board indirectly accuses the other directors of the board of failing to comply with their duties as directors. These allegations further contributed to the potential straining the relationship between Absa and the PA,

which Absa justifiably attempted to protect. There was no legal obligation on Applicant to follow this course of conduct (the "roadshow"), and the adverse publicity that this conduct created constituted a clear breach of trust and a conflict of interest.

- [55] Considering the aforesaid I am of the view that the decision to terminate the Applicant's appointment as a director cannot be held to be so outrageous and/or perverse and/or utterly irrational so that it will pass the high threshold test for rationality as set out *supra*. The object of the decision was to act in the interest of Absa and the means employed were not irrational.

SECOND GROUND OF REVIEW: ABSA'S DECISION WAS MOTIVATED BY UNTESTED ALLEGATIONS OF SEXUALL HARASSMENT:

- [56] It was submitted on behalf of Applicant that the uncontested allegations of sexual harassment were the motivating factor for the decision. For this contention, reliance was placed on a reference to these allegations by certain directors during the board meeting when the impugned resolution was adopted. In my view, the objective facts do not support this contention. A perusal of the minutes reflect that these directors primarily expressed discomfort with the fact that the issue of sexual harassment allegations were disclosed in the public domain, and the resultant potential adverse effect it may have on the Absa brand. The fact is that it was the Applicant who brought this issue into the public domain when he referred to that in his press statement and later interviews. However, the meeting

clearly focussed on the conflict of interest issue and a deteriorated relationship between Applicant and the other board members.

[57] An analysis of the evidence confirms that the allegations of sexual harassment were the catalyst for the informal objection by the PA, but at that stage there was no indication from the Board of Absa or the Chairperson that they intended to terminate the Applicant's appointment as a director. On the objective evidence the trigger event for this decision was the institution of the application for a declaratory order against the PA, joining Absa as respondent, and the subsequent statements made by the Applicant in the public domain which led to the process followed by Absa in terms of section 71(3) of the Act.

[58] This ground of review cannot be upheld.

THIRD GROUND OF REVIEW: THE APPLICANT'S REMOVAL WAS A FOREGONE CONCLUSION:

[59] The essence of this ground advanced by Applicant is namely that the formalities followed by Absa in terms of section 71(4) of the Act constitutes mere "*window dressing*" (own terminology), as the resolution to remove the Applicant as a director of Absa was *de facto* informally taken before the process commenced.

[60] In my view there is no merit in this submission. Section 71(4) of the Act prescribes a procedure where the intention to adopt a resolution to remove a director is conveyed in writing to the director involved and an opportunity is provided to such director to appear before the board and state his case, whereafter the matter is put to the vote. If any of the directors concluded beforehand that they would vote in favour of the removal of a director and the procedures prescribed in terms of section 71(4) are followed, the only question

that remains is namely whether the adoption of such a resolution was rational. The mere fact that a voting director has a *prima facie* view does not render the procedure that was followed irrational.

[61] This ground for review cannot be upheld.

CONCLUSION:

[62] At the hearing of the Application, counsel for Applicant argued that the notice in terms of section 71(3) referred to in paragraph [43] *supra* did not comply with the Act, as it did not provide grounds for the intended resolution with sufficient specificity. This ground was not specifically raised in the founding affidavit or heads of argument as a ground for review, however I deem it necessary to deal with this submission. Paragraph [45] *supra* refers to the fact that Applicant dealt with the grounds in substantial particularity. This response to the section 71(3) notice as provided by Applicant discloses that he was aware of the underlying issues and facts which informed the section 71(3) notice, was able to provide a comprehensive answer, and therefore suffered no prejudice. This point can therefore not be upheld.

[63] Considering the aforesaid, I am of the view that the decision to remove the Applicant as a director of Absa is not reviewable on the grounds as advanced by the Applicant and that the application therefore stands to be dismissed.

In the result, the following order is made:

1. The application is dismissed.

2. Applicant is ordered to pay the costs of the application, including costs of two counsel, to be taxed on Scale.



P A VAN NIEKERK
JUDGE OF THE GAUTENG DIVISION,
PRETORIA

APPEARANCES

FOR THE APPLICANT:

A SUBEL SC

N STEIN

INSTRUCTED BY:

HAFFEGEE ROSKAM SAVAGE ATTORNEYS

FOR THE FIRST RESPONDENT:

DA LOXTON SC

A MILOVANOVIC-BITTER

INSTRUCTED BY:

WEBBER WENTZEL ATTORNEYS

Date of hearing: 26 February 2026