REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 18245/2019

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED.

24-08-2021

In the matter between:

David Garth Miller	Applicant
Versus	
Natmed Defence (Pty) Ltd	First Respondent
Chalcid (Pty) Ltd	Second Respondent
Daniel Johannes Stephanus Kellerman	Third Respondent
Donald Dinnie	Fourth Respondent
Lance Turner	Fifth Respondent

JUDGMENT

MATOJANE J

Introduction

[1] This is an application where the Applicant seeks the following relief:

1. an order, setting aside the decision taken by the shareholder of the first respondent ("Natmed") to remove the Applicant as a director of the first respondent due to alleged non-compliance with Companies Act,2008; and reinstating the Applicant with retrospective director's fees.

2. The payment of outstanding amounts claimed in terms of a contract ("remuneration claim"). There are four legs to the Applicant's remuneration claim, namely

(a) Applicant claims that he was contractually entitled to director's fees of R50 000.00 per month payable by Natmed, in respect of March 2019, he only received R5 000.00, and he received no payment for in respect of April 2019. He claims this shortfall of R95 000.00

(b) There was an agreement by Natmed and Chalcid to pay the Applicant a discretionary bonus in respect of the financial year ending February 2018, which he has not been paid.

(c) The Applicant seeks to be retrospectively remunerated his director's fees at R50 000.00 per month, from the date of his removal until the date on which he is reinstated;

(d) a declaratory order that should the Applicant be reinstated as a director of Natmed, he is entitled to directors fees of R50 000.00 per month from the date of his reinstatement until the date that his directorship lawfully terminates.

(e) The Applicant seeks to have a written directorship contract rectified to reflect the legal entity as Natmed rather than Natmed (Pty) Ltd.

3. Finally, there is an application for referral to oral evidence if the remuneration claim cannot be resolved on papers.

[2] Natmed and the second respondent ("Chalcid") are both owned by the Kalafit Trust ("shareholder"), a body registered in terms of the Trust Property Control Act,1988.

[3] The third respondent("Kellerman"), fourth respondent ("Dinnie") and fifth respondent ("Turner") are all cited in their capacities as trustees of the shareholder. The respondents dispute that Dinnie is a trustee

Background

[4] On 25 May 2017, the Applicant, acting in his personal capacity and Kellerman acting in his capacity as a duly authorised shareholder representative of both Natmed and Chalcid, concluded three separate oral agreements.

[5] The first agreement was a directorship agreement between the Applicant and Netmed ("Natmed Agreement"). The second directorship agreement was between the Applicant and Chalcid ("Chalcid Agreement"). The third agreement was between Applicant on the one hand and Chalcid and Natmed on the other ("bonus agreement").

[6] In October 2018, by agreement, the Applicant resigned from Chalcid, and the amount that Chalcid was paying the Applicant in director's fees was taken over by Natmed. These amounts are disputed. The Applicant's initial director's fee was R5 000.00 per month from Natmed and R5 000.00 from Chalcid.

[7] The Applicant's Natmed directorship continued until 30 April 2019, when he was removed as the director thereof. The Applicant is challenging this removal in the present proceedings.

Points in limine –

(a) Misjoinder

[8] Dinnie states that he is not a trustee of the shareholder and should not have been cited as a party to these proceedings. He states that he is the Chief Executive Officer of the first and second respondent and his citation as a trustee constitutes a misjoinder as he has no direct and substantial interest in this application. This exception can be readily disposed of. The Applicant is under a *bona fide* belief that Dinnie is a trustee. Neither Dinnie nor Kellerman has placed before the court countervailing evidence in the form of a copy of the deed of trust or the letter of authority reflecting the names of the trustees. The information lies purely within their knowledge. The applicant's version stands.

(b) Lack of *locus standi* in judicio

[9] The third and fifth respondent submits that the Applicant lacks the requisite *locus standi* to claim the amounts appearing in the notice of motion as the invoices were issued by Miller Steward (Pty) Ltd, who should have been joined in the proceedings as it has a direct and substantial interest in this matter. This point *in limine* can also be readily disposed of.

[10] The shareholder concedes in its answering affidavit that Miller Stewart is not a party to any contract that forms part of the relief claimed. The agreement was entered into personally with the Applicant. It was the Applicant that rendered services, and no other person from Miller Steward did so. The respondents did not deny the averments by the Applicant in paragraph 15 of his founding affidavit that it is his removal as a director and the failure to pay his fees and bonuses owed to him in his personal capacity, which is a subject matter of this application and accordingly he had *locus standi.* The respondents have failed to raise a genuine dispute of facts, the Applicant’s version again stands.

(c) Foreseeable dispute bona fide dispute of fact.

[11] It is well established under the **Plascon-Evans** rule that where in motion proceedings

disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the Applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched, or so clearly untenable that the court is justified in rejecting them merely on the papers[1].

[12] The respondents submit that Applicant was aware that each of the agreements subject to this application was oral. As a result, the Applicant foresaw the reasonable likelihood of the terms of the oral agreements being the subject of genuine and bona fide factual disputes.

[13] In my view, none of the disputes of fact before me is such that they cannot be resolved on the papers. The denials by the shareholders are, in most cases, farfetched or untenable and fall to rejected.

The first issue – Director's fees

[14] The Applicant claims R25 000-00 (twenty-five thousand rands) from the First and Second Respondent each in director's fees. Kellerman alleges that such amount was in large part constituted by the consulting fees of R40 000-00 (forty thousand rands) payable to Miller Stewart (Pty) Ltd and a director's fees of R10 000-00 (ten thousand rands) pursuant to the resignation of the First Respondent's marketing manager and subsequent resignation of the Applicant from the Second Respondent.

[15] It is common cause that the incumbent marketing manager of the first respondent left as of 30 June 2018. The first time the Applicant invoiced both the first and second respondents, respectively, for the increased amount of R25 000.00 was in June 2018 and not July 2018 before the marketing manager had departed. The version of Kellerman that the

[1] National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

payment of the additional R40 000.00 was in respect of the Applicant taking up the interim role of marketing manager is unsustainable. The Applicant stopped the marketing activities at the first respondent in January 2019; despite this, the full amount of R50 000.00 continued to be paid to the Applicant for January and February 2019. If the respondent's version was correct, the full amount of R50 000.00 would not have been paid for the months of January and February.

[16] It is not disputed that in March 2019, the applicant only received R5 000.00, and he received no payment in respect of April 2019. His claim for this shortfall of R95 000.00 is justified.

The second issue - Discretionary bonus agreement

[17] After being appointed a non-executive director on 26 May 2017, the Applicant sent a confirmatory email to Kellerman confirming the oral agreement concluded the previous day. The email makes a reference to the oral agreement regarding the discretionary bonus. In the fourth paragraph, it is recorded that:

> "As agreed, I shall be remunerated at R 10,000.00 per month (R120,000.00 per annum) plus an additional discretionary but objective driven bonus of R 130,000.00 based on contribution and value add."

[18] Kellerman never disputed or denied the contents of this email. He concedes that an amount of R100 000.00 was offered to the Applicant as a discretionary bonus; however, on his version, the Applicant rejected the offer. As a result, no discretionary bonus agreement was concluded. There would have been no need to make this offer to the Applicant if there was no agreement to pay Applicant such a bonus.

[19] The Applicant requested information on why he was offered only R100 000.00 instead of R130 000.00, which was not responded to. He denies that he rejected the offer of R100 000.00

and, in an endeavour to limit the dispute, have accepted the offer of R100 000.00 in respect of the discretionary bonus. The Applicant has made out a case for entitlement to the discretionary bonus of R100 000.00 that was offered to him.

The third issue – Rectification of the Natmed directorship agreement

[20] The Applicant relies on a written directorship agreement, which is sought to be rectified. The shareholder argues that the written agreement was never concluded and signed by the shareholder or any of the Respondents.

[21] The Natmed directorship agreement refers to Natmed (Proprietary) Ltd as an entity that the Applicant contracted instead of Natmed Medical Defence (Proprietary) Ltd. Nothing turns of this typographical error as Natmed (Proprietary) Ltd has no relationship with the trust or any trustees cited in this matter. It is only Natmed Medical Defence who has to give effect to this agreement.

[22] Dinnie was the duly authorised representative in entering into the written agreement in question and has already conceded that the contracting party ought to have been Natmed Medical Defence (Pty) Ltd and not Natmed (Pty) Ltd. I can see no reason why the doctrine of rectification should not be applied where a document wrongly records the identity of a party so as to give effect to the intent of the true parties in terms of a prior agreement or understanding between them.

[23] The incorrect description of the legal entity that the Applicant contracted with was occasioned by the common error between the parties who signed the written contract in the *bona fide* but mistaken belief that it recorded their true agreement between them. The Natmed written directorship agreement falls to be rectified by removing reference to an entity described as "Natmed (Proprietary) Limited" with registration number "[....]" and replacing it with "Natmed Medical Defence Proprietary Limited" with registration number "[....], wherever the former appears.

[24] Having already thus disposed of the preliminary issues I now proceed to determine whether it was competent for the shareholder to remove the applicant as a director without first providing him with reasons for the proposed removal prior to the decision being taken.

The removal as a director

[25] It is common cause that on 24 April 2019, the Applicant was notified of a shareholders meeting to be held on 30 April 2019. The meeting was to be held telephonically. The main resolution proposed was the Applicant's removal as a director of Natmed with immediate effect. The notice stated that the notice period arising from statute for the holding of such a meeting was waived and that prior to considering and voting on the above resolution by the shareholder, the Applicant has the opportunity to make representation either personally or through a representative.

[26] On 29 April 2019, the Applicant, through his attorneys, addressed a letter to Kellerman setting out alleged deficiencies in convening the meeting. The letter read:

> "2. We are instructed that on 24 April 2019, a document purporting to be a notice convening a "shareholders' meeting" in terms of section 61(1) of the Companies Act, 2006 (as amended) ("the Act") was emailed to our client by Stephen Kellerman ("the purported notice").
>
> 3. The purported notice is defective for, inter alia, the following reasons (the list is not exhaustive, and our client's rights to supplement the reasons for the notice being defective, if it becomes necessary in the future, are reserved):
>
> > "3.1. It was not delivered at least ten business days before the meeting, as provided for in section 62(1) read with section 71(2)(a) of the Act;
> >
> > 3.2. It does not contain all the particulars required in terms of section 62(3) of the Act;

3.3. The proposed resolutions fail to comply with section 65(4) of the Act in that they are not accompanied by sufficient information or explanatory material; and

3.4. An attempt to hold the meeting telephonically falls foul of section 71(2)(b) of the Act, as our client would then be denied the opportunity of making a representation in person. This is not simply a technical point, and we are instructed to highlight that our client has had difficulties with conference calls and video conference calls, as there is, from time to time, difficulties in hearing people that have dialled in and a loss of communication during such calls.

4. Consequently, our client will not be afforded a reasonable opportunity to make a presentation before the shareholder votes.

5. In the event that a "shareholder's meeting" is convened on 30 April 2019, our client will be denied the opportunity to put forward relevant information and to ensure that the decision-maker is appropriately and adequately informed before taking such a decision. As a result, any proposed resolution passed to remove our client as director will be invalid and will fall to be set aside.

6. "Our client cannot be denied his statutory right before the shareholder votes to adopt a resolution for his removal, and our client is entitled to be furnished with reasons for his intended removal in order for him to make a meaningful presentation. In this regard, we refer you to the case of Pretorius and another v Timcke and others (15479/14) [2015]ZAWCHC (June 2015) at paragraph 9".

….

[27] Natmed responded on 30 April 2019, denying that it was in breach of the Act and recorded that the meeting would proceed on that date. The Applicant did not attend the meeting, and the meeting proceeded in his absence, where a decision was taken to remove him as a director.

[28] The Applicant contended that his removal was in breach of section 71(2)(b) of the Act on the basis that;

(a) No reasons were given to the Applicant regarding why his removal as a director was proposed in order to enable him to make representations.

(b) The notice to remove the Applicant was evidently given short of the statutorily required 10-day period.

(c) The shareholder's meeting that took the decision to remove him was held telephonically in breach of section 63(2)

(d) the notice of the meeting was given less than ten days before the meeting in breach of section 62(1)(b).

Discussion

[29] It bears mentioning outrightly that section 71 of the Companies Act 71 of 2008 draws a clear distinction between the removal of a director by the company's shareholders and instances where the board of directors seek to remove a director. Section 71 reads, in relevant part:

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

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

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a

presentation, in person or through a representative, to the meeting before the resolution is put to the vote.

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company-

(a) has become-

(i) ineligible or disqualified … ; or

(ii) incapacitated ... ; 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 the vote.

(5) …

(6) …

(7) …

(8) If a company has fewer than three directors-

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c)subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in

terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for-

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) … ’

[30] It was submitted by Mr Budlender SC for the applicant that section 71(2)(b) requires as a prerequisite for removing a director that reasons for the proposed removal be given to the director prior to the decision being taken. He argued that the section does not contemplate a director only making representations against the intended conclusion but also the actual basis and reasoning leading to that conclusion. He submitted further that the interpretation that a director is not entitled to the reasons for the proposed removal would simply make the provisions of section 71(2)(b) meaningless as the Applicant could not make representations when he did not know the reasons for his removal as a director.

[31] Counsel relied on the Western Cape decision of **Pretorius and Another v Timcke**[2] as authority for the proposition that the requirement that the director be given a reasonable opportunity to make a presentation should be read to require that reasons for the proposed removal be given to the director prior to the decision being taken.

[32] In that case, shareholders gave notice to the directors of their intention to remove them by way of a resolution. The director’s representative attended the meeting and requested the reasons the shareholders proposed to remove the directors. The shareholders maintained that the directors were not entitled to reasons but stated that the shareholders no longer wanted the applicants to remain as directors. The shareholders proceeded with adopting a resolution to remove the directors. The court declared the resolutions taken to remove directors invalid and set them aside. The court stated:

[2] (15479/14 [2015] ZAWCHC 215 (2 June 2015)

“[10] I respectfully disagree with the argument postulated in support of the opposition of the relief claimed. Whilst the Act requires less of the shareholding in the removal of a director/s, the affected director/s indeed have a statutory right to be heard before the shareholders' vote to adopt a resolution for his/their removal. A reading of the record of the proceedings at the shareholder's meeting illustrates that when the applicants' representatives were informed that the "reason" for their proposed removal was that the shareholding no longer wanted applicants to serve as directors, they were in my view merely advised of their finding or conclusion and indeed not furnished with a reason. The reason/s forming the basis for such finding or conclusion remained unknown. To read into the provision that an affected director can make representations without being furnished with reasons for his or her intended removal, would render the wording of the provision superfluous and without effect. Its simple interpretation would be that the applicants had to be afforded with reasons in order that they could make representations in respect thereof and meet their case accordingly.

[11] In my view therefore the reason was never given by the shareholders and consequently without such reason being made known, the applicants were not afforded the fundamental right to be heard. By not knowing the reason for their proposed removal, they could not exercise their right to be heard as they undoubtedly did not know on what issue/s to state their case. Rules of natural justice and the fundamental principle of audi alterem partem presupposes the right to place facts and evidence before the decision maker A prelude to the exercise of the right includes the right to obtain information, particulars or documents so as to place the affected person in a position to meet the case that need be answered. The Respondents wanted to avoid this situation from arising again. The argument by Mr. Loots that they nonetheless had an opportunity to make representations, is in my view incorrect as the applicants' representatives would not have known what information to place before the shareholders which would be relevant and apposite to the reason/s for their intended removal.

[33] But can the requirement that the director be afforded "*reasonable opportunity to make a presentation"* be read to require that reasons for the proposed removal be given to the director prior to the decision being taken? I am constrained to disagree. It would appear that the Western Cape High court has impermissibly resorted to the remedy of reading in circumstances where the Act is clear and the reading in not warranted.

[34] In Hyundai[3], the Constitutional Court cautioned that:

> "It follows that where a legislative provision is reasonably capable of a meaning that places it within constitutional bounds, it should be preserved. Only if this is not possible should one resort to the remedy of reading in or notional severance."

[35] The requirement that shareholders must furnish a director concerned with the reasons for the proposed resolution in advance is expressly provided for in section 71(3) of the Act. The section provides for instances where the removal of a director is sought by the board of directors. The director concerned must be given notice of the meeting, a copy of the relevant resolution accompanied by a statement of reasons for the resolution, which is detailed enough to enable him to formulate a response. Secondly, the decision by the board of directors to remove a director is subject to review by a court to ensure that removal is procedurally and substantively fair.

[36] Where shareholders seek, the removal of a director, Section 71(1) does not require shareholders to provide the director concerned with a statement setting out the reasons for the proposed resolution as in the case where the removal is by directors. The legislature has deliberately preserved the right of the majority shareholders to remove a director who they no longer support. Directors serve at the behest of shareholders who elected them. The shareholders can remove them at will without having to provide reasons.

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[3] Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[37] Counsel, as in the case of **Pretorius**, placed reliance on the decision of the Constitutional Court in **Minister of Defence and Military Veterans v Motau and others**[4]. The **Motau** decision is distinguishable from the current case. In that case, the issue that arose for decision was whether the Minister had shown good cause for her decision to terminate the two directors' membership of the board. The termination of their services was undertaken in terms of section 8(c) of the Armscor Act, which permits the Minister to remove a board members on good cause shown.

[38] The court in dealing with the procedural constraints on the exercise of the Minister's 8(c) power, held that the Minister had to comply with section 71(1) and (2) of the Act as it is the procedure by which the Minister exercises her section 8(c) power. At paragraph 79 the court explained:

> "It would not lead to an absurdity to hold that the Minister, as sole shareholder for these purposes, was obliged to comply with section 71(1) and (2) in the circumstances of this case. For the purpose of those provisions is not only to ensure that a majority of shareholders assent to a decision to dismiss a director, but also to ensure that those whose interests may materially be affected by the decisions taken are given an opportunity to put forward relevant information, and to ensure that the decision-makers are appropriately informed before taking a serious decision". *(own underlining)*

[39] Section 71(1) does not require shareholders to have a reason for wanting to remove a director. In my view, shareholders cannot, therefore, be obliged to give reasons in advance as this was not the legislature's intention.

Inadequate notice

[4] 2014 (5) SA 69 CC para 73

[40] The Applicant elected not to make representations for consideration by the shareholder, submitting that the notice for his removal was short of the statutorily required 10-day period. It is so that the Applicant did not consent to the shorter notice period and has objected to the meeting taking place on short notice. In my view, even if the Applicant was given the entire statutory notice period, he would still have not taken the opportunity to make representations at the meeting as his attitude was that he could not have participated and made representations when he did not know what exactly he needed to address.

[41] Though short of what is statutorily required, the notice period did not prejudice the Applicant to warrant the setting aside the shareholders' decision in exercising a statutory right that they possess. Nothing in section 71 deprive the Applicant of the right he may have at common law or otherwise to claim damages for loss of office as a director for non-compliance with the required notice period.

Non-suitability of the meeting over electronic means

[42] On common cause facts, there were difficulties in the past with telephonic means of communication. Applicant submits that as someone entitled to participate and to make representations, the meeting of such nature ought to have not proceeded telephonically and doing so was in breach of section 63(2)[5] of the Act and would have had the effect denying him an opportunity of making representation in person in terms of section 71(2).

[43] Section 71(2)(b) affords the Applicant a reasonable opportunity to make a

[5] Unless prohibited by its Memorandum of Incorporation

a shareholders meeting to be conducted entirely by electronic communication; or one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, so long as the electronic communication employed ordinarily 10 enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting.

representation, in person or through representative 'to the meeting' before the resolution is put to the vote more. The Applicant does not explain why he did not instruct his attorneys to participate in the meeting on his behalf if he personally had difficulties. The attorneys were entitled to attend or participate telephonically and raise the Applicant's complaint at the meeting. This, in my view, also could not be said to have prejudiced the applicant rendering his removal unlawful.

[44] Even if I am wrong in my finding that it was competent for the shareholder to remove the applicant as a director without having to give reasons in advance for its decision, the applicant cannot insist on remaining a director in the circumstances where the shareholder no longer have trust that he can conduct the affairs of the company to its liking. The relationship of trust has broken down irretrievably, as evidenced by the dispute over salary and bonuses and the eventual decision to remove him. The appropriate remedy, in my view, lies in a claim for damages for loss of office as a director as contemplated in section 71(9)[6] of the Act. A declaratory order that he be reinstated as a director fall to be dismissed.

[45] The order

In the result, the following order is made

a. The first respondent is ordered to pay the applicant an amount of R95 000 plus VAT in outstanding director's fees;

b. The first and second respondents, jointly and severally, the one paying the other to be absolved, are order to pay the applicant a discretionary bonus of R100 000.00 in respect of the financial year ending February 2018.

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[6] S 71(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for— 5 (a) loss of office as a director; or
(b) loss of any other office as a consequence of being removed as a director

c. The Natmed written directorship agreement falls be rectified by removing reference to an entity described as "Natmed (Proprietary) Limited" with registration number "[....]" and replacing it with "Natmed Medical Defence Proprietary Limited" with registration number "[....], wherever the former appears.

d. The respondents to pay the costs

K E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

Counsel for Applicant:	Advocate S Budlender SC Advocate Y Peer
Attorney for Applicant:	Edward Nathan Sonnenbergs Inc
Counsel for Respondent:	Advocate L Morrison SC
Attorney for Respondent:	Bouwer Cardona Attorney