 REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NUMBER: 12476/2015

DATE: 4 AUGUST 2015

In the matter between:

LINDIWE MTHIMUNYE-BAKORO Applicant

And

THE PETROLEUM OIL AND GAS CORPORATION OF SOUTH AFRICA (SOC) LIMITED 1st Respondent

GILLIAN NONHLANHLA JIYANE 2nd Respondent

J U D G M E N T

DAVIS, J:

INTRODUCTION:

This case concerns corporate governance, the animating idea of which is to ensure net gains in wealth for shareholders, protect the legitimate concerns of other stakeholders and improve efficiency, organisational performance and resource allocation. To this end, through a process of development, the

common law has imposed a series of duties and responsibilities upon directors, in essence these being:

(1) A set of fiduciary duties, that is the duty to avoid conflicts of interests, to act honestly, to promote the best interests of the company, not to usurp corporate opportunity, not to take secret profits, not to fetter votes and to exercise powers for the purpose for which they were granted and not for any collateral purpose.

(2) The duty of care, skill and diligence, which essentially amounts to the duty to manage the affairs of the company in the same manner as would be done by a reasonably prudent person of business.

This application raises a number of questions concerning the application of these principles, their purpose and the relationship of the common law to the Companies Act 71 of 2008 ('the Act'). It was launched as a matter of urgency in which the applicants seeks to challenge the lawfulness of certain meetings of the first respondent's board of directors and a decision and resolutions made and passed at such meetings.

The applicant is an executive director of first respondent and its chief financial officer. The first respondent is the Petroleum Oil and Gas Corporation of South Africa (SOC)

Limited. First respondent is a subsidiary of the Central Energy Fund (SOC) Limited, which is a state owned entity reporting to the Department of Energy. It is therefore a public entity as contemplated by the Public Finance Management Act 1 of 1999 (see Schedule 2) and has been described as the national oil company of South Africa. The second respondent is the interim chairperson of first respondent, who chaired the meetings which are the subject matter of this dispute.

The application was initially launched on 2 July 2015. In terms thereof the following relief was sought:

(1) Declaring the meeting of first respondent's board of directors held on 18 June 2015 to be unlawful.

(2) Declaring any decision taken at such meeting to suspend the applicant as employee and / or chief financial officer of first respondent to be invalid and of no force and effect.

(3) Declaring the purported resolution of the board of directors taken at such meeting to be invalid and of no force and effect.

(4) Further ancillary relief, in particular in respect of the provision of minutes of meetings and first respondent's governing documents.

First respondent's board of directors comprises of 8 non-executive directors and 2 executive directors namely, applicant and Ms Nosizwe Nokwe-Macamo who is the group chief executive officer ('GCEO') of first respondent. It is further common cause that the executive directors of first respondent, the applicant and the GCEO were not notified nor invited to the meeting on 18 June 2015.

The background to this meeting is set out comprehensively in the answering affidavit, upon which averments I am entitled to rely. The relevant facts can be summarised thus: During December 2014 it came to the attention of the board that first respondent was expected to declare a substantial loss of several billion rand for the financial year ending March 2015. Consequently the first respondent performed far below by the target performances which had been expected. According to the answering affidavit, which was deposed to by Mr Sebothoma, an attorney acting as the company secretary of first respondent, the loss at the time of the deposition of the affidavit was projected to be in the order of R4.58 billion, which incorporated an impairment charge of approximately R5.4 billion.

This loss was later revised in May 2015 in the amount of R14.89 billion of which approximately R14 billion relates to an

impairment charge. These losses have received much publicity in the press during and subsequent to the launching of this application.

The board then commenced a process of seeking to establish the cause of these losses and the poor performance of first respondent.

It formed the *prima facie* view that the poor financial performance could be attributed, at least in part, to the applicant's conduct in the light of the fact that management controlled the financial affairs of first respondent and the financial health of first respondent fell within applicant's duties and responsibilities as the group chief financial officer. The board also held the *prima facie* view that the applicant had committed acts of serious misconduct and had possibly been involved in contraventions of the provisions of the Public Finance Management Act.

Accordingly, first respondent determined that an investigation was required into the causes of the substantial losses and the poor performance generally, together with applicant's possible role in this poor performance and the losses which had been incurred pursuant thereto. According to the answering affidavit "the board's concerns regarding the first respondent's

financial predicament cannot be overstated."

The first respondent is a state-owned entity and subject to the PFMA. Not only is the first respondent likely to report a significant loss of approximately R15 billion but it will have also have failed to meet key performance targets for the year. It was therefore determined by the board that the applicant could not remain in her position, pending the outcome of the investigation and any disciplinary enquiry that may follow thereafter. There were further concerns regarding the potential negative impact of the applicant's continued presence and leadership position during this investigation. It was also pointed out that the applicant, given her senior position, exerts influence over employees who are answerable to her.

Applicant's presence in the workplace would simply not be viable during this comprehensive investigation to the board required to be undertaken. Accordingly, the board decided that the applicant and the GCEO would be approached to establish whether they would be prepared to go on what is generally known as "garden leave", pending the outcome of the investigation. A meeting was held between the applicant and the second respondent and was also attended by Ms Kgadi Kekana, in her then capacity as company secretary. At the meeting applicant was advised of the board's decision that she consider taking "garden leave" on full pay, pending the

outcome of the investigation.

Applicant requested time to consider the proposal and later advised second respondent she was not prepared to take voluntary leave. The first respondent then imposed a cautionary suspension on full pay of both applicant and the GCEO. The meetings held with the applicant in person and the meetings of the board were attended by both the second respondent and Kekana as company secretary.

On 2 June 2015 first respondent addressed a letter to the applicant in which she was advised of the board's proposal to place her on a precautionary suspension. She was advised that the board held the *prima facie* view that her precautionary suspension was justified and necessary because:

(1) Her continued presence at the premises could potentially compromise the integrity and obstruct the investigation.

(2) There was a possibility that she may interfere with or influence, intimidate or attempt to influence or intimidate possible witnesses and;

(3) This may jeopardise first respondent's business.

Accordingly, she was called upon to make representations as why this decision should not be taken. She was also advised

that, if her precautionary suspension was confirmed, it was the board's intention to suspend her as a director. Following this letter of 2 June 2015, applicant and first respondent's attorneys exchanged a series of letters. Essentially it appears that the applicant's attorneys requested further information and documents to which letter first respondent's attorneys responded.

On 15 June 2015 applicant's attorney addressed a letter to the first respondent's attorneys which, despite including further complaints regarding the paucity of information which had been provided to the applicant, contained a set of representations. In the letter, which runs to 11 pages, applicant's attorney noted that first respondent's disciplinary code and procedure records that the purposes thereof is to "ensure that the principles of natural justice are applied" and that one of its primary objectives "is to ensure a thorough investigation of all the facts by management prior to implementing disciplinary action."

The letter then suggests that the applicant was entitled to far greater detail than had been provided to her. It continues:

> "[I]t is difficult for our client to understand whether the concern is a performance issue of

disciplinary issue. Be that as it may, clause 9.3 of the code, more particularly clause 9.3.4 thereof, provides that the suspension of an employee until a hearing can take place would only be permitted if "the case warrants it" and should an investigation "into the matter be a reason for delay" ... Once again, our client is entitled to know what the reasons for the proposed suspension are, what investigation is required and what is to be investigated, in order to assess whether "the case warrants it (more particularly her suspension)."

The letter then continues:

"[I]t is of the utmost importance to the company that our client is able to continue with the work that she is currently busy with, including *inter alia* her work on;

26.1 securing support for the company's unfounded liability which, if not resolved, will, in all probability, result in a qualified audit being reported to the Auditor General;

26.2 concluding the trade finance facility of approximately USD$100m which is in the process

of having term sheets negotiated and will have a significant impact on easing the pressure on working capital;

26.3 leading the cost optimisation project which has already shown substantial benefits for the company in cost savings ... and progressing with the already initiated asset optimisation and revenue enhancement projects;

26.4 the turn-around strategy for the company."

The attorney for the applicant then contended that the applicant's presence at work was not an aggravation or a disruption and that this was supported by the fact that during the week prior to the letter being generated, applicant was, amongst other responsibilities, entrusted to travel to London to report to various of first respondent's insurers as part of its offshore insurance renewal program and to ease concerns with regard to first respondent's current financial position and leadership instability.

Following this letter, a meeting of the non-executive directors of the first respondent was called for on 18 June 2015. It appears that the primary purpose of this meeting was to consider the precautionary suspension of the applicant and the GCEO. All of the first respondent's directors, save for

applicant and the GCEO, were given notice of the meeting. The meeting was then attended by all of the 9 non-executive directors who were invited, apart from Mr Hlatshwayo, who tendered an apology. It appears that he has subsequently resigned as a director. The first respondent's attorneys of record were also invited to speak at the meeting and advise the members of the board. At that meeting the board decided to place the GCEO and applicant on precautionary suspension. All but one of the non-executive directors who attended voted in favour of this decision.

THE ESSENCE OF APPLICANT'S CASE

Mr Bembridge, who appeared on behalf of the applicant, submitted that respondent's conduct, as I have outlined it, contravened not only the law but also fundamental principles of proper corporate governance. The meeting of 18 June 2015 was in violation of these principles. Thus, it stood to be declared unlawful and the decisions and resolutions taken and passed at the meeting had to be declared invalid and of no force and effect. In this connection he cited the judgment in South African Broadcast Incorporation Limited v Mpofu and Another [2009] 4 ALL SA 169 (GSJ) in which a full bench approved certain basic principles of corporate governance relying, *inter alia,* on the King Report on Corporate

Governance for South Africa (which is referred to as the King Code).

In essence, Mr Bembridge submitted that the board, in its entirety, is the principle focal point of good corporate governance. It follows that the fiduciary duty the directors owe to each other is thus paramount. The central purpose of corporate governance is the accountability of senior management and the board of a company because of the extensive powers vested therein. Given the synergy which takes place with individuals possessed of different skills, experience and background, the board structure with executive and non-executive directors interacting one with the other remains appropriate for a South African company.

Meetings should include mechanisms that render the former efficient and timely. Board members should be briefed prior to meetings and should take responsibility for being objectively satisfied that they have been furnished with all the relevant information and facts before making a decision. Although non-executive directors may meet separately, the attendance of executive directors at board meetings has a considerable value for a diversity of approach which is important to the formulation of the best decisions in favour of the company. A board has a collective responsibility to provide effective

corporate governance. It should exercise leadership, enterprise, integrity and judgment in directing the affairs of the company.

Accordingly, the core principles of good governance dictate that resolutions should be properly taken at meetings after due and careful deliberation. A company is entitled to the benefit of the collective wisdom of all the directors present at meetings and not merely those of the majority. Essential to the principle of corporate governance, Mr Bremridge submitted, is that majority directors should not be permitted to exclude minority directors from board meetings or from voting thereat on the ostensible basis that minority directors are precluded as a result of a conflict of interest.

This is particularly appropriate, he contended, in a case where a public enterprise is involved and where principles of good corporate governance and best practice must be strictly adhered to in the interest of the public. The minority directors are entitled to all relevant information and to an opportunity of stating their views, even though they may ultimately have to submit to a majority decision, on the basis of the doctrine that the directors of the company are under duty to use their voting powers for the benefit and the interests of the company and not of any particular person. In general, it was justified to

describe these principles as established in our law. See for example the magisterial judgment of Colman, J in Novick and Another v Comair Holdings Ltd and Others 1979 (2) SA 116 (W) at 128, in which these principles are set out with clarity.

Applying these principles Mr Bembridge submitted that the suspension of a high profile chief executive officer in a public sector enterprise, which is directed to observe principles of good corporate governance and practice, was a matter which required the strictest adherence to these principles. He noted that in Mpofu's case, the Court had found, on the basis of these principles that, notwithstanding the perceived conflict of interest regarding a possible suspension, the chief executive officer and director in question was entitled to participate fully throughout the meeting. A decision to exclude him and two executive members from a meeting at which a decision to suspend the director as the CEO was taken upon the reliance of a conflict of interest, prevented the director from discharging his duties and precipitated a fatal flaw in the process conducted by the board.

In the circumstances the Court in Mpofu had held that due to the absence of meaningful notice of the meeting, exclusion of respondent and the other executive directors from substantial portions of the board meeting and a failure to ensure proper deliberation amongst members of the board, there had not

been a properly convened meeting, no business was validly transacted and the resolution of the meeting had to be set aside. Mr Bembridge submitted that the fundamental principle that could be gleaned therefrom was that a meeting of a board would be invalid and unlawful where a director has been excluded from full participation therein, save where the exclusion could be shown to be justified.

It is this latter concept which holds the key to this entire dispute.

Before dealing with the merits of the competing attempts to answer this question, it is necessary to deal with a preliminary point that was raised by the respondents regarding the jurisdiction of this Court.

JURISDICTION

Mr Muller, who appeared together with Ms Ioannou, on behalf of the respondents, submitted that this Court does not have the necessary jurisdiction to consider the relief which applicant sought, notwithstanding that it was framed as a challenge to the validity of meetings and decisions which had been taken. In this regard he relied on a decision in Wicks v S A Independent Services (Pty) Ltd and Another [2010] JOL 25715

(WCC). Mr Muller contended that this decision was "on all fours" with the present case.

In that case Zondi, J (as he then was) framed the question for determination as follows:

> "The only question with regard to jurisdiction is whether this Court had jurisdiction to determine the issue whether the applicant's purported suspension was null and void by reason of the respondent's failure to call a properly constituted board meeting to effect such suspension." para 34.

In Wicks, applicant had launched an urgent application declaring that his suspension from employment with first respondent was void and of no effect. The Court held that the applicant should have approached the CCMA with a case based upon an alleged unfair labour practice in terms of the Labour Relations Act 66 of 1995. Zondi, J reasoned thus:

> "In my view suspension of an employee by an employer based upon an unlawful conduct which is violative of either the company law or common law constitutes an unfair suspension of which the

> Labour Relations Act fully provides for remedies under section 193. It is therefore incorrect to contend that an employee whose suspension is unlawful has no remedies under the Labour Relations Act.
>
> By characterising the manner in which his suspension was obtained as unlawful, the applicant could have his case heard in the High Court, but yet if he characterises the same conduct as unfair he could have it heard in the Labour Court. This approach clearly defeats the object which the Legislature intended to achieve through the enactment of the Labour Relations Act. In my view it also places emphasis on the form of conduct and not on its substance. The real intention of the applicant is to obtain reinstatement as management director by having his purported suspension declared null and void."

In the present case the relief sought is for a declaration that meetings of the board of first respondent are unlawful and that, consequently, decisions taken thereat affecting the applicant and the general chief executive officers were invalid. All of these disputes fall firmly within the domain of the Companies Act 71 of 2008, and if not, the common law

regulating the duties and responsibilities of directors. The interpretation of certain provisions, in particular section 75 thereof, and in the alternative, the relevant common law, holds the key to the resolution of the dispute.

To the extent therefore that this case has been framed and litigated in this manner, it is in my view distinguishable from Wicks (*supra*); hence the *in limine* point raised by respondents stands to be rejected.

THE SUBSTANCE OF THE DISPUTE

With this finding in mind I can return to the substance of the dispute. Central to respondents' answer to applicant's case was that a further meeting of the board was held on 13 July 2015. The primary purpose of this meeting appeared to be for the board to consider, indeed to reconsider, the decisions which were taken at the meeting of 18 June 2015 to suspend the applicant and the GCEO. The applicant and the GCEO were both given notice and attended this meeting.

As appears from the agenda circulated with the notice of 9 July 2015, the main purpose of this meeting was to consider this application and to reconsider the resolution to suspend the two officers. It was attended by all the directors. The applicant

and the GCEO participated in the meeting via a video conference link from respondents' offices in Sandton. At the meeting the second respondent noted that the applicant was conflicted regarding the issues and the agenda that related to her. The applicant differed and indicated that she did not agree as the issues did not involve her financial inferences.

The chair pointed to the provisions of section 75(4) and (5) of the Companies Act and invited the applicant to address the board in this regard, which she so did. After receiving the applicant's representations and further complaints concerning the provision of insufficient information, the board requested the applicant to excuse herself from the meeting in order that it could commence deliberations on the issues affected. The applicant then left the meeting. After both the applicant and the GCEO had been excused, the board debated the proposed resolutions and resolved *inter alia* to confirm (and to reconfirm) the decision which it had initially taken on 18 June and to the extent necessary resolved afresh to suspend the applicant.

As a result, the applicant launched an application for leave to amend her notice of motion to include *inter alia* a challenge to the validity of the meeting of 13 July and the decisions taken there at in relation to her and the GCEO. I should add that

leave to amend included a challenge to the decisions that related to the GCEO; notwithstanding that decisions taken regarding the GCEO were not challenged in the original notice of motion, neither by applicant nor by the GCEO who is not before this Court.

Respondents' opposed this particular amendment, particularly in relation to the relief sought insofar as the GCEO is concerned.

Given the change of focus of the meeting of 13 July, it appears possible to summarise the dispute between the parties and the issues which now fall to be determined as follows:

(1) Whether, in the light of the meeting of 13 July and the decision taken at that meeting, the relief sought by the applicant in respect of the 18 June meeting has become moot?

(2) If this relief is not moot, or if it is otherwise necessary for the Court to consider the issue, whether the meeting of 18 June and the decision taken thereat to suspend the applicant was valid?

(3) The validity of the 13 July meeting and the decision taken at that meeting to suspend the applicant.

I should add that applicant also sought certain ancillary relief

in the form of the delivery of certain minutes of meetings and first respondent's memorandum of incorporation. In this regard the first respondent contends that it has not finalised its memorandum of incorporation but its articles of association were annexed to the opposing affidavit. First respondent avers further that the applicant has never previously sought these documents from first respondent. Had she done so they would have been provided to her. Applicant also seeks delivery of minutes of certain meetings which had been held. Respondent contends, that nowhere in her papers has she explained the basis upon which she claims such orders.

In any event, respondent contends no minutes of the meetings of the full board or of any committee meetings of the non-executive directors of the board since 22 May 2015 exist.

MOOTNESS

Mr Muller submitted that the 13 July meeting addressed the sole concern raised by the applicant regarding the meeting of 18 June and as a decision to suspend the applicant was confirmed at the 13 July meeting, the principal relief sought by the applicant in its notice of motion as regards 18 June meeting has become moot.

By contrast, Mr Bremridge referred to the following issues in relation to the meeting of 13 July:

(1) Applicant requested certain documents to enable her to prepare for the meeting and to participate therein; in particular the minutes of the previous meeting, the 18 June 2015.

(2) First respondents' articles of association and as yet signed memorandum of incorporation were not provided until approximately 17h00 on 13 July 2015 being some 19 minutes before the meeting was due to commence.

(3) The applicant avers that she did not have sufficient opportunity to consider or take advice thereon.

(4) The request for further information was refused.

(5) The agenda for the meeting on 13 July 2015 reflects that there would be a consideration or reconsideration of the decisions taken at the meeting of 18 June 2015; yet the respondents refused to provide the applicant with copies of the notes or draft minutes of this meeting.

Mr Bremridge submitted that applicant, having been excluded from the prior meeting of the 18 June, could not be expected to contribute to a process designed to consider or reconsider

decisions taken thereat without access to this set of documentation. Mr Bremridge noted further that the second respondent chaired the meeting held on 13 July 2015. She noted that the applicant was conflicted in regard to the matters for consideration of this meeting before the applicant had an opportunity to address the board on it and before the board had an opportunity to debate this.

In short, she had clearly predetermined the issue. Applicant was, in Mr Bremridge's view, permitted to make representations of the meeting as to the perceived conflict of interest as referred to by the chairperson. There was no further consideration or debate between the directors on the issue of any conflict, at this stage. Applicant's representations in this regard together with the objections of the short notice, the failure to provide the requested information were dismissed out of hand and she was then obliged to leave the meeting. Mr Bembridge noted that the GCEO was then permitted to make representations in relation to the alleged conflict of interest. Again there does not appear to have been any further consideration or debate on this issue between the directors and she was excluded from further deliberation or discussion. Accordingly the GCEO was also obliged to leave or be recused from the meeting.

With these facts as his basis Mr Bremridge again invoked *dicta* from the Mpofu decision to which I have already made reference:

> "The chairperson appears to have unilaterally and without proper deliberation with all the members of the Board, made a decision to exclude the respondent based on a perceived conflict of interest. The entire deliberation of this aspect should have been debated by the directors and minuted."

Mr Bremridge submitted further that this is exactly what happened at the meeting of 13 July. In his view, the executive directors were excluded from the meeting on the basis of a perceived conflict of interest without any proper determination or debate as to whether they were conflicted on the matters for consideration at the meeting.

Much of the debate therefore turned on the justification for this exclusion. In this regard the justification was sought to be found in section 75(5) of the Companies Act, together with paragraph 74 of the articles. It is to these sections that I must now turn.

THE COMPANIES ACT

To the extent that it is relevant, section 75(5)(d) and (e) of the Act deal with the presence at or participation in any deliberation by a board of a matter in which a director has a personal interest. Section 75(5) reads thus:

> "If a director of a company, other than a company contemplated in subsection (2)(b) or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board or knows that a related person has a personal financial interest in the matter, the director:
>
> (a) must disclose the interest and its general nature before the matter is considered at the meeting.
>
> (b) must disclose to the meeting any material information relating to the matter and known to the director.
>
> (c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors.
>
> (d) If present at the meeting must leave the meeting immediately after making any

disclosure contemplated in paragraph (b) or (c).

(e) must not take part in the consideration of the matter except to the extent contemplated in paragraph (b) and (c).

(f) while absent from the meeting in terms of the subsection

(i) is to be regarded as being present at the meeting for the purposes of determining whether sufficient directors are present to constitute the meeting and

(ii) is not to be regarded as being present at the meeting for the purpose of determining whether the resolution has sufficient support to be adopted and

(d) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board."

This section must be read together with the definition of personal financial interest contained in section 1 of the Companies Act. This provision reads thus:

> "Personal financial interest, when used with respect to any person:
>
> (a) means a direct material interest of that person of a financial, monetary or economic nature or to which a monetary value may be attributed, but
>
> (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investments Schemes Act 2002 ... unless that person has direct control over the investment decisions of that fund or investment."

The purpose of section 75 is set out in the description of the equivalent provision of section 175 of the Companies Act to the United Kingdom of 2006 by Charlesworth Company Law (18th Edition), at 346:

> "A statute provides a mechanism for directors avoiding liability stemming from conflicts of interest. In essence s 175 provides that a director bears an obligation to avoid even potential conflicts of interest although that duty

does not exist if the directors have authorised the conflict of interest or if there is not likely to be any reasonable conflict of interest."

It is instructive to refer, in the context of the suspension of applicant, to section 71(3) of the Act, which deals with the removal of directors. It provides thus:

"If a company has more than two directors and a shareholder or director has alleged that a director of the company (a) has become ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a);or

(2) incapacitated to the extent that a 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 the director,

the board, other than the director concerned, must determine the matter by resolution and may remove a director who it is determined to be an ineligible or disqualified, incapacitated or

negligent or derelict as the case may be."

When this occurs section 71(4) provides:

> "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."

If Mr Bremridge's submission is correct, a board of a company, such as first respondent, in dealing with an executive director against whom serious allegations are made, would not be able to deliberate without the participation of the director, when considering her temporary suspension as an executive, whereas, if removal was contemplated, it could so do.

Applicant's interpretation would also place on extremely strict construction upon the meaning of personal interest as to permit full participation by the director who is the very subject matter of the deliberations of the board.

In my view, this construction is incongruent with the purpose of section 75. Recall that prior to the 2008 Act, where the articles permit a director to have an interest in a contract with a company subject to the approval of a general meeting, a director who has such an interest and who is also a member entitled to vote at such in general meetings, may vote at the meeting on a resolution to prove the contract unless the articles provide otherwise and provided his doing so does not involve a fraud upon the minority. Henochsberg On the Companies Act 71 of 2008 at 289. This suggests that section 75 sought to constrain the participation of a director with such an interest as compared to the pre-2008 position

This conclusion drives the judgment back to an examination of the decision in Mpofu *supra*, which was the essential authority relied upon by Mr Bembridge. In Mpofu the 14 day notice period prescribed by the articles was not given to any of the directors. The applicant was given only one minute's notice of the meeting. He was then asked to explain the suspension of one Dr J Zikalala and then requested to leave the meeting.

The remaining board members thereafter passed a resolution suspending him due to his divisive and disruptive conduct. Two of the board members were not present at the meeting.

The applicant had virtually no notice of the meeting, was not advised that its purpose was to consider his suspension and was invited to address the board on a topic which was not the basis upon which the decision to suspend was made in his absence.

In addition there were several other irregularities in relation to notice and the composition of the meeting. In her judgment Victor, J relied extensively upon a judgment of Seligson, AJ in Trans Cash (SWD) (Pty) Ltd v Smith 1994 (2) SA 295 (C), in particular at 305 F-306 C:

> "In effect what occurred in the present case assuming that Ewald was in fact a director and that there was accordingly a quorum, was that a majority of the directors purported to pass a resolution otherwise and at a board meeting, without giving the other director any opportunity to influence the passing of the resolution. This is contrary to the basic democratic principle of our company law namely, that the minority is entitled

to an opportunity by means of debate and discussion to persuade the majority to adopt its view of the matter."

There is however a further relevant *dictum* in this judgment at 306H, to which I must refer:

"Mr Rosenthal however contended that the common law principle underlying these principles was that the director was precluded from voting in any matter in which there was a conflict between his interests and those of the company. There is a fallacy in Mr Rosenthal's argument because it presupposes that a conflict of interest existed at the time. In order to establish this, respondents' alleged unlawful conduct *vis-a-vis* the company which he disputes will have to be investigated and established. This will involve entering into the merits. In the present case applicant itself sought a preliminary ruling without canvassing the merits. It cannot therefore rely on the allegations of respondent as if they had been proved in order to found the argument based on conflict of interest."

In this case, unlike Transcash, there was a manifest conflict of interest. It surely cannot be contended with any measure of justification that, when the decision of the board concerns the preliminary suspension of an employee, who happens to be a director, that director does not have a conflict of interest in the deliberations which have to be undertaken by the board. To the extent, however, that the *dicta* in Transcash are sought to be applied, in this case, unlike Trancash, there was a manifest conflict of interest. If, on the other hand, it is suggested that the facts in both cases are similar, then the dicta in Transcash can no longer hold the same force or application given the content of section 75 of the Act.

In addition, if the *dicta* in Transcash are construed to provide authority that the no conflict rule under common law extends to permitting a director to participate in a decision to suspend her, then it cannot be a correct reflection of the law.

Under common law, a director may not place herself in a position in which she has, or can have a personal interest, which conflicts or possibly conflicts with her duties to the company. See, for example, Robinson v Randfontein Estates Gold Mining Co Ltd 1921 AD 168 at 178-179. The test regarding conflict of interest said Innes CJ:

"rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest (e.g., by making a profit) at that other's expense."

Lord Herschell in Bray v Ford [1896] AC 44 at 51 captured the animating idea thus: 'human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty and thus prejudicing those who he is bound to protect'. See also Aberdeen Railway Co v Blaiker Bros (1854) 1 Macq 461 at 471; Bhullar v Bhullar [2003] 2 BCLR 241 (CA).

The common law principle of conflict of interest should be approached by courts on a common sense basis. Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606 at 637-638. Accordingly, if section 75 is construed narrowly as Mr Bremridge would have it, then recourse may be had to the common law which, save for express legislative exclusions remains the structure of company law upon which the superstructure of the Act rests. On these principles alone, the applicant was conflicted.

In her founding affidavit, the applicant sought to deal with these legal difficulties. She recognised the risk of damage to

her reputation by virtue of suspension to which a monetary value may be attributed but she said that as she had been suspended on full pay. Hence the decision of whether to suspend her did not impact upon any personal financial interest that she may have. However, given the purpose of the decision to suspend the applicant her continued employment with respondent might well be impacted following an investigation which her precautionary suspension was intended to facilitate.

Given the breadth of the definition of personal financial interest, as I have set it out, and the existing common law principle regarding conflict of interest, I agree with Mr Muller that, on applicant's own version regarding reputational damage and the possible implications for her employment with respondent, she would not, by virtue of the provisions of the Act or alternatively the existing common law be permitted to participate in meetings regarding her suspension.

In addition another factor which favours this conclusion is paragraph 74 of first respondents' articles of association which expressly preclude the applicant from participating in any decision in respect of her contract such as her contract of employment in which she has an interest:

> "Subject to the provisions of the Statutes, a director should not vote in respect of any contract or proposed contract with a company in which she is interested or on any matter arising therefrom and if he does so vote, his vote shall not be counted, provided that his article (sic) shall not apply where the company has only one director." (my emphasis)

To argue otherwise is to suggest that somehow the applicant could bring an independent and impartial mind to the deliberations of her own suspension, transcending her own interest and making an exclusive determination of what was in the best interest of the company. This would be so incongruent with the principles of corporate governance, as I have outlined them, and, as Mr Bremridge himself urged upon this Court, as set them out earlier in this judgment, as well as the common sense approach that should infuse the concept of conflict of interest to stand to be firmly rejected.

CONCLUSION

With these principles in mind, I return to the meeting of 13 July. Whatever the legality of the meeting of 18 June and, in my view, without deciding, the resolution of suspension may have been valid, given the law as I have outlined it, the latter

meeting holds the key to the resolution of this dispute.

What was different about the meeting of 13 July was that the applicant was given timeous notice, she attended the meeting, addressed the meeting before being excused from it prior to the resolution been taken.

Applicant's complaint appears then to fall within four categories:

(1) She was given insufficient notice of the meeting.

(2) She was not provided with sufficient information in order to participate.

(3) A view was formed that she was conflicted when she was not and she was compelled to leave the meeting.

(4) The meeting was called for an improper motive.

I need to deal briefly with each of these contentions.

NOTICE

The applicant was given reasonable notice of the meeting. Notice was given on Thursday, 9 July, which was 4 days prior thereto. This is entirely different to the situation of Mpofu's case. Sufficient time was given to all the directors to attend as is evidenced by the attendance of all the directors at the meeting, including the applicant and the suspended GCEO.

INFORMATION

Applicant complains that she was not given adequate information to properly formulate an opinion. First, she had made her opinion clearly known, in her detailed written representations of 15 June which I have sought to summarise earlier in this judgment. In that letter there was a comprehensive case made out as to applicant's attitude to the suspension. Secondly, there is a distinction that must be drawn between disciplinary proceedings which might lead to dismissal and a precautionary suspension, which is the subject matter of this dispute, for the burden on respondent in the latter case is far more onerous.

THE QUESTIONS OF CONFLICT

The applicant contends that she was not conflicted and that she should not have been required to leave the meeting. I have already found that this averment must be dismissed. There can be no rational basis for suggesting that a person who faces suspension has no conflict and can deal with the matter utterly impartially without taking their own interest into account, and only taking account of the company's interests.

IMPROPER MOTIVE

The applicant avers that the meeting of 13 July was called for an improper motive "in an attempt to avoid the previous unlawful conduct of the non-executive directors." First, the respondents defended the meeting of 18 June and the decision taken thereat. This is not necessarily an issue with which I have to deal.

The meeting of 13 July was held for the avoidance of any doubt. The applicant and the GCEO were invited, to avoid any further technical challenge. One has to ask rhetorically what more can be expected from the first respondent in this connection, on the assumption that legal procedure had not fully been followed on 18 June.

Even if the purpose of the meeting was to address an early invalid decision, it does not appear to me to be anything untoward and as such conduct and the motivation would not invalidate the meeting. See in this connection Cilliers and Benade Corporate Law (2000) at 132.

The essence of the relief sought by the applicant in her amended notice of motion was essentially the following:

> "The meeting of the board of directors of the first respondent held on Monday, 13 July 2015, be declared unlawful. Any decision taken by first respondent at such a meeting to suspend the applicant as an employee and / or chief financial officer with the first respondent, be declared invalid and of no force and effect. Any decision taken by the first respondent at such a meeting to suspend Ms Nosizwe Nokwe-Macamo as employee and / or group chief executive officer of the first respondent be declared invalid and of no force and effect."

This relief focusses correctly on the relevant meeting of 13 July. Once this meeting is held to be valid, this relief cannot be granted.

For all the reasons which have been set out, I can find no justification for the relief so sought. **ACCORDINGLY THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING THE COSTS OF TWO COUNSEL.**

_____

DAVIS, J