IN THE HIGH COURT OF SOUTH AFRCA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case no: 14243/20

In the matter between:

FRANCOIS JACOBUS KLOMP	Applicant
and	
WESTERN & EASTERN CAPE CONSULTING ENGINEERS (PTY) LTD	First Respondent
NORMAN EMILE VAN DER MERWE	Second Respondent
CAREL JACOBUS JANSE VAN RENSBURG	Third Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 27 OCTOBER 2020

SHER, J:

1. This matter came before me as an urgent application in the 3rd division on Friday 16 October 2020.
2. The applicant is a shareholder in, and former managing director of, the 1st respondent company ('WECCE'). He seeks an Order declaring that a meeting

which was held by the board of WECCE on 2 September 2020, as constituted by his co-directors (2nd and 3rd respondents), did not constitute a lawful and valid directors' meeting and that certain resolutions which were passed by them at such meeting, in terms of which he was suspended as an employee and the company was authorised to institute disciplinary proceedings against him in the event that these were warranted, were invalid and unlawful. He further seeks an Order declaring that the subsequent convening of such disciplinary proceedings, which are due to commence on 28 October (following a postponement from the original date of 8 October for which they were scheduled), should also be declared to be unlawful and invalid and should similarly be set aside.

3. The matter is opposed by the respondents on a number of grounds. In the first place they contend that the application constitutes an abuse of process, in that the applicant failed to approach the Court immediately after his suspension and waited until 5 October 2020 ie for almost a month before filing proceedings as a matter of urgency, setting the matter down for hearing on a day's notice 2 days before his disciplinary hearing was due to commence. In the second place they aver that inasmuch as the application effectively seeks to set aside the applicant's suspension as an employee it concerns an employment-related complaint, the adjudication of which falls within the exclusive jurisdiction of the Labour Court and/or the CCMA.[1]

4. After hearing argument I indicated that I would require time to consider my judgment, given that I had a number of other urgent matters to deal with.

The relevant facts

5. It is common cause that the applicant was not given notice of the meeting which was held on 2 September 2020 by 2nd and 3rd respondents, at which the resolutions referred to above were taken in his absence. How this came about is as follows.

6. Although the applicant originally was responsible for the company's financial affairs, over the course of the last year his duties in this regard have increasingly been assumed by 2nd respondent. During August 2020, 2nd respondent came to

[1] In terms of ss 157, 191 and 193 of the Labour Relations Act 66 of 1995.

be in possession of certain information and bank statements pertaining to an Absa bank account which was held in the name of WEC Private and Public Consultants (Pty) Ltd ('WECPPC'), a related entity in which the applicant has an interest and in respect of which he is also a director.

7. Certain transactions which were allegedly effected by the applicant, between WECPPC and WECCE via this account appeared to be irregular, and consequently on 27 August 2020 2nd respondent consulted with the company's attorneys in regard thereto. The upshot of the advice which he received pursuant to these consultations was that an investigation was required and that it might be necessary to suspend the applicant as a precautionary measure, in order that such investigation be carried out and the company be protected against any further harm pending the outcome thereof. Given the nature of the transactions concerned it was also necessary that 2nd respondent discuss the matter with the other shareholders and the applicant be given an opportunity to provide an explanation in regard thereto, prior to any decision being taken in regard to his possible suspension.

8. On 31 August 2020, 2nd respondent approached the applicant and asked him to provide an explanation in regard to the transactions in question. It is common cause that when confronted the applicant became very angry and did not provide an explanation. He complained that 2nd respondent had no right to go into the financial records concerned and indicated that he was going to consult an attorney.

9. On 2 September 2020, 2nd and 3rd respondents duly met and formally resolved that an investigation should be carried out and the applicant should be suspended pending the outcome thereof. According to 2nd respondent they considered that a suspension was warranted as the applicant was holding closed-door meetings with a number of employees and had terminated an auditor's mandate in respect of the affairs of WECPPC, and the respondents were concerned about the applicant's continued presence at the company's offices and feared that he might interfere with the investigation. In his answering affidavit 2nd respondent says that they were both acutely aware that the decision

was something in which the applicant had an interest as it affected him, but in their view it was not a decision which he could participate in given that he was the subject thereof. As a result, he was not given notice of the meeting.

10. On 9 September 2020 a formal letter of suspension, which had been vetted by the company's attorneys, was sent to the applicant. He was informed therein that 2nd respondent was in possession of bank statements of WECPPC together with a summary of certain payments which had been made from its bank account, as well as a list of transactions which had occurred between WECPPC and WECCE, which appeared to be irregular and which allegedly occurred without the knowledge and consent of co-shareholders. The applicant was informed that, in the light thereof he was suspended with full benefits pending the outcome of an investigation, and he was instructed to hand over his laptop together with his passwords and to refrain from transacting on the company's bank accounts and from attending on the company's premises. The applicant was also (again) asked to provide an explanation, by 14 September 2020, for the various transactions as contained in the bank statements and an attached Excel spreadsheet.

11. On 14 September 2020 the applicant's attorneys provided a response to the letter of suspension in which the applicant denied being involved in or benefiting from any financial irregularity or impropriety, but in which no explanation in respect of the transactions concerned was provided.

12. Instead, the applicant requested that he be provided with the notice, agenda and minutes of the meeting at which the resolution to suspend him had been passed. He also indicated that he was not prepared to hand over his laptop, which he claimed was his personal property, and in his view he was entitled to continue accessing the premises as he still was a director of the company.

13. There was no response to this letter. A further request for the documentation which was sought was addressed to the company's attorneys on 18 September, and again on 21 September 2020, on which occasion they were reminded that a response was still outstanding. In his letter of 21 September 2020 the applicant complained that the relationship between himself and the other shareholders had completely broken down and he threatened to launch an application for the

winding-up of the company, if a response was not forthcoming by the following day.

14. On 22 September 2020 the company's attorneys indicated that the investigation was in its final stages and they would be in a position to reply comprehensively to the applicant's letters, the following week. They requested that, in the meantime, the applicant should desist from continuing to make contact with other shareholders or employees, and the company's auditors.

15. On 29 September 2020, 3 weeks after his suspension, the applicant's attorneys addressed a further letter to the company's attorneys in which they complained that the applicant had been irregularly and unlawfully suspended as an employee and had as yet not received any response to his request for information and documentation pertaining to the decision to suspend him. They further indicated that as a result of the breakdown in the relationship between the applicant and the other shareholders they had received instructions to brief counsel to prepare an application for the winding-up of the company. However, once again no such application was forthcoming.

16. On 30 September 2020 the company's attorneys responded in a further letter in which they denied that the applicant's suspension was unlawful and indicated that a notice calling upon him to attend a disciplinary hearing would be forwarded later that day. They also attached a copy of the minutes of the meeting which had been held on 2 September 2020, which had been signed by the respondents the previous day. The minutes recorded that notice of the meeting had been given to all of the directors, except for the applicant, on account of their being a 'manifest conflict of interest' on his part. Later that day a 28-page charge-sheet which, as the applicant acknowledges contains a number of serious and far-ranging allegations of misconduct and financial impropriety on his part, was served on him, and he was called upon to attend a disciplinary hearing on 8 October 2020.

17. On 2 October 2020 the applicant's attorneys forwarded a communication in which they complained that the meeting at which the applicant had been suspended had not been lawfully convened. In this regard they averred that in terms of clause 7.3.1 of the company's memorandum of incorporation, decisions

of the company in meeting could only be adopted if each director had received prior notice of the matters to be decided upon. Consequently, it was alleged that the applicant's co-directors had no right or entitlement to avoid giving him notice of the meeting which was held on 2 September 2020, or to exclude him from it. In the circumstances it was contended that the meeting had not been lawfully convened and did not constitute a valid directors' meeting, and consequently all resolutions taken thereat, including the resolution to suspend the applicant and to authorize the convening of a disciplinary enquiry, were invalid. In their response, which was forwarded on the same day, the respondent's attorneys denied that the absence of notice to the applicant had invalidated the resolution which had been taken to suspend him.

18. On 2 October 2020 the applicant attended a board meeting at which a resolution was passed in terms of which 2nd and 3rd respondents were authorized to act as signatories and administrators of the company's bank account, pending the outcome of the disciplinary proceedings. The applicant voted against the resolution.

19. Finally, on 3 October 2020 the applicant's attorneys addressed an email to the respondents' attorneys in which they indicated that papers in an urgent application to set aside the decisions which had been taken on 2 September 2020 were in the process of being finalized and were expected to be issued on 5 October 2020.

An evaluation

20. In my view, there are a number of reasons why the application must fail. In the 1st place it is evident that despite being informed of his suspension on 9 September 2020, the applicant waited for almost a month, until 5 October 2020, before launching an application to set it aside, as a matter of urgency, on one day's notice and some 2 days before his disciplinary hearing was due to commence. As a director of the company and someone who, by his own admission, took legal advice as early as 10-11 September 2020, the applicant must surely have been aware of the legalities pertaining to the giving of notice in respect of a directors' meeting and the formalities pertaining thereto, and the consequences

of a failure to adhere thereto. Despite this, he deliberately failed to act expeditiously to challenge his suspension. In fact, initially his response was simply to threaten to bring an application to wind-up the company on the grounds of a breakdown in the relationship between himself and his co-shareholders.

21. The applicant's excuse for not taking action immediately following upon his suspension was that he had requested that the respondents provide him with a copy of the agenda and minutes of the meeting at which the resolution to suspend was taken, and that until he received such documentation he was not in a position to exercise his rights. In my view this is not a valid excuse. He must surely have been aware, already at the time when he was informed of his suspension on 9 September 2020, that it had been effected by his co-directors in his absence, without him having been given notice of the meeting at which such decision was taken. In the circumstances I agree with the respondents' contention that the application constitutes an abuse of process and any urgency which existed was self-created. This alone would constitute a good and sufficient reason to strike the matter from the roll, with costs.

22. But, even if I am wrong on this aspect and one were to give the applicant's explanation a charitable acceptance, and one were to entertain the application on the merits, it must in my view still fail.

23. Although, ever since the decision of the Constitutional Court in *Gcaba* [2] it is trite that whether the High Court has jurisdiction in a matter, or whether the Labour Court has exclusive jurisdiction in respect thereof, is a matter which must be determined by a consideration of the manner in which the case which is before the Court has been pleaded, it is also well-established in the subsequent jurisprudence which has emanated that in arriving at a determination in this regard the Court is not to confine itself blindly to the language and terminology which has been adopted in the pleadings, and must have regard for the substance, and not only the form, thereof. In each case a careful analysis must be made of the case which is before the Court. Thus, where a matter comes before a Court by way of an application, having regard only for the form in which

[2] *Gcaba v Minister of Safety & Security & Ors* 2010 (1) SA 238 (CC).

the notice of motion is couched will obviously not suffice for such an exercise, and the Court must consider the contents of the affidavits which are tendered in evidence in support thereof.

24. And in this regard I agree with the respondents that, on a careful conspectus of the contents of the affidavits which have been tendered by the applicant in support of the application, it is clear that irrespective of the *form* in which the relief which is sought in the notice of motion and certain paragraphs in the founding affidavit has been cast (viz in the form of a declaratory Order directing that the meeting at which the resolution to suspend the applicant was taken was invalid and unlawful, in that it was not properly constituted in terms of s 73(4)(b) of the Companies Act [3]- which provides that no meeting of a board of a company may be convened without notice to all directors), in *substance* the application is one aimed at setting aside the applicant's suspension as an employee of the company, as well as the investigation which has ensued and the disciplinary hearing which has been convened. As such, the decision which was taken on 2 September 2020 was not one which impacted in any way, at least not directly, on the applicant's position and rights as a director. According to the respondents a shareholders' meeting at which a resolution to remove the applicant as a director, will be called in due course. In the event that the applicant were to seek to challenge such a decision (if he could), the matter would obviously be one which would fall within this Court's jurisdiction, as the substance of any challenge in this regard would be directed at a perceived irregularity in regard to the applicant's rights and status as a director, and not as an employee.

25. The distinction which I seek to make was aptly elucidated by Zondi J (as he then was) in *Wicks* [4] where, as in this case, the respondent's managing director had been suspended as employee. As in this case it was similarly averred that the meeting of the board at which the applicant had been suspended, had not been properly constituted. As the learned judge pointed out, depending on the manner in which a claim by a director who has allegedly been unlawfully suspended (as

[3] Act 71 of 2008.
[4] *Wicks v SA Independent Services (Pty) Ltd & Ano* [2010] ZAWCHC 97.

an employee) is characterized, it could be heard either in the High Court (on the grounds that it was effected contrary to the prescripts of company law), or in the Labour Court (on the grounds that it was effected unfairly).

26. In his view, allowing a litigant to adopt such an elective approach would defeat the very object which the legislature sought to achieve in terms of the Labour Relations Act, which provides specific remedies and forums for vindicating them, where employees have allegedly been improperly and thus unfairly suspended, and would place form over substance.[5] Consequently, the learned judge held[6] that where the suspension of an employee has allegedly been effected unlawfully, either in violation of the prescripts of company law, or contrary to the common law, it would constitute an unfair suspension in respect of which the Labour Court enjoys exclusive jurisdiction.[7]

27. The respondents point out that the approach which was adopted in *Wicks* has not been uniformly adopted in subsequent decisions by this, and other Courts. Thus, for example in *Bakoro*[8] Davis J held that an application for an Order declaring that a meeting of a board of directors at which a resolution was taken to suspend the CEO was unlawful was, properly considered, and given the manner in which it had been framed and litigated, a matter which fell within the domain of the Companies Act, and was distinguishable from *Wicks*.

28. If one were to assume, in favour of the applicant, that this matter too can be distinguished from *Wicks* and that this Court consequently has the necessary jurisdiction to entertain it, the question which must be answered is whether the failure to give the applicant notice of the board meeting necessarily resulted in the decisions which were taken at such meeting being unlawful and/or invalid, as was contended.

29. Where decisions are taken by an improperly constituted board, without the necessary majority of directors ie without a quorum being in place, they will

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[5] Paras [49]-[50].
[6] At para [48].
[7] In terms of s 157(1) of the LRA.
[8] *Mthimunye-Bakoro v Petrosa* 2015 (6) SA 338 (WCC) at paras [7] and [8].

ordinarily be a nullity.[9] In this matter the decision to suspend the applicant was taken by the requisite majority. Aside from such instances there appears not to be any general rule or principle that decisions which have been taken by a board which has not been properly constituted because not all the directors were given notice of a board meeting, contrary to the requirements 73(4)(b) of the Companies Act, are necessarily invalid or unlawful.

30. In *De Villiers*[10] the SCA held that although the principles of good corporate governance require that resolutions should ordinarily be taken after due and proper deliberation at meetings of directors, this does not mean that in instances where this course has not been followed the directors cannot bind the company, by such resolutions.

31. In endorsing this dictum in *Mpofu*[11] a full bench of the South Gauteng High Court held[12] that in each instance the particular circumstances must be assessed in order to determine whether a resolution which was taken by an improperly constituted board should be upheld or not.

32. In that matter the Court held that, inasmuch as it concerned the suspension of a high-profile General CEO of a public company established in terms of the Broadcasting Act,[13] which was a public sector enterprise in terms of the Public Finance Management Act,[14] which required in terms of its Articles of Association that no less than 14 days notice was to be given of general meetings of its board, and which required that resolutions of directors which were taken needed to be signed by all the directors, the 1 minute notice which had been given to the applicant had been insufficient, and he had not had a proper opportunity to put his case to the board, during the time that he was afforded. Consequently, it held that the business which had been transacted at the meeting had not been valid,

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[9] Vide *Panamo Properties (Pty) Ltd & ano v Nel & Ors NNO* 2015 (5) SA 63 (SCA), which concerned a resolution by the board to place a company in business rescue.
[10] *De Villiers & Ano NNO v BOE Bank Ltd* 2004 (3) SA 1 (SCA).
[11] *SABC Ltd v Mpofu & Ano* [2009] All SA 169 (GSJ).
[12] Per Victor J.
[13] Act 4 of 1999.
[14] Act 1 of 1999.

and the decision of the Court *a quo* to set aside the suspension, should be upheld.

33. In my view there are a number of features in this matter, which distinguish it from the facts and the decision in *Mpofu*. In the first place WECCE is a private company which does not operate within the strictures and confines set by the statutes which regulate a public entity such as the SABC. Secondly, unlike the applicant in *Mpofu*, the applicant in this matter was given an opportunity to respond to the allegations against him, prior to the meeting which was taken on 2 September, at which a decision was taken to suspend him. He chose not to avail himself of that opportunity. Even after his suspension, when he was given another opportunity to deal with the allegations he chose not to do so. He has not given any explanation for why he did not do so. In the third place, the applicant's suspension was a precautionary one only. In *Mpofu* (and other cases of similar ilk) the suspensions which were effected do not appear to have been temporary, precautionary suspensions, pending disciplinary proceedings. As the respondents have pointed out, in *Long*[15] the Constitutional Court held that in the case of a precautionary suspension an employer is not required to give an employee a prior opportunity to make representations, in regard thereto. In the circumstances, given the law on this aspect as laid down by the Constitutional Court, it would be anomalous and irrational to hold that in instances where a director is suspended as an employee, at a board meeting which is held without him having been given notice thereof in terms of company law, and an opportunity to make representations with a view to influencing the board, it must follow that the resolution which was taken is unlawful or invalid and cannot be given effect to. Lastly, although the fact that because there may be a conflict of interest in respect of a decision which may be taken against a director at a board meeting, does not necessarily preclude him from being given notice thereof, in order that he might attend and attempt to influence it in regard to such decision, it cannot be ignored that in this instance the applicant could never have participated in the decision which was taken, because of such conflict.

[15] *Long v SA Breweries* (2019) 40 *ILJ* 965 (CC).

34. In the circumstances I am of the view that the resolution which was taken by the applicant's co-directors, albeit that it was taken without notice to him, was not a nullity, nor is it to be declared to be unlawful or invalid, and it can and should be given effect to.

Conclusion

35. In the result, for the above reasons the application is dismissed with costs, including the costs of two counsel.

M SHER

Judge of the High Court

Appearances:

Applicant's counsel: Adv M Schreuder SC
Applicant's attorneys: Vos Maree Inc (Stellenbosch)
Respondents' counsel: Adv RGL Stelzner SC
Adv D Van Reenen
Respondents' attorneys: Basson Blackburn Inc (Paarl)