

IN THE HIGH COURT OF LESOTHO
(Commercial Court Division)

HELD AT MASERU

CCA/0093/2020

In the matter between:

LESOTHO DAIRY PRODUCTS (PTY) LTD

APPLICANT

And

LESOTHO NATIONAL DAIRY BOARD

1ST RESPONDENT

THE REGISTRAR OF COMPANIES

2ND RESPONDENT

**THE PRINCIPAL SECRETARY – MINISTRY
AGRICULTURE & FOOD SECURITY**

3RD RESPONDENT

Neutral Citation: Lesotho Dairy Products (PTY) Ltd v Lesotho National Dairy Board & others [2022] LSHC 345 COM (15th December 2022)

JUDGMENT

CORAM: MATHABA J

Heard On: 21st November 2022

Delivered On: 15th December 2022

SUMMARY

Application – Authority to institute legal proceedings on behalf of artificial person seriously challenged – Onus on the deponent to the founding papers to provide more than minimum of evidence that the proceedings are duly authorised – A director does not have authority to institute legal proceedings on behalf of artificial person by virtue of position – Authority to institute legal proceedings must be duly conferred – The deponent to the founding papers failing to thwart challenge to his authority – Application dismissed.

ANNOTATIONS:

Statutes

Companies Ac No. 18 of 2011

Cited Cases

Central Bank of Lesotho v Phoofolo LAC (1985-89) 253

Lesotho Human Rights Alert Group v Minister of Justice & Human Rights & Others 1990-1994 LAC 657

Lesotho Revenue Authority & Others v Olympic Offsales LAC (2005-2006) 535

Wing on Garment (Pty) Ltd v LNDC & Another 1995-1999 LAC 752

South Africa

Burstein v Yale 1958 (1) SA 786 (W)

Fisheries Development Corporation of SA v AWJ Investments (Pty) Ltd 1980 (4) SA 156

Pretoria City Council v Meerlust Investment (Pty) Limited 1962(1) SA AD 321

S v Hepker 1973 (1) SA 472 (W)

South African Broadcasting Corporation & Others v Dali Mpofu (A5021/08)
[2009] ZAGPJHC 25; [2009] 4 ALL SA 169 (GSJ) (11 June 2009)

Transcach SWD (Pty) Ltd v Smith 1994 (2) SA 295

Themba Wele v Economic Freedom Fighters & Others 509/15 [2016] ZAE
CBHC

INTRODUCTION:

[1] The first respondent is a shareholder in the applicant. The dispute arises from a meeting it held on 7th July 2020 where it resolved that it was the sole shareholder in the applicant and to dissolve the board of the applicant. In response, the applicant approached this Court on an urgent basis on 18th August 2020 challenging the legality of invitation letters by the first respondent to the said meeting as well as the resolutions taken.

[2] The applicant sought interim reliefs restraining the first respondent from implementing the resolutions and interfering with its business. This Court was then not operational. As a result, the interim court order in this regard was only granted on 23rd November 2020. A rule *nisi* was issued calling upon the respondents to show cause, if any, on 7th December 2020, why the interim court order could not be made final.

[3] From the minute on the court file, the court did not discharge or

confirm the rule *nisi* on 7th December 2020, which is inadvertently reflected as 7th November 2020. What it did was to postpone the matter to a date to be arranged without extending the rule *nisi* or making any pronouncement on the same. I will revert later to this aspect.

[4] The ordinary relief that the applicant is pursuing is couched as follows:

- “2.1 Declaring the 19th June 2020 invitations to Applicant’s shareholders as a nullity.
- 2.2 An order setting aside all resolutions taken pursuant to those invitations including but not limited to the dissolution of Applicant’s board of directors and change in the shareholding structure of Applicant.
- 2.3 An order interdicting the 1st Respondent from holding itself out or passing itself off as the sole shareholder of Applicant.
- 2.4 In the event that by the time this application is heard, the 2nd Respondent would have effected changes to Applicant’s Extract, that such changes be declared void *ab initio* and that 2nd Respondent be ordered to reinstate it to the position it was before the changes.
- 2.5 That the costs of this application be awarded against those respondents who oppose this application on an attorney and client scale, jointly and severally, the others to be absolved.”

[5] The matter is opposed by the first respondent. On the date of hearing *Adv. Ncheke* from Attorney General’s Chambers confirmed that the second to the fourth respondents were no longer opposing the matter. At any event, they had not filed their intention to oppose or anything of record.

BACKGROUND FACTS:

[6] The genesis of the dispute is invitation which the first respondent made to *Milk Producers Association*, Mr. *Qekisi Hlehlisi* and *Denmar* on 19th June 2020 for a meeting scheduled for 7th July 2020 to discuss their alleged shareholding in the applicant. *Milk Producers Association* and *Denmar*, declined the invitation to the meeting.

[7] The meeting was held on 7th July 2020 and the respondent resolved that it was the sole shareholder in the applicant and to dissolve the board of directors of the applicant. On 16th July 2020 the respondent notified the registrar of companies of the meeting and its resolutions. It further informed the registrar that it was going to approach her office to correct shareholding of the applicant to reflect it as the sole shareholder.

[8] On 30th July 2020 the respondent wrote a letter to the Plant Manager of the applicant informing him that it was the sole shareholder of the applicant; that it has written a letter to the banks demanding that they should not process the loan application he intended to make; and further warning him to desist from acting in concert with people calling themselves board of the applicant when they were not. All the letters were written by Molati Chambers pursuant to respondent's instructions.

[9] The applicant is challenging the propriety of the invitation letters on the ground that they contravened Part VII of the Companies Act No. 18 of 2011 and are at variance with the so-called resolutions. Amongst others, it argues that not all shareholders were invited to the meeting; that the invitation letters did not reflect if the meeting was special or general and that the resolutions to dissolve the board and to tamper with its shareholding structure was not part of the agenda.

PRELIMINARY POINTS:

[10] Of the view I take of the matter, it is convenient to consider the following preliminary issues raised by the respondent: irregular and unauthorized proceedings.

Irregular Proceedings

[11] The respondent contends that the applicant has purportedly instituted this application to protect the interests of other shareholders. Accordingly, the nature of the application is *actio popularies* which in law is unacceptable, so asserts the respondent. It calls in aid the decision in **Lesotho Human Rights Alert Group v Minister of Justice and Human Rights and**

Others¹ to support this proposition.

[12] In my respectful view, the argument is patently misplaced. The impugned invitation letters resulted in a meeting which took the resolutions dissolving the board of the applicant and changing its shareholding structure. In addition, the first respondent issued an instruction to applicant's plant manager not to cooperate with the board of the applicant. Obviously, the actions of the respondent have a negative impact on the applicant. Consequently, the applicant has a direct and substantial interest in this matter. Characterization of the proceedings as *actio popularies* is disingenuous. For the foregoing reasons, this point *in limine* is rejected.

Unauthorized proceedings

[13] I preface the discussions with the following passage from **Wing on Garment (Pty) Ltd v. LNDC and Another**²:

“The deponent to the founding affidavit was one Charles Buchler, who describes himself as a director and shareholder of International Merchandising Services (Pty) Limited (“International”) a company incorporated in South Africa with its “offices” (presumably its registered office or principal place of business) in Pretoria. Buchler asserts as follows:

“I have been duly authorized to depose to this affidavit by and on behalf of the [appellant]... I am therefore entitled to make this

¹ 1990 – 1994 LAC page 657

² LAC (1995 - 1999) 752 at pages 754 to 755

application.”

No further facts were advanced in support of this assertion, and no resolution by the appellant’s board of directors was adduced. In answer, the LNDC’s chief executive, Ms S. Mohapi, contended *in limine* that the appellant “has no *locus standi in judicio* to bring this application”, and pertinently in answer to Buchler’s assertion of authority set out above, the following:

“The contents contained herein are vehemently denied and the deponent is put to the proof thereof. It is glaring that there is no relationship between [the appellant] and International Merchandising Services (Pty) Ltd”.

The appellant filed no replying affidavit to this. This issue is not a matter of mere technicality. In the leading decision in *Mall (Cape) Pty Ltd v Merino Kooperasie Beperk* 1957(2) SA 347 (C), Watermeyer J (delivering a judgement of the Full Bench) held (at 351-2) as follows:

“I proceed now to consider the case of an artificial person, like a company or co-operative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the court to show that the applicant has duly authorized the institution of notice of motion proceedings... unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its Constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the formalities had been compiled with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the court or that proceedings which purport to be brought in its name have in fact been authorized by it...”

Each case must be considered on its own merits and the court must decide whether enough has been placed before it to warrant the conclusion that the applicant which is litigating and not some other authorized person on its behalf”.

As that judgement explain, much depends on what a respondent’s own answer to the assertion of authority is. If it is a mere bare denial, or otherwise not such as to cast particular doubt upon an applicant’s assertion of authority, a court will generally not be inclined to uphold the defence that the authority is not proven. It all depends on the affidavits as a whole (see too *Central Bank of Lesotho v Phoofole* LAC (1985-89) 253; *Lesotho Telecommunications Corporation v Nkuebe* LAC (1995-99) 567. The present case however is very different. The answering affidavit positively asserted that no relationship existed between the appellant and International – a contention to which the appellant chose not to reply.”

[14] In **Pretoria City Council v Meerlust Investments (Pty) Limited**³
Ogilvie Thompson JA stated as follows⁴:

“The question of authority having been raised, *the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council*; that it is the Council which is prosecuting the appeal, and not some unauthorised person on its behalf (cf. *Mall (Cape) (Pty.) Ltd v Merino Ko-operasie Bpk.*, 1957 (2) SA 347 (C) at pp. 351-2). ... In order to discharge the abovementioned *onus*, the petitioner ought to have placed before this Court an appropriately worded resolution of the Council. ... This the petitioner has failed to do.” (emphasis added)

[15] The lesson learned from the above passages is that where deponent’s authority to institute legal proceedings on behalf of a juristic person is challenged, the onus is on him to show that the proceedings have been authorised. Much will depend on what the response is in the replying affidavit. I venture to state that though a resolution may not invariably be annexed to the founding papers⁵, once authority is directly challenged, it becomes necessary to provide more than minimum of evidence to demonstrate that indeed proceedings have been authorised.

[16] Litigation has consequences and authority is required for purposes of committing the company to all such consequences of litigation including payment of costs. Thus, the court must be satisfied that legal proceedings instituted on behalf of artificial person have been duly authorised, no matter

³ 1962 (1) SA AD 321 at 325C-F

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⁵ *Central Bank of Lesotho v Phoofolo LAC* (1985-89) 253 at 258 J-259B

how good applicant's case may be on merits.

[17] The following extracts from the affidavits will shed more light as to the respondent 's complaint and contentions of the parties on this issue. In establishing his authority to institute the proceedings, Mr. *Phafane* says the following in the founding affidavit:

“1.1 I am both a director and chairman of the Applicant herein, and in that capacity duly authorised to represent the Applicant herein and to dispose to this affidavit.”

[18] On the contrary, the deponent to the answering affidavit, Mr. *Mashale*, disputes that the proceedings were duly authorised. He asserts as follows in this regard:

“5.2.2 Unauthorised proceedings

These proceedings are not authorised by the a (*sic*) duly constituted lawful and legitimate Board of the applicant in which the 1st respondent is represented. The 1st respondent could not have resolved to sue itself. There has never been an invitation calling the 1st respondent to the meeting in which this litigation was discussed and a resolution made that the litigation be embarked upon.”

[19] In reaction to Mr. *Mashale*'s challenge on whether the proceedings were duly authorised or not, Mr. *Phafane* says the following:

“4.1 It is difficult to understand this point as it is not clear whether deponent

is saying applicant has not resolved to initiate these proceedings or if so such resolution was not of a lawful and legitimate board.

- 4.2 Secondly, also fail to understand what deponent means by saying 1st Respondent is represented in Applicant's board moreso when he fails to mention the person who represents it.
- 4.3 Over and above that I cannot make sense of the statement that "1st Respondent could not have resolved to sue itself". This dispute is against the 1st Respondent who had been warned several times that it is acting illegally as appears more fully in annexure "E" to the founding affidavit.
- 4.4 This point should also be dismissed not only for lack of clarity but also for lack of merit. 1st Respondent would not be invited when it was subject of the discussion as it is itself which is in the wrong and had purportedly dissolved Applicant's board."

[20] Granted, the point may have not been elegantly couched and the statement "The 1st respondent could not have resolved to sue itself" incomprehensible, but the gist of the complaint is clear. It is that the respondent is represented in the board of the applicant, but it was not invited when the resolution to institute the proceedings was made. As a result, the board was not properly constituted, and therefore the resolution not validly made.

[21] Undoubtedly, being artificial person, the first respondent cannot sit in board meetings. Thus, the assertion that the respondent is represented in the board of the applicant could only mean that the respondent has appointed a nominee director to the board of the applicant.

[22] Thus, I am taken aback when Mr. *Phafane* says that he does not

understand what Mr. *Mashale* mean when he says that the respondent is represented in the board of the applicant. This statement is clear and calls for a straightforward denial or concession taking into account that an affidavit in motion proceedings constitutes both pleadings and evidence. Instead of directly dealing with this assertion, Mr. *Phafane* quibbles about the respondent 's failure to disclose the name of its representative in the board of the applicant. Looking at his positions in the company, he surely must know if the respondent is represented in the board of the applicant or not.

[23] In paragraph 4.4 of the replying affidavit Mr. *Phafane* says that “1st Respondent *would* not be invited [to the meeting] when it was subject of the discussion as it is itself which is in the wrong and had purportedly dissolved Applicant’s board”. The modal auxiliary verb “*would*” creates the impression that as a matter of fact, no meeting was held and that even if one were to be held, the first respondent would not have been invited because it was conflicted.

[24] Under attack is Mr. *Phafane* 's authority to institute the proceedings, thus the onus is on him to demonstrate that the applicant duly resolved to institute these proceedings. He says that as a director and chairman of the applicant, he is duly authorised to represent the applicant and to depose to the founding affidavit⁶. Obviously, this creates the impression that Mr. *Phafane*

⁶ Pleadings – Founding Affidavit, page 13, para 1.1

is clothed with the authority to represent the applicant by virtue of his positions.

[25] However, during argument, counsel for applicant created the impression that the meeting was in fact held where the resolution was taken to institute the proceedings and Mr. *Phafane* authorised to depose to the court papers. Thus, counsel devoted his argument in justifying the exclusion of the respondent from the meeting to an extent that I had to bring to his attention the decision in **South African Broadcasting Corporation Ltd and Others v Dali Mpofo**⁷ to which I will later revert in this judgment.

[26] Unless specifically authorised by articles of incorporation or founding documents of a company, a board chairman or a director does not, by virtue of his position, automatically assume authority to represent or initiate litigation on behalf of a company. A director or any officer of a company may also be authorised through a case specific resolution or a blanket authorisation given to him to represent the company in any court case, pending or any that may arise in future. Both authorisations have to be given by a properly constituted board.

[27] Based on how Mr. *Phafane* has pleaded his authority and his reaction to Mr. *Mashale*'s challenge, as well as how counsel for the applicant

⁷ (A5021/08) [2009] ZAGP JHC 25; [2009] 4 ALL SA 169 (GSJ) (11 June 2009)

argued the issue, I am faced with an undesirable situation where I have to consider all the scenarios regarding Mr. *Phafane*'s authority to institute these proceedings. I am reluctant to dismiss counsel's argument on the ground that it is not in sync with the papers – counsel settled the applicant 's papers, it could be the meeting was indeed held, but the papers inelegantly drafted.

[28] At the outset, I deal with invocation of the decision in **Lesotho Revenue Authority and Others v. Olympic Off Sales**⁸ by the applicant in support of its case. In my view, this case is distinguishable. There the court *a quo* erroneously ruled that the Lesotho Revenue Authority (“LRA”) had not resolved to oppose the application. This was in circumstances where the deponent to the answering affidavit, Dr. *Jenkins*, had specifically stated that “The 1st respondent [LRA] has duly [properly] resolved to oppose this application and [has] authorised me to file this answering affidavit on behalf of the respondents herein”. The court *a quo* labelled this assertion hearsay. Zeroing in on this issue, the Court of Appeal stated as follows:

“[13] The second respondent stated in his answering affidavit that the first respondent duly (i.e. properly) resolved to oppose the application and to authorize the second respondent to file an answering affidavit on behalf of all the respondents. There is no justification in my view for the court *a quo* to have labelled the second respondent's statement as “unsubstantiated allegations” or “inadmissible hearsay evidence”. The second respondent's statement is made under oath and there is no evidence by or on behalf of the applicant to contradict it. The applicant's denial that the first respondent has duly resolved to oppose the application is nothing more than a bare denial.”

⁸ LAC (2005 – 2006) 535

[29] In *casu*, I am unable to characterise Mr. *Mashale*'s denial of Mr. *Phafane* 's authority to initiate the proceedings as bare. He has sufficiently substantiated his denial⁹. Consequently, it was incumbent upon Mr. *Phafane* to directly deal with Mr. *Mashale*'s denial of his authority and explain how he was authorised to represent the applicant. If the source of his authority is the articles of incorporation or founding documents of the applicant, he should have said so.

[30] On the other hand, if his is a case specific authorisation, he should have disclosed when the board of directors resolved to institute these proceedings and authorised him to represent the applicant. This would apply even in a case of a blanket authorisation. Annexing a board resolution was going to help to put the issue beyond doubt. A minimum of evidence is only sufficient when there is no serious challenge to authority to initiate legal proceedings.

[31] I am not oblivious to the history between the parties and to the fact that at some stage shareholders of the applicant authorised Mr. *Phafane* by way of special resolution to institute legal proceedings against Mr. *Malefetsane Samosamo*¹⁰. On that occasion Mr. *Phafane* was given a case specific authorisation to litigate. This may be a signal that he does not have a blanket

⁹ Pleadings – Answering Affidavit, page 43, para 5.5.2

¹⁰ Pleadings – page 57

authorisation, or authority to litigate by virtue of his position. Be that as it may, Mr. *Phafane* has not addressed Mr. *Mashale*'s query adequately.

[32] In my respectful view, confronted with Mr. *Mashale* 's challenge to his authority, Mr. *Phafane* was supposed to explain how authority was conferred on him to litigate for the applicant by virtue of his position as a board member and chairman. He has not done so. Consequently, there is no basis to assume that the instant proceedings have been duly authorised. There is less reason to presume that the applicant is properly before court.

[33] I turn to consider the scenario presented by applicant 's counsel which is that the meeting was held to resolve to institute the proceedings, but that the respondent was excluded as it was a subject of discussion. Obviously, the proposition recognises that the respondent is represented in the board but provides justification for its exclusion from the meeting. It bears repeating that representation of the respondent in the board could only be through a nominee director.

[34] Thus, director's duties in a company are of relevance in determining the legality of excluding the nominee director from the board meeting that resolved to institute the instant proceedings. Common law director's duties have been codified in this jurisdiction. Therefore, the

Companies Act provides as follows:

“Fundamental duties

63. (1) Subject to subsection (2), a director of a company, when exercising powers or performing duties, shall act in good faith and on reasonable grounds in the interests of the company.

(2) A director of a company, when exercising powers or performing duties as a director, shall exercise the care, diligence and skill that a reasonable director would exercise in the same circumstances taking into account the nature of the business of the company, the nature of the decision taken, the position of the director and the nature of the responsibilities undertaken by that director.

(3) The directors, including former directors, shall be severally and individually liable to the company, its shareholders and any other person for any loss suffered by the company, its shareholders or any person as a result of the directors' failure to perform their duties stated in subsections (1) and (2).

[35] A director's duty to act in good faith in the interests of the company entails exercising an independent judgment and taking decisions according to the best interests of the company. *Margo J* pointed out in **Fisheries Development Corporation of SA v AWJ Investments (Pty) Ltd**¹¹ that:

“A director is in that capacity not the servant or agent of the shareholder who votes for or otherwise procures his appointment to the board (the position of "nominee", though referred to in the plea, would not seem to have the legal consequences alleged by the defendants). The director's duty is to observe the utmost good faith towards the company, and in discharging that duty he is required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. He may in fact be representing the interests of the person who nominated him, and he may even be the servant or agent of that person, but, in carrying out his duties and functions as a director, he is in law obliged to serve the interests of the

¹¹ 1980 (4) SA 156 (W) 163

company to the exclusion of the interests of any such nominator, employer or principal. He cannot therefore fetter his vote as a director, save in so far as there may be a contract for the board to vote in that way in the interests of the company, and, as a director, he cannot be subject to the control of any employer or principal other than the company. On the general principles, see *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) *per* CENTLIVRES CJ at 828D; *R v Herholdt and Others* 1957 (3) SA 236 (A) *per* FAGAN CJ at 258D; *S v De Jager and Another* 1965 (2) SA 616 (A) *per* HOLMES JA at 625A - C; *S v Hepker and Another* 1973 (1) SA 472 (W) *per* HIEMSTRA J at 475H. See also Gower *Modern Company Law* 4th ed at 576 - 7; Henochsberg *The Companies Act* 3rd ed at 364; Cilliers, Benade and De Villiers *Company Law* 3rd ed at 255 - 6; Naude *Die Regsposisie van die Maatskappye Direkteur* at 106 - 7.”

[36] The duty requires a director to apply his unfettered discretion whenever a decision or action needs to be taken. Courts are not tolerant of directors “who allow themselves to be used as dummies on a board by acting under command of others”.¹²

[37] Accordingly, the suggestion that the first respondent was not invited to the meeting because it was a subject of discussion or because it did not recognise the board is legally untenable. It reveals patent misapprehension of directors’ duties. More tellingly, it does not draw the distinction between a nominee director and a shareholder who votes or procures the appointment of a nominee director to the board.

[38] The applicant was obliged to issue invitation for the board meeting to the nominee director. The minute he attends a board meeting, the nominee director has a legal duty to act in good faith and exercise independent judgment

¹² *S v Hepker* 1973 (1) SA 472 (W) 484

in the interest of the applicant and not the respondent. This is notwithstanding the fact that he is respondent's appointee to the board. Failure to invite the nominee director or to ask the respondent to inform its nominee director about the meeting is a fatal omission. It is of cardinal importance to keep distinct a nominee director and a shareholder who nominates or appoints him to the board.

Validity of the resolution to institute the instant proceedings

[39] A question presenting itself from the papers, which must be posed and answered, is whether the resolution to institute the proceedings was taken by validly and properly constituted board of the applicant. Thus, legal requirements on how board meetings have to be arranged and conducted are extremely apposite to the present enquiry. The Act provides as follows:

“Proceedings at board meetings

64. (1) Subject to the articles of incorporation of a company, proceedings of the board of directors of a company may be governed by the by-laws.

(2) Unless otherwise provided for in the articles of incorporation or by laws, the following rules shall govern proceedings of the board of directors-

(a) members of the board may elect a chairperson, who shall preside at meetings, and a vice-chairperson, who shall preside in the chairperson's absence; and in the absence of both the chairperson and vice-chairperson, the members shall elect another member to act as a

- chairperson for that meeting;
- (b) notice of the time and place of meetings of the board shall be given to each director not less than 5 days, in case of an ordinary meeting and one day in case of special meeting, before the date and time of the meeting and attendance by a director at a meeting shall constitute waiver of failure to provide sufficient notice under this section;
- (c) a quorum shall be not less than 50 percent of all directors and if a quorum is achieved and a meeting is begun, business may be continued despite withdrawal of directors from the meeting that reduces the number to less than a quorum;
- (d) a director may be present at a meeting either in person at the meeting or by audio or audio-visual connection, and shall be counted towards a quorum if so connected;
- (e) a director shall have one vote on matters requiring a vote, and in the case of an equality of votes, the chairperson shall have the casting vote;
- (f) minutes of every meeting of the board shall be kept in the minute book of the board of directors; and
- (g) where the board of directors adopts a resolution by written consent of all the members of the board, that resolution shall be recorded in the minute book of the board of directors.

[40] None of the parties is relying on the articles of incorporation of the applicant as a result of which they do not form part of the record. Neither was I told that the articles of incorporation make different provision for holding of board meetings. Therefore, the rules in section 64(2) are applicable to the applicant. In mandatory terms, section 64(2)(b) provides that notice of board meetings shall be given to each director not less than five days in case of ordinary meeting and not less than one day in a case of a special meeting.

[41] According to the scenario presented by the counsel for the applicant, it is beyond disputation that in stark violation of this section, the

nominee director for the respondent was not invited to the meeting which resolved to institute these proceedings. It bears repeating that the reasons for non – compliance with notice requirements as advanced by the applicant are legally untenable.

[42] In **Burstein v. Yale**¹³ *Kuper J* came to the following conclusion:

“A copy of the Memorandum and Articles of Association of the Company was not placed before me and therefore I do not know the provisions relating to the powers of directors, and to the quorum of directors. The general rule is that directors of a company can only act validly when assembled at a board meeting, unless the articles otherwise provide (*Silver Garbus & Co. (Pty.) Ltd v Teichert*, 1954 (2) SA 98 (N) at p. 102), but it is clear that a board meeting may be dispensed with if all the directors agree to what is done. In the case of *African Organic Fertilizers and Associated Industries Ltd v Premier Fertilizers Ltd.*, 1948 (3) SA 233 (N), it was held that in order to constitute a valid meeting of directors, notice of such meeting must be given to every director who is within reach, and the question whether a director is within reach depends upon the circumstances, including the nature of the business to be transacted. If the business to be transacted is contentious, the degree of inaccessibility would have to be very great. If, on the other hand, the business is non-contentious but requires immediate attention, the degree of inaccessibility would be very much less, particularly where the absent director knew and approved of the formal business to be transacted. In the instant case there is nothing to show that the third director Phiditis was out of reach on the 17th February, 1956, nor has any reason been advanced why notice should not have been given to him. In fact so little evidence has been put before me that it is possible that Phiditis was opposed to the grant of the cession and that if he had been given notice of the proposed cession, he would have been able to prevent it. All these difficulties could have been avoided, provided that they do not exist in fact, if either Panos or Mentis had been called as a witness. The plaintiff has not established that the cession was in fact authorised by the directors of the Company because he has failed to prove that a proper meeting was held, or that notice was given to all the directors of the Company who were within reach of the cession and that they approved of the cession.”

[43] *Seligson AJ* said the following in **Transcach SWD (Pty) Ltd v.**

Smith¹⁴ where a director challenged the validity of a board meeting from which

¹³ 1958 (1) SA 786 (W) at 771

¹⁴ 1994 (2) SA 295 (c) 304 – 307

he was excluded as well as consequent resolution to institute both criminal and civil proceedings against him:

“It is common cause that respondent was not invited to stay for or to attend the meeting which was held after he had been told of his dismissal as an employee and had departed. This may have been because Bingham held the erroneous view that respondent's dismissal as an employee also terminated his directorship. In fact, in the absence of a contrary (*sic*) provision in the article, a director can only be removed by the special procedure laid down in s 220 of the Act. There was no such provision in the applicable articles here. The fact remains that respondent had no notice of the meeting at which the resolution was taken in spite of being within reach; in fact he was present at applicant's offices shortly before the meeting was held. The business which it was proposed to transact at the meeting was extremely contentious and vitally affected respondent. Bingham must have appreciated that respondent would have resisted the resolutions which would be taken. According to respondent he indicated before his departure that he wanted to discuss the dispute which had arisen but Bingham declined to do so. This seems to me likely to have occurred. Given these circumstances it is not possible to hold that there was a properly convened meeting of applicant's directors and that the business transacted thereat was valid.

...

Mr Rosenthal conceded that Bingham and Ewald purported to act as if they were the sole directors of the company, but he contended further that respondent was not entitled to be present at the meeting by virtue of the conflict of interest in his position, which would in any event have debarred him from voting on the resolution. He relied in this regard on the general principle that a director stands in a fiduciary relationship to his company, which requires him *inter alia* to avoid a conflict between his own interests and those of the company. The only relevant provision of the articles of association in the present case in this regard is art 74 of Table B which provides as follows:

'Subject to the provisions of ss 234-241 inclusive of the Act, a director shall not vote in respect of any contract or proposed contract with the company in which he is interested, or any matter arising therefrom, and if he does so vote his vote shall not be counted: Provided that this article shall not apply where the company has only one director.'

This article incorporates the provisions of ss 234-7 of the Act, which require full disclosure by a director who has an interest in a contract or proposed contract with a company at or before the board meeting at which such contract is considered.

Mr Rosenthal, however, contended that the common-law principle underlying these provisions was that a 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, respondent's alleged unlawful conduct vis-à-vis the company, which he disputes, would have to be investigated and established. This would 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 against respondent as if they had been proved in order to found an argument based on conflict of interest.

In any event I am by no means convinced that where, as in the instant case, there is a dispute between the majority and minority shareholders/ directors of a private company, the majority can, on the strength of its view that the minority has been guilty of unlawful conduct, exclude the minority from board meetings or from voting thereat on the simple basis that the minority is precluded from voting because of a conflict of interest. Such a principle would be fraught with difficulty and provide a temptation to the majority to manufacture conflict of interest situations. Even if there is alleged misconduct of a serious nature against him, in my judgment, a director, particularly one who is also a shareholder, is entitled to exercise his rights as a director until he has been validly removed as such. See in this regard Joubert (ed) *The Law of South Africa* vol 4 sv 'Companies' para 208 in which the following statement of the law appears:

'A director may not be prevented by his fellow directors from discharging his duties as director. Thus they may not prevent him from attending meetings of the board or from stating his views and voting at such meetings and he may obtain an interdict restraining them from doing so.'

For these reasons I hold that the meeting and the resolution in question were in any event invalid and ineffective, even if Ewald had been validly appointed as a director.”

[44] Both **Transcach SWD (Pty) Ltd v. Smith** and **Burstein v. Yale** were quoted with approval in **South African Broadcasting Corporation Ltd and Others v Dali Mpofo**¹⁵ where the court found that, in their capacity as directors, Mr. *Mpofo* and other two executive directors ought to have been invited and participated in a board meeting which discussed and resolved to suspend Mr. *Mpofo* from his position as the appellant. The court said the

¹⁵ Footnote 3

following in upholding the decision of the court *a quo*¹⁶:

“In the result the court a quo correctly held that the respondent was fully entitled to participate fully throughout the entire meeting of 6 May 2008. The chairperson’s decision to exclude the respondent and the two executive members when the decision was taken to suspend him precipitated a fatal flaw in the process as found by the court a quo. The reliance on a conflict of interest as a reason to exclude the respondent from the meeting resulted in preventing him from discharging his duties as a director. The same applies to the other two executive directors who could not possibly have had a conflict of interest.”

[45] As it was stated in **Wing on Garment (Pty) Ltd v. LNDC and Another**, *supra*, whether artificial person has authorized institution of court proceedings is not a matter of mere technicality. Considering the denial by the respondent that the proceedings were authorised by the applicant, it was incumbent upon Mr. *Phafane* when he files his replying affidavit, to explain in detail the source of his authority to institute the proceedings. The fact that he is a director or chairman of the board would not *ipso facto* cloth him with authority to sue on behalf of the company.

[46] Counsel for applicant argued that even the deponent to the answering affidavit has not furnished a resolution authorising him to oppose the application. This challenge is not raised in the replying affidavit where the respondent would have had an opportunity to seek leave to file further affidavit dealing with this query. The applicant had such an opportunity to provide more

¹⁶ Ibid para 49

that minimum of evidence in the replying affidavit.

[47] Be that as it may, I cannot help, but observe that just like Mr. *Phafane*, Mr. *Mashale* does not provide the particulars of his authorisation to oppose the application. He simply says he is authorised by virtue of his position as the Chief Executive and Secretary to the Board of the 1st respondent. Whether this authorisation was granted by articles of incorporation of the respondent, is case specific or a blanket authorisation, he does not say. Lucky for him, Mr. *Phafane* did not question his authority when he filed the replying affidavit.

[48] In my view, even if I were to agree with Counsel for the applicant that Mr. *Mashale*'s authority to oppose the application had not been sufficiently pleaded, that would not compensate the deficiency already identified regarding Mr. *Phafane*'s authority to institute the proceedings on behalf of the applicant. This cannot reverse the conclusion that the applicant is not properly before court. The deponent to the founding affidavit has failed to thwart the attack on his authority.

[49] I now turn to consider the implications of not confirming or extending the rule *nisi* on the 7th December 2020. In **Themba Wele v Economic Freedom Fighters and Others**¹⁷ *Mbenenge J* said the following:

¹⁷ Case No: 509/15[2016] ZAECBHC 3 @ page 12-13

“[28] In any event, on the authority of Fisher v Fisher, the rule nisi granted on 6 October 2015 not having been extended to a particular date lost its validity and lapsed on 20 October 2015, on which day the matter was postponed “*sine die*”, without the rule *nisi* having been extended to a particular date, and not subsequently revived. It is a salutary practice for counsel and attorneys appearing to postpone a matter wherein there is an order incorporating a rule *nisi* to bring to the attention of the court the existence of the rule *nisi* to enable the court to extend the rule nisi to a specific date – the date to which the matter stands postponed, otherwise the rule simply lapses in an instance such as here, where the parties consented to an order postponing the matter *sine die*.

[29] Even though strictly speaking there is in fact no rule *nisi* to discharge, the application encapsulated in Part A of the notice of motion has to be brought to its logical conclusion, leaving the applicant to consider his position regarding what should become of the review application (part B). The respondent has attained substantial success on this bout. When this court issued the rule *nisi*, it was also ordered that the costs occasioned by the interlocutory application stand over for determination in the review application. The respondent did not feature at that stage. The parties adopted a different approach when the matter was being heard. They each contended that the costs incurred at this stage should follow the result. In any event, that is the proper course to follow.” (Footnotes excluded)

[50] The essence of the decision is that if a rule *nisi* is not extended to a specific date, it lapses and loses its validity. I therefore find that the rule *nisi* in this matter lapsed on the 7th December 2020 when it was not discharged, confirmed or extended to any date. Therefore, there is no rule to confirm or to discharge.

ORDER:

[51] In the result, I make the following order:

51.1 the application is dismissed with costs.

A.R. MATHABA J
Judge of the High Court

For the Applicant: Mr. T Mpaka

For the 1st respondent: Mr. L. A. Molati