

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2024/00175

In the matter between:

MARIA ELIZABETH VAN STRAATEN

APPLICANT

and

JACOBUS CORNELIUS REYNEKE

1ST RESPONDENT

RUDOLF WOLDEMAR WINCKLER

2ND RESPONDENT

RAINLY DAY INVESTMENTS TWENTY-THREE

(PTY) LTD

3RD RESPONDENT

WILLIAM OLIVER GRAHAM NO

4TH RESPONDENT

ANNAMEY GRAHAM NO

5TH RESPONDENT

HERMANUS ALBERTUS DU TOIT NO

6TH RESPONDENT

Neutral Citation: *Van Straaten v Reyneke* (HC-MD-CIV-MOT-GEN-2024/00175) [2024] NAHCMD 251 (24 May 2024)

Coram: MASUKU J

Heard: 2 May 2024

Delivered: 24 May 2024

Flynote: Civil Procedure – Urgent application – Rule 73(4) – Considerations taken into account in hearing a matter on an urgent basis – Interim interdict – Requisites to be satisfied by applicant therefor – Company Law – Companies Act 28 of 2004 – Requirements for calling directors' meetings and period of notice required – Consequences where those time limits have not been observed – Law of costs – Circumstances in which costs on the attorney and client scale are granted.

Summary: The applicant is a director of a company. She was informed by her co-director of a meeting to be held in less than 30 hours and at which some business was to be transacted. She intimated that she was not in Namibia due to personal reasons but eventually attended the meeting virtually. During that meeting, certain resolutions were moved for adoption and which she objected to, citing among other things that the meeting had been irregularly convened. A resolution for her removal as a director was moved, to which she objected but the resolution was nonetheless passed. She approached the court on an urgent basis applying in the interim that that the meeting and resolutions taken thereat be interdicted pending an application to declared the said meeting and resolutions null and void and of no force and effect. The application was opposed by the respondents and in which they took certain points of law in limine, arguing that the application should be dismissed with costs.

Held: That in urgent applications, an applicant should satisfy the court that the matter is urgent and aver the circumstances that render the matter urgent. Furthermore, that party must satisfy the court that it would not obtain sufficient redress at a hearing in due course.

Held that: In deciding on urgency, the court does not subject the papers to a microscopic examination and analysis. What it has to do is to consider the allegations made and decide whether on the whole, the applicant has satisfied the requirements of the rule 73(4), in particular.

Held further that: Meetings of directors are governed by the Companies Act and that where the requirements thereof have not been met, that may result in the meeting and resolutions taken, being declared null and void.

Held that: In the instant case, the applicant has satisfied the requirements of an interim interdict in the sense that she has established a clear right, or at least a *prima facie* right although open to some doubt; that there is a well grounded apprehension of harm; that the balance of convenience favours her and that she has no other satisfactory remedy.

Held further that: The manner in which the respondents behaved was deserving of the respondents being mulcted in costs on the punitive scale.

Interim relief granted with costs on the attorney and client scale.

ORDER

AD PART A

1. The Applicant's non-compliance with the forms, service and timelines provided for by the rules of Court is hereby condoned and this application is heard as one of urgency as contemplated by rule 73(1) and (3) of the Rules of Court.

2. Pending the finalisation of the relief sought in Part B;
 - 2.1 The First, Second and Third Respondents are hereby interdicted and restrained from placing any reliance on the resolutions purported to have been adopted at the ostensible directors' meeting held on 17 April 2024 at 15h00 ("**the irregular meeting**") and are hereby further interdicting from making any steps to give effect to or implement the resolutions adopted at the irregular meeting;

2.2 The First, Second and Third Respondents are hereby interdicting and restrained from relying upon or exercising any powers arising from or in consequence of the resolutions adopted at the meeting on 17 April 2024;

2.3 The Second Respondent is hereby interdicted and restrained from exercising any powers or occupying the office of director of the Third Respondent and interdicted and restrained from making any representations to any third party that he has been duly and properly appointed as a director of the Third Respondent on 17 April 2024.

3. The Respondents are ordered to pay the costs of this Part A of this application on the scale as between attorney and client.

AD PART B

4. The Applicant must within one calendar month from date of this order institute proceedings for the relief as set out in Part B of the Notice of Motion, being:

4.1 an order that the meeting convened by the First Respondent on 16 April 2024 and held at 15h00 on 17 April 2024 ("**the meeting**") be declared irregular, null and void and of no force and effect;

4.2 an order that all resolutions and business transacted at the meeting be declared to be the product of an irregular meeting and as such null, void and of no force and effect and that the First, Second and Third Respondents may not exercise any rights or place any reliance on any resolutions and business purportedly transacted at the meeting;

4.3 an order that the First and Second Respondents pay the costs associated with the setting aside and declaring irregular, null and void

the meeting, such costs to be paid on the scale as between attorney and client.

JUDGMENT

Introduction

[1] What may be regarded as a pedestrian, uneventful, mundane and uninteresting day to one, may be a destiny-defining day to another and in which events of cataclysmic proportions occur.

[2] For many, including yours truly, 17 April 2024, was a mundane day, not worth writing about, save the traversing the normal hustle and bustle associated with uneventful days. This is when one goes through the motions to see the day through. For Ms Maria Elizabeth van Straten however, this was a day when she was at the receiving end of certain resolutions that she claims detrimentally affected her life and career. She has therefor approached this court on an urgent basis, seeking an order interdicting and restraining the respondents from taking any further steps in furtherance of the said resolutions.

[3] Mr Jacobus Cornelius Reyneke and Mr Rudolph Woldemar Winckler are alleged by Ms van Straaten, the applicant, to be at the centre of the resolutions she seeks to impugn in these proceedings. Both Messrs Reyneke and Winckler take the position that the applicant's application is meritless and that it is doomed to fail and must therefor either be struck from the roll or be out rightly dismissed by this court.

[4] The remit of the court, in the circumstances, is to decide, with reference to the papers filed of record and the applicable law, as cited by the parties, where justice in this case lies. Does the law and the interests of justice demand that the application be granted or they demand, as the

respondents have forcefully submitted, that the application be thrown out with both hands as it were? The answer to this all-important question follows in the succeeding paragraphs of this judgment.

The parties

[5] The applicant, as stated above, is Ms Van Straten, an adult female resident in Windhoek at Pioneerspark. The first respondent is Mr Jacobus Cornelius Reyneke, an adult male whose residential address is on Eadie Street, Windhoek. The second respondent is Mr Rudolf Woldermar Winckler, an adult male, whose address is not provided to the court in his affidavit, which was left blank in this regard.

[6] The third respondent, is Rainy Day Investments Twenty-Three (Pty) Ltd, ('RD23'), a company duly incorporated in terms of the company laws of Namibia. Its registered place of business is at Unit 03, Reger Park, Reger and TV More streets, Windhoek. The fourth respondent, on the other hand, is Mr William Oliver Graham *NO*, an adult male who is a trustee of the Rodzina Carbonile Trust. The fifth respondent is Ms Annamey Graham, an adult female physiotherapist and Trustee of the Rodzina Carbonile Trust. She resides in Windhoek. Last, but by no means least, the sixth respondent is Mr Hermanus Albertus Du Toit, an adult businessman residing in Finkenstein, Windhoek.

[7] The applicant makes it plain that she does not seek any relief against the Trust but would apply for costs against it if it chooses to oppose the application and the relief sought.

[8] The applicant was represented by Mr Heathcote, whereas the first to third respondents, were represented by Mr Namandje. The court records its appreciation to both counsel for the assistance they duly rendered to the court in the determination of this matter. In this regard, with the nub of issues at play, it may not be possible to capture and decide all the interesting legal issues and argument presented. This is by no means any reflection on the

industry of the legal practitioners involved. The relief sought and the stringent time limits pointed to the court dealing with the main issues and at times, in broad strokes.

[9] The first to third respondents, joined issue and filed affidavits opposing the relief sought. In that connection, I will refer to the three respondents collectively as 'the respondents'. Ms van Straaten will be referred to as 'the applicant.' In the event reference is made to the applicant and the respondents, they will collectively be called 'the parties'.

Relief sought

[10] In her notice of motion, which is in two parts, the applicant prays for the following relief:

'PART A

1. Condoning the applicant's non-compliance with the forms, service and timelines provided for by the Rules of Court and hearing this application as one of urgency as contemplated by Rule 73(1) and (3) of the Rules of Court.
2. Interdicting and restraining the First, Second and Third Respondents from placing any reliance on the resolutions purported to have been adopted at the ostensible director meeting held on 17 April 2024 at 15h00 (**"the irregular meeting"**) and further interdicting them from taking any steps to give effect to or implement the resolutions adopted at the irregular meeting;
3. Interdicting and restraining the First, Second and Third Respondents from relying upon or exercising any powers arising from or in the course of the resolutions adopted at the meeting on 17 April 2024;
4. Interdicting and restraining the Second Respondent from exercising any powers or occupying any office of directorship of the Third Respondent and interdicting and restraining him from making any representations to any third party that he has been duly and properly appointed as a director of the Third Respondent on 17 April 2024.
5. That the Respondents pay the costs of this Part A application on the scale of attorney and client.

6. Further and/or alternative relief.

PART B

7. Within one calendar month from the grant of the order under Part A, the Applicant will institute proceedings seeking the following relief:

7.1 an order that the meeting convened by the First Respondent on 16 April 2024 and held at 15h00 on 17 April 2024 (**the meeting**) be declared irregular, null and void and of no force and effect;

7.2 an order that all resolutions and business transacted at the meeting be declared to be the product of an irregular meeting and as such null and void and of no force and effect and that the First, Second and Third Respondents may not exercise any rights or place reliance on any resolutions and business purportedly transacted at the meeting.

7.3 An order that the First and Second Respondents pay the costs associated with the setting aside and declaring irregular, null and void the meeting, such costs to be paid on the scale between attorney and client; and

7.4 Further and/or alternative relief.'

The applicant's case

[11] The facts giving rise to the present application are largely common cause. They are for that reason not the subject of much disputation save certain conclusions and inferences that may be drawn therefrom. There is of course disparate approaches to the legal consequences that arise from the facts and it is be the duty of the court, where appropriate, to deal with those disputes and issue an order that seems meet in the circumstances.

[12] It is the applicant's case that on 25 July 2022, she was appointed as the executive director of an entity called Rainy Day Investments ('RD23'), referred to earlier. To this end, the applicant attached a Form CM 27 and her consent to the appointment. It is her case that she has held this office from the date of appointment continuously until the events of 17 April 2024, which form the axis of this application.

[13] It is her case that the second respondent, Mr Reyneke, is her fellow executive director of RD23, having been so appointed on 24 July 2022. The applicant deposes further that from October 2020, she has been responsible for performance of the secretarial duties of RD23. This however, appears to have come to a screeching halt on 17 April 2024, when the first respondent called a meeting that the applicant considers to be unlawful and whose decisions and resolutions she prays be declared unlawful, null and void and of no force and effect by this court.

[14] She narrates the events leading to the present application as follows: On 16 April 2024, she was in South Africa to attend to a medical emergency involving her daughter. The applicant had been scheduled to return to Namibia on 19 April. On 16 April, she received an email from Mr Reyneke giving notice of a meeting that would be held the following day ie 17 April at 15h00. The meeting was described as a 'General Meeting of Directors'.

[15] The email advised that the meeting would be held at the offices of Sisa Namandje & Co's boardroom, with the following issues identified as forming part of the agenda, namely, opening remarks and roll call; shareholder resolutions; directors, auditors, accounting records of Rainy Day; banking matters; legal representation and appointments, Hikanos transactions and any other business. It was signed by Mr Reyneke in his capacity as director of RD23.¹

[16] The applicant contends that she had not been given any prior notice of the meeting by Mr Reyneke. She found the formal manner in which the meeting was called strange, considering that the two were the only directors of RD23. She had expected that Mr Reyneke would call her and discuss the issues needing urgent attention and why a meeting was to be held on 27 hours' notice.

[17] The applicant only became aware of the email late on 16 April and she thereupon wrote an email in response. She advised Mr Reyneke that she was

¹ Page 6 of the record of proceedings.

in South Africa to attend to her daughter's operation. She complained that the proposed meeting was not discussed with her nor had proper notice of the meeting been given. She also pointed out that she had not agreed to the holding of the meeting nor to the agenda thereof. As such, the meeting would be irregular, she retorted. She pointed out that the meeting was to put certain resolutions to vote with no insight as to what the said resolutions are that are being proposed. She accused Mr Reyneke of taking the law into his own hands.

[18] The applicant sought an undertaking from Mr Reyneke that the meeting would not be held as it was irregular and that if no such undertaking was given, she would be left with no option but to approach the courts to stop the meeting. It was also her case that if she was unable to obtain an order from this court, she required that she be joined in the meeting virtually so that she could make her position on the said meeting clear, namely that she formally objects to the holding of the meeting. She also demanded in that event that the meeting be recorded and that she be furnished with the recording of the meeting *ex post facto*.²

[19] The applicant deposes further that after taking legal advice, she was informed that it would not be feasible to launch an urgent application in Windhoek on 17 April, considering that she was in South Africa. It is the applicant's case that she contacted the shareholder of RD23, the Elegant ELM, which holds 100% shares in the former, of the developments of 16 April 2024. The Trust was equally in the dark regarding these developments.

[20] The applicant contends that the meeting was irregular for the following reasons, namely, that she had not been consulted or contacted by Mr Reyneke prior to the email dated 16 April nor had she given her consent to the said meeting being held. It was her case further that she was unaware of the need to hold a directors' meeting. Furthermore, the time limits within which the meeting was to be held was short as it was called on 27 hours' notice, thus rendering it irregular.

² Email by the applicant dated 16 April 2024, at p 68 of the record.

[21] The applicant deposes that she ultimately joined the meeting virtually on 17 April and it commenced at 15h00. It was for the first time that she learned that a Mr Winckler, the second respondent, was to join the meeting as the latter had been appointed by Mr Reyneke as a director of the third respondent, RD23. This, she considered irregular.

[22] During the meeting, she had a refrain in the adoption of the proposed resolutions, namely that the meeting held was invalid and she cast her vote against all the resolutions. This, she did in relation to all the resolutions proposed by Mr Reyneke and supported by Mr Winckler, which were all endorsed by the duo, ie Messrs Reyneke and Winckler.

[23] The applicant deposes that it has come to her attention that Mr Reyneke had suddenly appointed Mr Winckler as a director, simultaneously removing her as a director because he had designed a scheme to undermine and misappropriate assets that belong to the RD23 and which are owned and controlled by the Trust. It is her case that Mr Reyneke's conduct in this instance, is similar to what he has done in South Africa regarding properties owned by the Trust. In this connection, she deposed, he utilises his position as a director in the said companies to manoeuvre himself into a position where he seeks to misappropriate assets of the Trust held by other wholly owned companies although he has not contributed financially to those companies.

[24] The applicant deposes further that Mr Reyneke considers that she stands as an obstacle to him trying to misappropriate the assets of the Trust hence his move to remove her as a director of RD23, replacing her with Mr Winckler, unlawfully so, she adds. It is her case that Mr Reyneke has, with the assistance of Mr Winckler in effect 'hijacked' the Board of RD23 and sought, in the process, to isolate the applicant's involvement in the company to ease his unlawful business.

[25] It was the applicant's further deposition that RD23 is due to receive tens of millions of dollars from the sale of its shares in nine separate property owning companies known as the Hikanos suit of companies. The removal of the applicant is designed to ease Mr Reyneke's laying his hands on these funds. In this regard, the applicant deposes that during the impugned meeting, Mr Reyneke created an artificial voting structure during which he purported to pass resolutions aimed at diverting funds into accounts under his control and thus swindle the Trust's assets.

[26] To this end, the applicant deposes, Mr Reyneke removed her as a co-signatory to all the third respondent's bank accounts and chose to arrogate unto himself, the right to instruct Dr Weder Kauta & Hoveka to immediately pay funds held in trust to Mr Reyneke's legal practitioners of record in this matter.

[27] Regarding urgency, the applicant contends that from what has been stated above, it is clear that the matter is urgent and that she cannot be afforded substantial redress in due course. The applicant points out that had she not had a medical emergency in South Africa, she would have approached this court to interdict the meeting of 17 April. It is her case that she attempted to avoid bringing an urgent application by seeking certain undertakings which would have served to render the bringing of the urgent application unnecessary from the first respondent but these were not provided.

[28] The applicant further deposes that when regard is had to the resolutions taken at the said meeting, she is left with the distinct impression that the duo, namely Messrs Reyneke and Winckler, will immediately take steps to action the resolutions which they adopted, to the detriment of the third respondent, the Trust and the applicant as well. It is her case that as a director, she is in duty bound to bring this application on an urgent basis in order to safeguard the interests of the third respondent from the nefarious scheme sought to be perpetrated by the Messrs Reyneke and Winckler.

[29] The applicant states further that if she did not bring the matter as one of urgency, then she would be unable to protect the third respondent from harm and also restore her ability to act as director of the third respondent in the face of her illegal removal by the duo. It was her case that she would not be able to secure substantial redress in due course if she did not approach the court urgently.

[30] As matters stand, if the interdictory relief is not granted, the applicant deposes that the duo would be at large to appoint any person as the company secretary of RD23; appoint auditors of RD23; appoint legal practitioners for RD23; instruct bankers to remove the applicant's signing powers as co-signatory with Mr Reyneke; instruct Dr Weder Kauta & Hoveka to transfer funds held in trust by them on behalf of RD23, to the latter's detriment, to mention a few issues.

[31] Last, the applicant deposes that if no interdictory relief is granted, the duo of Messrs Reyneke and Winckler, will be at large to do as they please with the corporate personality of the third respondent for the promotion of their individual interests. The applicant proceeded to deal with the question of the granting of an interim interdict, addressing the various requirements for such in their papers. It is not necessary to delve into these matters at this stage of the judgment.

The respondents' case

[32] The respondents, being Messrs Reyneke, Winckler and RD23, opposed the relief sought. I will, for ease of reference, refer to these three parties as 'the respondents'. To this end Mr Reyneke deposed to the opposing affidavit. The respondents deal pound for pound with the contentions of the applicant as narrated above. It suffices to mention though that whilst they engage the applicant's case on the merits, they however raise certain points of law *in limine* that they say should result in the court throwing the application out with both hands as it were.

[33] In their papers, the respondents raise the following issues, namely, the non-joinder of Elegant, the shareholder of RD23; that the applicant lacks standing to bring urgent interdictory relief; no case is made out in terms of rule 73(4)(a) and (b); misjoinder of the Trust and the effect of the proceedings pending in South Africa on the current case.

[34] In the light of these points of law raised, I do not consider it necessary to deal with the respondents' contentions on the contentious issues pound for pound. I intend, as indicated, to deal with the legal issues raised and to decide whether the applicant is entitled to the interim relief sought on an urgent basis. If it becomes necessary, after dealing with these legal issues, to deal in detail with the respondents' factual and legal position on the issues, I will do so in necessary but measured detail.

Locus standi in judicio

[35] Because of the dispositive nature of the point raised regarding the applicant's alleged lack of *locus standi in judicio* to move these proceedings, I am of the considered opinion that it is prudent that I deal with that issue first. Mr Namandje, in his spirited address, submitted that there is confusion in the instant case regarding the capacity in which the applicant has launched these proceedings. He argued that from reading the papers, it seems that the applicant appears to arrogate upon herself what is referred to as the derivative action, which only rests in shareholders of a company.

[36] Mr Namandje argued that in the instant case, when proper regard is had to the applicant's papers, it is not clear that she has any right in law to bring the proceedings. This is chiefly so because any injury likely to be suffered in this case, regard had to the allegations made in the founding papers, will be suffered by RD23. In that wise RD23 is the possible victim and not the applicant. For this reason, so Mr Namandje argued, the applicant does not have the right in law to bring the proceedings and that it should have been RD23 itself that brought the proceedings. In the alternative, he further

submitted, a shareholder in RD23 should have brought the application and not the applicant because she is not a shareholder in RD23.

[37] Mr Heathcote, responding in kind, argued that there must be no terminological inexactitude that is allowed to cloud issues. It was his contention that in the present case, the applicant is not a shareholder in RD23 but she is a director. He submitted that in the instant case the applicant is not bringing a derivative action as contemplated in s 260 of the Companies Act 28 of 2004, ('the Act'), that being the exclusive preserve of members of a company, which she is not.

[38] It was his argument that properly construed, the applicant has brought the proceedings in her capacity as a director of RD23. That being the case, he further submitted, the applicant, as a director, owes a fiduciary duty to the company for which she may suffer consequences should she not act appropriately and propitiously. As such, he further argued, that fiduciary duty to the company made it incumbent upon the applicant to lodge these proceedings. As such, he submitted, the applicant has the right in law, having especial regard to her relationship to the company, to launch these proceedings.

[39] In the instant case, the applicant's case is that she was unlawfully removed as a director of RD23 by the duo of Messrs Reyneke and Winckler, ('the duo') on 17 April 2024. She therefor approached the court seeking relief aimed at setting aside the said removal as unlawful, null and void and of no force or effect at law.

[40] I am of the considered view that the applicant has not sought to bring a derivative action as alleged by Mr Namandje. The applicant, as correctly pointed out by Mr Heathcote, is not a member of RD23 but is a director thereof. It is common cause that she, in her capacity as a director, owes fiduciary duties to RD23 and these fiduciary duties make compelling behests on her to approach the court in cases where she takes the view, on

reasonable grounds that the interests of the company may be negatively impacted under her watchful eye.

[41] The applicant has and in sufficient detail, chronicled the events leading to this application and the reason for her discomfort with her removal as a director of RD23 and the implications that this might have, not just on her own interests but that of RD23. It is her case that a lot of money and assets belonging to the company may be purloined by the duo. Her fiduciary duties call upon her, in the circumstances, to do her part to prevent the possible catastrophe she has deposed to on oath.

[42] I am thus of the considered view, that the applicant has persuaded the court that she has the necessary standing in law to seek the relief that she has. She does not purport to bring a derivative action in her papers nor does it appear from the papers that she has done so. In the premises, I incline to the view that this point of law must be dismissed as being of no merit. I proceed to deal with the question of urgency immediately below.

Urgency

[43] Mr Namandje argued further that the application must be struck from the roll for lack of urgency and in particular, the non-compliance with the provisions of rule 73(4) of this court's rules. It was argued that the applicant's papers appear schizophrenic, so to say, regarding the applicant explicitly setting out facts that render the matter urgent. In this regard, it was contended that the urgency alleged appears to apply to the Trust and the applicant. At some part of the application, the applicant alleges that the application is to safeguard the interests of RD23. In regard to the latter, it is further alleged, the applicant inexplicably seeks relief against RD23.

[44] Mr Namandje relied for his submissions chiefly on the judgment of Ueitele J in *Mumvuma and Others v Chairperson of Board of Directors and*

*Others*³ where reference was made to the requirements for a party to satisfy in order for the urgency procedures to be invoked. I do not find it necessary to quote the requirements stated in the said judgment, save to say that a party, claiming urgency and seeking relief thereunder has to meet twin requirements. First the applicant must satisfy the court that the matter is urgent. In this regard, the facts and circumstances that render the matter urgent, must be disclosed. Second, the applicant must satisfy the court that he or she cannot be granted substantial redress in due course.

[45] I want to briefly accentuate the requirements of the rule 73(4)(a) and (b). The rule in question does not require the court in an application for invocation of urgency procedures, to conduct a microscopic examination and analysis of the applicant's papers and in the process, consider them word for word and sentence by sentence to determine urgency. What is required is that an applicant must, in the affidavit, make a case to the satisfaction of the court that the matter is, on the facts, urgent. In this regard, the circumstances that render the matter urgent must be fully disclosed. Furthermore, the applicant must make out a case of persuasive standards that if the matter is not heard urgently, the applicant would not be afforded substantial redress at a hearing in due course.

[46] In this regard, the court has to take the facts and circumstances attendant to the matter into account as stated under oath and thereafter form a considered opinion as to whether on the whole, the requirements of the subrule referred to above have been met. If satisfied on these issues, the court should deal with the matter on an urgent basis. I must hasten to add that that cases differ in immediacy, seriousness and ramifications. These considerations become key in deciding whether or not to deal with a matter as one of urgency. Each matter must thus be dealt with in the light of its own peculiar circumstances, without derogating generally from compliance with the requirements of rule 73.

³ *Mumvuma and Others v Chairperson of Board of Directors and Others* (HC-MD-CIV-MOT-REV-00009/2017) [2017] NAHCMD 125 (25 April 2017).

[47] A further consideration, in dealing with urgency, that has become settled as the majestic Baobab tree in the procedural jurisprudence in this jurisdiction, is that in dealing with a matter on an urgent basis, the court must assume in favour of the applicant that the allegations made on oath, are correct. To insist on a proper evaluation and analysis of the disputed aspects on urgency may have the deleterious effect of denying a deserving litigant the privilege to have the matter dealt with expeditiously on an urgent basis thus resulting in a failure of justice, whose deleterious effects may not be undone if the matter is heard in due course.

[48] Having regard to the papers filed of record, in this matter, I am of the firm view that the applicant has made out a good case for invoking rule 73. It is clear that she was out of the jurisdiction when the facts giving rise to these proceedings occurred. Her circumstances, which cannot be denied, were grave, namely, the health of her daughter, which required her to travel to South Africa, for the daughter's operation, which took place on the date of the meeting, whose resolutions are sought to be countermanded in these proceedings.

[49] The applicant attempted to obtain undertakings from the respondents that would have served to obviate the need for this application but these were not forthcoming from the respondents. She was accordingly left without any other recourse but to approach this court urgently. The harm she stands to suffer, together with the absence of substantial relief in due course, are dealt with in the papers to the satisfaction of this court. I am accordingly of the considered view that a case for dealing with the matter on an urgent basis, has been satisfactorily made out by the applicant.

[50] To that extent, I am of the considered view that Mr Namandje's arguments to the contrary, cannot, on a proper analysis and consideration of the facts of this matter, be allowed to carry the day. I accordingly find that the matter is urgent, as contemplated in rule 73 of this court's rules.

[51] I need to deal with one minor issue from Mr Namandje's argument. He criticised the applicant for blowing hot and cold in dealing with RD23. He argued that on the one hand, she claimed to act in the interests of RD23 but on the other hand, she, in the relief sought, appears to seek an order against RD23. This may appear schizophrenic and contradictory but on a full analysis of the case, the applicant was correct. Although she was also acting in the interests of RD23, in addition to her own, she would have faced catastrophic consequences if she had not cited RD23, even for formal purposes.

[52] Mr Namandje would, in that event had properly claimed a forfeit and the application could have been struck from the roll for non-joinder. It is in any event clear that she did not seek any specific relief from RD23. That the respondents chose to oppose the relief on behalf of RD23 does not in any manner shape or form, affect her application. In my view, she did the correct thing.

Non-joinder and misjoinder

[53] Mr Namandje had another arrow in his quiver. He argued that the applicant ought to have joined the Elegant Trust in these proceedings. This would be done on the presumption that it is a shareholder in RD23 thus having a direct and substantial interest in the orders sought in this matter. It was also argued that the Trust not being a shareholder in Elegant, is cited as a party to the exclusion of Elegant. The latter is argued to constitute a serious misjoinder that should serve to non-suit the applicant.

[54] I must preface my remarks by saying that cases of non-joinder or misjoinder, do not have a dispositive effect on causes launched before court. This is to mean that if either is proved, the proceedings cannot be dismissed therefor. What the court may do, is to order the party not joined to be so joined to the proceedings. This is a trite proposition that hardly needs authority in support.

[55] I am of the considered view that the question of non-joinder or misjoinder, as the case may be, must not be approached from a prism that does not take into account the relief sought and the circumstances in which it is sought. The applicant's complaint is primarily against the directors of RD23 and not necessarily the members of the said entity. The relief sought, when properly considered, affects the entities at the level of directors and not necessarily at the level of the shareholding thereof.

[56] Mr Heathcote argued that Elegant is not a Namibian company. For that reason, this court has no jurisdiction over it and an order for joinder of Elegant may be nothing but *brutum fulmen*. I agree. He stated that Mr Reyneke had been requested to consent to Elegant being joined as a party, but this request remains unattended. In short, it has not been acceded to or refused.

[57] I am of the considered view that Mr Heathcote is eminently correct in his submission. This court cannot, despite the formidable powers it enjoys and wields in this jurisdiction, join parties that fall outside its jurisdictional precincts. Reference in this regard, was helpfully made by Mr Heathcote to *South African Railways and Harbours v Chairman, Bophuthatswana Central Road Transportation Board and Another; South African Transport Services v Chairman, Bophuthatswana Central Road Transportation Board and Another*.⁴

[58] In that case, the court, per Hiemstra CJ remarked as follows:

'The third party here concerned is a firm called Rent-a-bakkie Holdings (Pty) Ltd. Whereas the present applicant is an *incola* of Bophuthatswana, Rent-a-Bakkie is a *peregrinus*, and despite a diligent search no assets could not be found within the country capable of attachment *ad fundandam jurisdictionem*. They were requested to submit to the jurisdiction of this Court, but refused to do so. The applicant, *ex abundanti cautela*, nevertheless served these papers upon them. There is no other way of bringing them under the jurisdiction of this Court.'

⁴ *South African Railways and Harbours v Chairman, Bophuthatswana Central Road Transportation Board and Another; South African Transport Services v Chairman, Bophuthatswana Central Road Transportation Board and Another* 1982 (3) SA 629 (B) p 630 C.

[59] I am of the considered view that this excerpt applies with equal force in the instant matter. The applicant cannot, in the circumstances, carry the blame for not citing a party that is not subject to this court's jurisdiction, short of the said party submitting to the court's jurisdiction, which has not yet eventuated. This marks the end of this argument. This point of non-joinder must accordingly fail.

Interim interdict

[60] I now turn to deal with the question whether the applicant is entitled to the interim interdict she seeks. This is done on the understanding that the main relief and which is final in nature and effect, is to be found in Part B of the application. The relief in Part A is merely temporary and interdictory, in nature and effect. I accordingly deal with the latter.

[61] A party, such as the applicant, who seeks the granting of an interdict that is temporary in nature and effect, ie an interlocutory interdict, is called upon to satisfy the court of the following requisites, as stated in *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*⁵:

'Briefly these requisites are that the applicant for such temporary relief must show –

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of an interim relief is clear or, if not, is *prima facie* established although open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.'

⁵ *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at p 267A-F.

[62] These requirements have been accepted as part of our law and case law in this jurisdiction, is replete with these requirements. The question is whether the applicant, in the instant case, has managed to satisfy these. I must state that an applicant is required to satisfy all the requirements *ad seriatim*. Should an applicant fail to satisfy one or more of these, then *cadit quaestio* – the matter is at an end and he or she fails in obtaining interim protection.

Clear right or prima facie right

[63] I intend to deal with these requirements in turn, commencing with the first. As indicated above, the applicant can either show that he or she has a clear right or one open to some doubt, but which is *prima facie* established. The applicant, in this case, alleges that she enjoys a clear right in this case. This is because she states on oath and attaches documents showing that she is a director of the RD23. There appears to be no serious contest of her claim in this regard. I say so for the reason that she attaches documents from BIPA, which reflect her as a director of RD23 as from 25 July 2022.⁶ If there be any valid one, I am of the view that she has, at the least, shown that she has a *prima facie* right, although open to some doubt.

[64] She is inscribed therein as director of RD23. Then the events leading to the meeting, which forms the backbone of this application, come into view. The notice sent by Mr Reyneke, dated 16 April, called for a meeting on 17 April 2024. It is clear that the applicant objected to the meeting being held on short notice, considering as well that she was out of the country on an emergency. She contended that the meeting had not been arranged with her nor the agenda therefor discussed with her. She termed the meeting irregular and called upon an undertaking that the meeting would not be held, failing which she would approach this court for relief.⁷

⁶ Page 55 of the record of proceedings.

⁷ Email to Mr Reyneke dated 16 April 2024.

[65] It must be mentioned in her favour that first, the meeting of 17 April 2024, was in part, called to remove her as a director of the RD23. Secondly, there was a meeting scheduled for 8 May 2024 which was touted to be one where the shareholders of RD23 would endorse the applicant's removal as a director of RD23. These actions by the first and second respondents, in my view, appear to lend credence to the applicant's claim that she was a director of the applicant and was regarded by the first and second respondents as a director, thus casting doubts on any version by the respondents suggesting the opposite.

[66] As narrated earlier, the meeting did in fact take place despite her protestations and it was held virtually. One of the resolutions taken and to which she objected, was her removal as a director of RD23. She contends that this decision is illegal for the reason that it does not comply with the statutory prescripts contained in company legislation.

[67] In this regard, it was submitted by Mr Heathcote that the said meeting was held contrary to the provisions of Article 34 to Table B to Schedule 1. After consideration of the relevant provisions, it occurs to me that reference to Article 34 of Table A, is mistaken. In my considered view, the applicable provision is Table A, where Article 34 and 35, which record that:

'34 Annual general meetings and other general meetings shall be held at such time and place as the directors shall appoint or at such time and place as is determined if the meetings are convened under section 187(5), 189, 190 or 191 of the Act.

35 An annual general meeting and a meeting called for the passing of a special resolution shall be called by not less than 21 clear days' notice in writing and any other general meeting shall be called by not less than 14 clear days' notice in writing. The notice shall be exclusive of the day on which it is served or deemed to be served and of the day for which it is given, and shall specify the place, the day and the hour of the meeting and shall be given in such manner hereinafter mentioned or in such other manner, if any, as may be prescribed by the company in general meeting, to such persons as are, under these articles, entitled to receive such notices from the

company: Provided that a meeting of the company shall, notwithstanding the fact that it is called by shorter notice than that specified in this article, be deemed to have been duly called if it is so agreed by a majority in number of the members having a right to attend and vote at the meeting, being a majority holding not less than 95 per cent of the total voting rights of all the members.'

[68] It is clear that in the instant case, the relevant provisions quoted above, were not followed. First, the notice period, was thrown out of the window, so to speak. Whereas, the period of notice required for a general meeting, is not less than the peremptory fourteen clear days, the applicant was only afforded less than 30 hours' notice. This is clearly irregular and not in keeping with the statutory prescripts. It must be mentioned that the applicant did not agree to a shorter period of notice and no proper vote appears to have been taken in this regard. These facts fortify the applicant's case that the meeting and the resolutions therein taken may be illegal and thus null and void.

[69] Second, it appears that the mode employed in calling the meeting was also not authorised by subsidiary legislation. In this regard, the notice was sent via e-mail, which is not a manner specified by the article 96 of Table B. It is common cause, especially after the COVID 19 pandemic, business has been carried out in more efficient and convenient manners, including more convenient ways of notice. That notwithstanding, we cannot close our eyes to what are the stark requirements of our law. It does not lie on a party to choose a manner of service that is convenient where it does not comply with the law as it stands.

[70] In the instant case, a prepaid letter sent by post is prescribed by law to an address given by the member. It appears that this was not done in the instant case thus pointing to a possible violation of the manner of service prescribed by law. This in my considered view, served to show that the applicant has at least, *prima facie* basis for the granting of the interim relief prayed for.

[71] Meskin,⁸ the learned author, posits the following:

‘It is to be noted that the articles cannot provide for a shorter period of notice and any provision in the articles providing for a shorter period is void . . . A meeting called on short notice is improperly called, proceedings are irregular and resolutions purportedly adopted at it are invalid.’

I am accordingly of the considered view that the meeting would appear, from what is stated above, to have been irregular and so are the resolutions taken thereat as they *prima facie* appear to be in contravention of the applicable law.

[72] I should mention, albeit briefly, that it does not appear that the provisions of s228 of the Act were followed either in the removal of the applicant. Section 228(3), for instance, requires that a special notice must be issued for the proposed resolution to remove a director of a company. Notice of the proposed resolution must also be served on the director proposed to be removed, with the said director entitled to be heard on the proposed resolution. This does not appear to have been followed in the instant matter, thus strengthening the applicant’s case for interim relief.

[73] There are other issues that would show that the applicant has a clear right or at least a *prima facie* one and I need not deal with them here. This may include the participation of Mr Winckler in the meeting and the fact that the applicant objected to the resolutions, which should have resulted in a deadlock, when considering the directors of RD23 being the applicant and Mr Reyneke. I need not mention the fact that the objects of the resolution sought to be taken do not appear to have been adequately set out with and with necessary precision nor did the agenda adequately cover the resolutions ultimately passed.⁹ I say nothing more of this issue.

Well-grounded apprehension of irreparable harm

⁸ Henochsberg on the Companies Act, Vol 1 p341.

⁹ *Caldecott and Others v Botha’s Reef GM Co* (1888) 5 HCG 249.

[74] In the instant case, I am satisfied that the applicant has, to the extent that it is found, she did not make a case for a clear right, that she has made allegations that persuade the court to find that she has a well-grounded apprehension of irreparable harm. In her papers, she attaches correspondence in which Mr Reyneke has given instructions to Dr Weder Kauta and Hoveka to transfer money to the respondents' legal practitioners. This amount runs into tens of millions of Namibian dollars.

[75] She states that her fiduciary duty to the company requires her not to fold her arms in agreement as a potential exists that the money may be transferred and she would have to give an account of what she did in her capacity as director to avert if not avoid the potential disappearance of the money. In any event, it is clear from the papers that she has been removed by resolution and illegally, as she claims. She has, in that event, shown that she is likely to suffer irreparable harm.

[76] Should the court not grant the interdict, there is a potential, it was submitted on her behalf, that the duo will act in concert and disgorge the monies that stand to the credit of the RD23. She deposed as much. In that event, she claims that she does not have a right in terms of the Act to intervene other than to bring the present application in order for her to continue carrying out her fiduciary duties to RD23. Her removal, if successfully executed, will leave the duo totally unchecked. I agree with the applicant in this regard.

Balance of convenience

[77] I am of the considered view that the applicant has, from what has been stated above, established that the balance of convenience favours her. From present indications, her removal does not appear to be in keeping with the relevant prescripts of the law. Her removal, as she asserts, is geared towards

smoothing the access by the duo to the assets of RD23. Were the temporary relief to be granted, I am of the considered view that there would not be much harm suffered by Messrs Reyneke and Winckler, considering in turn, the harm the applicant and RD23 stand to suffer as stated above. In my considered opinion, she has managed to satisfy this requisite as well.

[78] It is perhaps opportune to deal with one aspect at this juncture. The respondents indicated that there is a meeting which has been called for 13 May 2024 and in which the resolutions taken on 17 April 2024, will be placed before the shareholders for possible endorsement. It is claimed in this regard that it is at that juncture that the applicant will have an opportunity to be heard on the resolution to remove her.

[79] I am not convinced that this is a sound proposition. I say so for the reason that the applicant should have been afforded an opportunity to deal with the resolution to remove her, having been afforded sufficient notice of the proposed resolutions and also given time to deal with any adverse allegations against her. It cannot be, in my considered view, that the decision, which was made, resulting in her removal, will be dealt with at another meeting when it appears that she had not been afforded proper *audi* before that decision was taken. In that event, I am of the view that the balance of convenience favours her in this case.

No other satisfactory remedy

[80] The applicant states that she has no other satisfactory remedy other than that which she has sought. I am of the considered opinion that when regard is had to the actions of the respondents and the possibly calamitous consequences of the decisions made by the respondents, including that of removing the applicant as a director, there is a real risk that the interests of the company, which the applicant has a duty to preserve in her fiduciary position, would be compromised.

[81] Considering the brazen manner in which the whole removal was executed, with Mr Winckler being questionably drafted in and the far-reaching resolutions which were objected to but were nonetheless approved, I am of the considered view that the applicant does not have another satisfactory remedy in the circumstances. She has fiduciary duties to carry out for the company and her removal in the manner she alleges, if allowed to stand, may open her to questions about her performance of her fiduciary duties during her tenure as a director of RD23.

[82] It was argued by Mr Namandje that the applicant has an alternative remedy in proceedings that she has instituted in South Africa. I am of the considered view that there is an application serving before this court and the court is in duty bound to deal with the application. Had it been the case that a similar case is pending before this court on the same issues, it may have been prudent to stay the proceedings. As it is, I have no full appreciation of the issues pending in South Africa and how they will be handled. Where a citizen, subject to this jurisdiction, comes to this court for urgent relief, it hardly seems comely for the court to send the citizen away and say they must pursue their litigation in a foreign jurisdiction, with the court where the issues arise, washing its hands of the matter in Pontius Pilate style.

[83] I am accordingly of the considered view that the applicant has made out a case that she has no other satisfactory remedy at her disposal. It is necessary, in the circumstances, to grant the interim order and the respondents will be afforded ample time to deal with the matter when Part B is scheduled for hearing.

Costs

[84] It is plain that the applicant has sought costs on the punitive scale. Is this justified in the circumstances? The learned author Cilliers¹⁰ states the following regarding granting of punitive costs:

'The court will grant attorney and client costs only where special circumstances are present, for instance, where the litigation has been pursued vexatiously or frivolously, or where a party has been guilty of reprehensible behaviour.'

[85] I am of the considered opinion, in view of the fact that the applicant has succeeded, that the respondents must pay the costs. Regarding the scale of costs, I am of the view that the manner in which the litigation was conducted by the respondents, Messrs Reyneke and Winckler, in particular, is richly deserving of a punitive costs order. There are a few matters that are of concern in the behaviour of the duo.

[86] First, they appear to have had no consideration for the perilous circumstances in which the applicant found herself when the meeting was foisted upon her. It does not appear that there was any urgency alleged on an objective basis, that would have required the meeting to be held on those stringent time limits. The applicant was out of the country on a medical emergency involving her daughter. She had to put everything aside, including her daughter's well-being and apportion her attention and time to meetings which it has not been shown could not have waited until her return. Human beings and their transient afflictions should draw pity and sympathy and not callous disregard by fellow human beings.

[87] In this connection, the applicant's objections and cries for reason, and an undertaking that the resolutions will not be implemented, appear to have fallen on deaf ears. The respondents, despite being requested not to continue with their scheme, proceeded with their plan undeterred and called a meeting that appears on first principles, to have been illegal and contrary to the edict

¹⁰ A C Cilliers *Law of Costs*, LexisNexis 1997 p4-15.

of the law. Even attempts by the applicant's legal practitioners to bring reason to the table by writing letters trying to avoid the applicant having to come to court, counted for nothing.

[89] I am of the considered view that this is an appropriate case for the granting of costs on the punitive scale.

Order

[90] In view of the foregoing reasons, I am of the considered view that the following order should issue:

1. The Applicant's non-compliance with the forms, service and timelines provided for by the Rules of Court is hereby condoned and this application is heard as one of urgency as contemplated by rule 73(1) and (3) of the rules of Court.

2. Pending the finalisation of the relief sought in Part B;

- 2.1 The First, Second and Third Respondents are hereby interdicted and restrained from placing any reliance on the resolutions purported to have been adopted at the ostensible directors meeting held on 17 April 2024 at 15h00 ("**the irregular meeting**") and are hereby further interdicting from making any steps to give effect to or implement the resolutions adopted at the irregular meeting;

- 2.2 The First, Second and Third Respondents are hereby interdicting and restrained from relying upon or exercising any powers arising from or in consequence of the resolutions adopted at the meeting on 17 April 2024;

- 2.3 The Second Respondent is hereby interdicted and restrained from exercising any powers or occupying the office of director of the Third Respondent and interdicted and restrained from making any

representations to any third party that he has been duly and properly appointed as a director of the Third Respondent on 17 April 2024;

3. The Respondents are ordered to pay the costs of this Part A of this application on the scale as between attorney and client.

AD PART B

4. The Applicant must within one calendar month from date of this order institute proceedings for the relief as set out in Part B of the Notice of Motion, being:

4.1 an order that the meeting convened by the First Respondent on 16 April 2024 and held at 15h00 on 17 April 2024 (“**the meeting**”) be declared irregular, null and void and of no force and effect;

4.2 an order that all resolutions and business transacted at the meeting be declared to be the product of an irregular meeting and as such null, void and of no force and effect and that the First, Second and Third Respondents may not exercise any rights or place any reliance on any resolutions and business purportedly transacted at the meeting;

4.3 an order that the First and Second Respondents pay the costs associated with the setting aside and declaring irregular, null and void the meeting, such costs to be paid on the scale as between attorney and client.

T S MASUKU
Judge

APPEARANCES

APPLICANT: R Heathcote, with him J Schickerling
Instructed by Francois Erasmus & Partners, Windhoek

RESPONDENT: S Namandje, with him K Simson
Of Sisa Namandje & Co. Inc., Windhoek