IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)

CASE NO: 3812/2024

In the matter between:

BESSO INVESTMENTS (PTY) LTD	First Applicant
SCARLETT IBIS INVESTMENTS 286 (PTY) LTD	Second Applicant
DE VLEI PROPERTY DEVELOPMENT	Third Applicant

and

CAPECO DEVELOPMENT (PTY) LTD	First Respondent
PATRICK VINCENT BOUTENS	Second Respondent
NOKUTHULA TANA	Third Respondent
HENDRY JOHN TARR	Fourth Respondent

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

JUDGMENT

POTGIETER J

INTRODUCTION

[1] This is an opposed urgent application in terms of section 61(12)[1] of the Companies Act[2] (the Act) for an order requiring the board of directors of the first respondent (Capeco) to convene a meeting of shareholders to consider a motion to remove the third and fourth

[1] Section 61 provides as follows in relevant part:

'**61. Shareholders meeting.-** (1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders meeting at any time.

(2) Subject to section 60, a company must hold a shareholders meeting-

…

(c) when otherwise required-

(i) in terms of subsection (3) or (7);

…

(3) Subject to subsections (5) and (6), the board of the company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and-

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the earliest times specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.

(4) A company's Memorandum of Incorporation may specify a lower percentage in substitution for that set out in subsection (3)(b).

…

(12) If a company fails to convene a meeting for any reason other than as contemplated in subsection (11)-

…

(b) when required by shareholders in terms of subsection (3)

…

a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, subject to any terms, that the court considers appropriate in the circumstances.'

[2] Act 71 of 2008.

respondents as directors. The crisp question is: what are the requirements for a statutorily compliant notice calling a shareholders' meeting pursuant to a demand in terms of section 61(3) of the Act. More specifically whether the affected directors are entitled to be provided with the reasons or grounds for their proposed removal.

[2] The applicants are the shareholders of Capeco and the second to fourth respondents its incumbent directors.

[3] Mr Richards appeared on behalf of the applicants and Mr Nepgen on behalf of the third and fourth respondents ('the respondents').

[4] The issue of urgency is in dispute and will be disposed of *in limine.* It is, however, convenient at the outset to record the relevant background which is largely common cause.

THE RELEVANT BACKGROUND

[5] The first respondent was registered in 1969 under the name Wonderwonings Eiendomme (Pty) Ltd. Its name was subsequently changed to Capeco Development (Pty) Ltd. It has continuously since registration conducted the business of investment in and development of immovable property. It owns a substantial property portfolio.

[6] The applicants are South African companies each holding a one third share of the total issued share capital of Capeco. Each of the applicants is wholly owned by a company registered in Europe, being Calo Investments, Fivanco and Service Partners respectively. Each one of the holding companies in turn is wholly owned by permanent residents of Europe (who are the ultimate beneficial owners of Capeco). In the case of Calo Investments it is the second respondent ('Boutens'); in the case of Fivanco it is David van Biervliet ('David'); and in the case of Service Partners it is Robert Baeyens (Robert) and his wife. The applicants acquired their respective interests in Capeco approximately 15 years ago and from time to time elected and appointed its directors primarily from the

ranks of the existing employees of the company. As indicated, its board is constituted by the second to fourth respondents. The third and fourth respondents are resident in Gqeberha and are also employed by Capeco in administrative capacities. Boutens, the second respondent, who is resident overseas was elected as a director during mid-2023.

[7] The role of general manager of the business of Capeco was fulfilled for some time by John Baeyens (who is the son of one of the ultimate owners, Robert) as a consultant and not an employee. The management of Capeco was historically conducted relatively informally, by means of consultation between the directors and the ultimate owners, to ensure consensus on strategic and important operational decisions. The relationship between the ultimate owners (and thus the applicants) and John Baeyens (Baeyens), however, deteriorated over time resulting in the contractual basis for Baeyens' role being terminated during June 2023. It is common cause that Baeyens' involvement in Capeco continued regardless. The issue is the effect of his continued involvement on Capeco. According to the applicants the conduct of Baeyens was prejudicial to Capeco, while the respondents contend that his role was beneficial. The details in this regard are set out in the section on urgency below. For commercial reasons, the applicants decided against engaging in an adversarial relationship with Baeyens. The applicants nonetheless took steps to strengthen the board of Capeco by appointing Boutens as a director and also considered the eventual removal and replacement of the third and fourth respondents as directors.

[8] It is also of note that the board of each one of the applicants consisted in each case of the third respondent and the relevant ultimate owner. In order to proceed with the possible removal of the third and fourth respondents as directors of Capeco, the attorneys of record of the applicants approached the third respondent seeking her agreement to resolutions providing for the appointment in terms of section 58 of the Act, of the ultimate owners as the proxies of the applicants for the purposes of a shareholders' meeting. Although the third respondent indicated that she will attend thereto, Baeyens intervened and this never happened as more fully set out below. To avoid a deadlock between the two directors on their respective boards (being the third respondent and the relevant

ultimate owner), the applicants appointed Mark Stewart, the deponent to the founding affidavit, as an additional director to their respective boards and also appointed Stewart as the proxy of each one of the applicants. Pursuant to resolutions to that effect, Stewart issued a demand dated 1 August 2024 (which was delivered on 5 August 2024) on behalf of each of the applicants in terms of section 61(3) of the Act for the board of Capeco to call a shareholders' meeting for the purposes*, inter alia,* of considering a resolution in terms of section 71(1) of the Act to remove the third and fourth respondents as directors. After a prolonged exchange of correspondence between the respective attorneys of record of the parties, as more fully set out below, and an extensive list of documents having been furnished to the respondents by the applicants, it is now common cause that the respondents have a duty to convene the meeting. Their position, however, is that they are not obliged to do so until the applicants provide them with comprehensive reasons or grounds for their removal. They contend that the reasons provided by the applicants are inadequate and fail to comply with the relevant statutory requirements. I deal with these issues more fully below.

[9] In the circumstances the applicants initially resolved to launch the present application in the normal course. Subsequent information that came to their attention, however, necessitated the application to be brought urgently. It is necessary to revert to the issue of urgency.

URGENCY

Legal requirements

[10] It is trite that Uniform Rule 6(12) empowers the court to authorise a departure from the requirements of Rule 6(5) in matters of urgency and to allow the matter to be disposed of on an expedited basis. The applicable principles are equally trite and do not warrant repetition save that the applicant is required to comply as far as practicable with the existing rules and must set forth explicitly the circumstances which are averred render the matter urgent and the reasons why substantial redress cannot be obtained at a hearing

in due course. It is not open to the applicant to rely on self-created urgency resulting from a failure to act expeditiously. Where, however, an applicant undertakes genuine efforts to resolve the issue and thereby avoid litigation, this would not be regarded as dilatoriness if such efforts fail[3]. It is convenient to deal with the case of the respondents first.

Respondents' case

[11] The respondents contend that the applicants failed to demonstrate urgency and that any urgency was self-created. They indicate that the application was issued on 30 September 2024 and was electronically served on their attorneys of record on the same day. The notice of motion provided for entry of opposition by 16:30 on 2 October 2024 and for answering affidavits to be filed by 16:30 on 4 October 2024. The matter was set down for hearing on 8 October 2024 and was by agreement postponed to 10 October 2024 when the application was heard. According to the respondents the curtailment of the normal time periods was extreme and prejudicial in that it drastically limited their opportunity to consider the matter and to respond. The meeting of shareholders was demanded on 5 August 2024. The applicants' attorneys, Rushmere Noach Incorporated ('RNI'), indicated on 19 August 2024 that they had instructions to proceed in terms of section 61(12) of the Act to compel the Capeco board to convene the meeting. On 11 September 2024 RNI threatened to bring the application if notice of the meeting was not provided by 13 September 2024. When no meeting materialised, RNI repeated the threat on 16 September 2024 to litigate if notice of the meeting was not given by 18 September 2024. The application was only brought some two weeks later on extremely short notice. Moreover, the factual basis for urgency stemmed from the alleged involvement and improper control and influence exercised by Baeyens over Capeco which, on the applicants' own version, occurred since June 2023.

[12] The respondents furthermore contend that another fundamental reason why the matter is not urgent, is that the shareholders themselves are entitled to have called the

[3] *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004(2) SA 81 (SECLD) para 34 ('*Greyvenouw')*; *Stock & Another v Minister of Housing & Others* 2007(2) SA 9 (C) at 12I.

shareholders' meeting. They indicate that on the applicants' case Capeco's board of directors was not effective. Firstly, because the third and fourth respondents do not exercise their functions as directors independently of Baeyens and further because the second respondent is willing to convene a meeting but cannot do so without the agreement and co-operation of the third and fourth respondents. The directors are effectively *'deadlocked'.* It is generally accepted in our law that if for some reason directors cannot or will not exercise powers vested in them, the general meeting of shareholders has inherent power to exercise the powers in question. The applicants are therefore entitled to and ought to have called the shareholders' meeting themselves.

[13] In support of the above contention, Mr Nepgen submitted that on a proper interpretation the Act and Capeco's memorandum of incorporation as well as its shareholders' agreement, all recognise that the shareholders can call the meeting. Section 61(3) of the Act provides that the board of a company *'or any other person specified in the company's Memorandum of Incorporation'* must call a shareholders' meeting upon delivery of a written and signed demand. The memorandum of incorporation provides as follows in clause 4.2:

> **Shareholders' right to requisition a meeting**
>
> The rights of Shareholders to requisition a meeting, as set out in section 61(3), may be exercised by the holders of at least 10% of the voting rights entitled to be exercised in relation to the matter to be considered at the meeting, subject to the demands from the Shareholders to call a meeting being a signed written demand describing a specific purpose for which the meeting is proposed.
>
> (emphasis added)

Section 7.2 of the shareholders' agreement states (*sic*):

> **Call.** The Shareholders' Meetings shall be called by any of the company's Directors when convenient or necessary, **or by request of any of the Shareholders, in the events provided by law**, provided that such a request shall be accompanied by the considerations that contained the description of the matters that shall be discussed

> and decided in the respective meeting, as well as indicate all of the pertinent documentation that could be required for such discussions.
>
> (emphasis provided by the respondents)

[14] Mr Nepgen argued that the shareholders are *'any other person specified in the company's Memorandum of Incorporation'* as contemplated in section 61(3). He submitted that the term *'requisition'* in clause 4.2 of the memorandum of incorporation refers to the right to call the meeting and not only the right to demand the meeting. This is evidenced by the reference to both a *'requisition'* and a *'demand'* in clause 4.2 which must have different meanings and cannot both refer to the right to demand a meeting. The meaning of the term *'requisition'* in the memorandum of incorporation is put beyond doubt, so the argument continued, if regard is had to clause 5.3.2 thereof which provides that: *'The right of the Company's Directors* ***to requisition*** *a meeting of the Board, as set out in section 73(1), may be exercised by at least 25% of the Directors, in the case of the Board having 12 or more members, or 2 Directors in any other case.'* (emphasis provided by the respondents).

[15] It goes without saying, so the argument ran, that there is no urgency and that the notice to convene a shareholders' meeting can be issued by the applicants themselves. The application therefore ought to be struck from the roll for lack of urgency.

Applicants' case

[16] Mr Richards submitted that although RNI alluded in the exchange of correspondence to an application in terms of section 61(12), it was never envisaged prior to 29 September 2024 to bring the application as a matter of urgency. Prior to the latter date, the applicants intended to bring the application in the ordinary course. It was only after the information provided by Ms Holmes on 29 September 2024 came to the attention of the applicants, that they had clear reason to believe that the third and fourth respondents (under the influence of Baeyens) were engaging in conduct that was detrimental to Capeco. While the respondents denied some of the information provided

by Ms Holmes, they have not denied the assertions concerning the signature and backdating of leases entrenching the interests of Baeyens but contend that they did not in any way act unlawfully. By signing the documents referred to, the respondents have ignored the need for formal resolutions of directors or at the very least of notification to Boutens as the third director. This demonstrates, according to the argument, the need for a shareholders' meeting to be convened at the earliest opportunity to enable the applicants to consider the removal of the third and fourth respondents as directors and the election of an additional director or directors who are independent and not subject to the dominance of Baeyens. There is every prospect that should the application be brought in the ordinary course, the respondents would continue to prevaricate in convening the meeting and will continue to do the bidding of Baeyens in the interim. In that event, the applicants would not be able to obtain substantial redress at a hearing in due course.

[17] Mr Richards further submitted that clause 4.2 of the memorandum of incorporation does not entitle the applicants to convene a meeting of shareholders and that to the extent that clause 7.2 of the shareholders' agreement may allow a shareholders' meeting to be called by an individual director it conflicts with the provisions of the memorandum of incorporation and the Act and is rendered void by the provisions of section 15(7)[4] of the Act. The matter is accordingly sufficiently urgent to justify the departure from the rules of court.

Assessment

[18] It is readily apparent that the factual basis for urgency is the information provided by Ms Holmes on 29 September 2024 to the effect that Baeyens has orchestrated certain actions by the respondents to the detriment of Capeco. Prior to that stage, steps were taken by the applicants to avoid the need to bring an application in terms of section 61(12)

[4] The section provides that:

> *'The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with the Act and the company's Memorandum of Incorporation, and any provision of such agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency.'*

which was envisaged would be brought in the ordinary course. These steps to resolve the matter do not amount to dilatoriness on the part of the applicants[5]. The application was in fact launched as a matter of urgency the day after the relevant information provided by Ms Holmes came to the attention of the applicants.

[19] The respondents dispute much of what Ms Holmes had conveyed to the applicants. It is not necessary to finally decide any of the disputes in this regard in order to adjudicate the merits of the present application. It is in fact not desirable to do so given that the applicants are instituting separate proceedings dealing with the issues concerning Baeyens. I accordingly deal with this aspect only to the extent strictly necessary to decide the issue of urgency.

[20] It is clear on the available evidence that Baeyens' involvement in Capeco continued even after the contractual basis for his previous role was terminated. The third respondent confirmed in the answering affidavit that she knew that the consulting agreement, forming the basis for Baeyens' role in Capeco, was terminated in 2023, but indicated that she was never informed that this would have any influence on how the business of Capeco was to be conducted. She avers that Baeyens continued to provide support as before and that she was never instructed that this had to change. On her version Baeyens was a positive influence in Capeco.

[21] According to the applicants, Baeyens refused to relinquish his management role in Capeco after the contractual basis for that role was terminated. This is the subject of separate litigation. They indicate that he is neither a director nor an employee of Capeco and there is no legal basis for his continued participation in its business but he nonetheless continued to exercise control over the business.

[22] The evidence overwhelmingly supports the conclusion that Baeyens' continued role in Capeco is not constructive. He has clearly intervened and scuppered the efforts of the applicants to get the third respondent to sign the resolutions for the appointment of

[5] *Greyvenouw* supra note 3.

proxies for the applicants. He realised that the ultimate goal was the removal of his allies, the third and fourth respondents, as directors. Baeyens obtained access to the applicants' attorney Mr Arnold under false pretences on 16 July 2024 (more than likely with the co-operation of the third respondent) when he hijacked a telephone call apparently from the third respondent to Mr Arnold after Mr Arnold took the call. He informed Mr Arnold that he and the third respondent were one, that *'we will not be leaving',* and that the resolution will not be signed. He purported to represent the third respondent in the discussion. All of this occurred after receipt of emails from the third respondent on 16 July 2024 (annexures 'FA 4-6') addressed to Mr Arnold indicating that she will be attending to the resolutions. She admits having received the email from Mr Arnold of 17 July 2024 (annexure 'FA7') recording the conversation with Baeyens and requesting her to confirm whether she instructed Baeyens to represent her in the discussion. She never responded nor did she deny Baeyens' averments. She simply states in the answering affidavit that she cannot comment on the conversation of 16 July 2024.

[23] The account of Ms Holmes concerning the conduct of Baeyens is set out in some detail in the founding affidavit and is confirmed in her confirmatory affidavit. It is apparent that Ms Holmes had a long-standing involvement with Capeco. She indicated that Baeyens maintained absolute control over the affairs of Capeco in a loud, aggressive and domineering manner. He has an uncontrollable temper and the third and fourth respondents are completely under his control and do anything he orders them to do for fear of incurring his wrath. He is a bully and Ms Holmes and other staff members are terrified of him and have suffered extreme mental abuse over an extended period at his hands. If anything occurs which does not meet his approval, he screams at the subject of his disapproval using foul and obscene language to the extent that spittle flies from his mouth. Ms Holmes reported that after the first letters of RNI were sent to the third respondent concerning the resolutions in respect of proxies for the applicants, Baeyens rampaged around the office, asserting that he and the staff were under attack from the shareholders and Mr Arnold, uttering epithets and threats regarding what he would do.

[24] The third respondent vehemently denies Ms Holmes' account of Baeyens' behaviour including the rampage at the office, but admits that Baeyens is a 'passionate' person (which in her view is not a negative trait) and does recall that Baeyens was upset with the apparent inaccurate allegations made against him by RNI. This is rather peculiar because there is no reference to Baeyens in the said letters of Mr Arnold to the third respondent and there were therefore no inaccurate allegations made against him in those letters that he could have been upset about. As alluded to, the third respondent replied to the letters of Mr Arnold on 16 July 2024 confirming that she will attend to the request to sign resolutions of the shareholders to appoint a proxy in terms of section 58(1) of the Act. To recap, the discussion between Mr Arnold and Baeyens took place after the third respondent's reply of 16 July 2024 confirming that she will sign the resolutions. Baeyens informed Mr Arnold that the resolutions will not be signed. Baeyens' influence over the third respondent is demonstrated by the fact that the resolutions were never subsequently signed. This tends to corroborate the account of Ms Holmes.

[25] Further corroboration for the account of Ms Holmes can be found in the exchange of correspondence between Mr Arnold and the respondents' attorneys of record which demonstrates Baeyens' attitude and conduct. The email of 13 August 2024 (annexure 'FA 22') from Mr Arnold to Joubert Galpin Searle ('JGS'), who are the respondents' attorneys of record, states that:

> 'Lastly, it appears that all communication to the directors of Capeco, is being intercepted by one John Baeyens. He also then proceeds to send a flurry of incoherent, unsubstantiated and often defamatory emails to the shareholders of Capeco, their family and their overseas attorneys. To the extent that you are able, please impress upon him to cease and desist from doing so immediately. Neither of those parties, nor our offices, have any desire to engage with Mr Baeyens at this time.'

[26] In an email of 19 August 2024 (annexure 'FA 25') from Mr Arnold to JGS it is recorded that:

> 'Unfortunately, however Ms Tana and Mr Tarr have fallen inordinately under the influence of Mr John Baeyens ("Mr Baeyens") (who of course is not a director of Capeco). In the course of bombarding our clients and various unrelated third parties with often incoherent, defamatory and factually incorrect missives, Mr Baeyens repeatedly refers to himself, Ms Tana and Mr Tarr by means of the third person plural pronoun in relation to the management of the company.
>
> Mr Boutens *[Second Respondent]* has always been contactable and willing to engage with the other directors of Capeco. Unfortunately, the negative, aggressive and dismissive approach adopted by Mr Baeyens (and his concomitant influence on Ms Tana and Mr Tarr) has resulted in a breakdown of the relationship between our clients (as shareholders) and Capeco and has also frustrated the relationship between Mr Boutens and his fellow directors.
>
> …
>
> It follows also that our clients share the view of Mr Baeyens (expressed in an email on 15 August 2024 to our clients and 16 other recipients, in the following terms "… *hence, again, my deepest request: let's divorce. Nobody wants to work with both of you. I'll pay in for the divorce"*) that any form of relationship between them and Mr Baeyens is unworkable.'

[27] In a letter dated 6 September 2024 (annexure 'FA 28') from Mr Arnold to JGS it is stated that:

> 'In closing, we reiterate that Mr Boutens has at all times been willing to interact with his fellow directors in Capeco. Unfortunately, such interactions have frequently been prematurely scuppered by the uninvited and disruptive presence of Mr Baeyens (who, as we have previously pointed out, holds himself out as the representative of Ms Tana and Mr Tarr) and whose main objective appears to be to spew a deluge of unhelpful, irrational and defamatory missives which add no commercial value to Capeco and serve no purpose other than to entrench the divide between him and the shareholders.'

[28] It is readily apparent from the letter of JGS dated 15 August 2024 (annexure 'FA24') addressed to the ultimate owners of Capeco, that JGS was also acting on behalf

of Mr John Baeyens. The above references to Baeyens in the exchange of correspondence between Mr Arnold and JGS, have nowhere been disputed.

[29] Finally, in follow up letters dated 26 July 2024 (annexures 'FA17-19') addressed by Mr Arnold to the third respondent requesting signature of the resolutions of the applicants for the appointment of proxies, it is stated that: '*Despite having responded in all three instances to advise that you would "attend to the matter" you have not done so. Instead, we have received a flurry of intemperate correspondence from John Baeyens (who is not a director or other officer of the Company nor of either of the other shareholder companies, or of Capeco) purporting to represent you in your capacity as director."* There is no response or denial on record from the third respondent.

[30] Needles to say, for present purposes there is no need and it is not advisable to finally decide the apparent dispute relating to the issues concerning Baeyens. As indicated, those issues will no doubt feature in the separate proceedings being instituted in that regard by the applicants and is only relevant to the extent necessary to determine the issue of urgency. Suffice it to say that I am satisfied that the account of Ms Holmes is largely borne out by the available evidence. This in turn appears to support the applicants' contention that Baeyens, in conjunction with the respondents, were acting to the detriment of Capeco justifying the decision to bring the application as a matter of urgency.

[31] In my view there is no merit in the submission of Mr Nepgen that the shareholders can call the meeting themselves which disposes of the applicants' contention that the matter is urgent. There is no basis for the submission that Capeco's board is not effective or that the directors cannot or will not exercise the powers vested in them. The argument advanced in this regard is that the third and fourth respondents are effectively 'deadlocked' with the second respondent in that the latter is willing to convene the shareholders' meeting, while the former are not. In the circumstances the general meeting of shareholders therefore has the inherent power to exercise the powers vested in the board and would have the power to convene the meeting and to issue the relevant notices. This argument is misconceived. There is nothing approaching a deadlock among

the directors. The position is that the third and fourth respondents, who constitute a majority, is not presently willing to call the meeting. There is accordingly no basis for the shareholders to intervene and assume the power of the board to call a meeting on the basis that the board is not effective or that the directors cannot or will not exercise their powers to call the meeting. The third and fourth respondents accepted that the directors are under a duty to call the meeting, but argue that they are not obliged to do so until their requirements have been complied with. The only available avenue for the shareholders is to seek relief in terms of section 61(12) of the Act where they disagree with the position adopted by the third and fourth respondents. Any meeting which is unilaterally convened by them to remove the third and fourth respondents, would be unlawful.

[32] Furthermore, clause 4.2 of the memorandum of incorporation, on a proper interpretation, does not empower the shareholders to call or convene a shareholders' meeting. The approach to the interpretation of words used in a document such as the memorandum of incorporation, is now well-established. The inevitable point of departure is the language of the provision. It is the language used, understood in the relevant context and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation, however, the triad of text, context and purpose should not be used in a mechanical fashion.[6]

[33] The clause, on its plain meaning, explicitly gives effect to the right of shareholders, which is entrenched in section 61(3), to demand a meeting. The proposition advanced by Mr Nepgen is fanciful that the word 'requisition' in clause 4.2 actually means call or convene. The ordinary meaning of the word is clear. It is defined as: *'1. The action of requiring something; a demand; 2. The action or an act of formally requiring or demanding that a duty etc. be performed; a written demand of this nature.'*[7] The word requisition is used as a verb in clause 4.2 meaning to demand. The clause records the right of shareholders to demand that a shareholders' meeting be called. Neither the context nor

[6] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA) para 18; *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd & Others* 2022(1) SA 100 (SCA) para 25.

[7] The New Shorter Oxford English Dictionary (1993) p 2557.

the purpose of the clause militates against this conclusion. The fact that clause 4.2 refers to both a 'requisition' and a 'demand' is of no moment in that the words are synonymous in the context of the clause. The use of both words in the clause does not signify that they must have different meanings as Mr Nepgen submitted. There is no reason why the drafters of the document would not explicitly have referred to the right of shareholders to 'call' a meeting if that was the intention, instead of referring to a right to 'requisition' a meeting which is synonymous to demanding a meeting. This is particularly so given that the clause provides that the *'demands from the Shareholders to call a meeting'* must comply with certain stated requirements. It is clear that the latter is a reference to the right of shareholders to demand that a meeting be called. It would be meaningless and absurd to grant the shareholders the right to demand that a meeting be called, if the shareholders themselves can call the meeting. The clause clearly gives effect to the provisions of section 61(3) which compel the board, or another person specified in the memorandum of incorporation or rules, to call a shareholders' meeting upon delivery of a compliant demand for such meeting. On the plain meaning of clause 4.2, the shareholders are not specified as *'any other person'* authorised to call a shareholders' meeting. This conclusion is not disturbed, as Mr Nepgen contends, by the provisions of clause 5.3.2 of the memorandum of incorporation which similarly give effect to the obligation in terms of section 73(1) imposed on a director, authorised by the board, to call a board meeting if required by the stipulated number of directors. The reference in the clause to the right *'to requisition'* a meeting clearly refers to the right of the stipulated number of directors to *'require'* that a board meeting be held in terms of section 73(1)(i) and (ii)[8]. This is similar to the right of shareholders to demand a shareholders' meeting in terms of section 61(3). The respondents' reliance on section 7.2 of the shareholders' agreement is equally misplaced. This provision does not empower shareholders to call or convene a shareholders' meeting. It provides in terms, that the shareholders' meeting shall be called

[8] The section provides that:

'**73. Board meetings. –** (1) A director authorised by the board of a company –
may call a meeting of the board at any time; and
must call such a meeting if required to do so by at least –
(i) 25% of the directors, in the case of a board that has at least 12 members; or
(ii) two directors, in any other case.'

by any of the directors (not shareholders), *inter alia, 'by request of any of the shareholders.'*

[34] It follows that there is no merit in the contention that the applicants could have relied upon the right of the shareholders to call a shareholders' meeting.

[35] I am accordingly persuaded that the application is sufficiently urgent to justify the applicants' non-compliance with the rules and that the application should be entertained on that basis.

MERITS

The respondents' attitude towards the calling of the meeting

[36] It is common cause that the applicants' demand in terms of section 61(3) for a shareholders' meeting was delivered to each of the second to fourth respondents (the directors of Capeco) on 5 August 2024. The second respondent is amenable to the meeting being held. He is, however, based overseas and has for logistical reasons requested the third and fourth respondents, who are also local employees of Capeco, to attend to calling the meeting. The respondents are willing to undertake the task, but argue that they are presently unable to issue the notice calling the meeting until all the statutory requirements have been met. This has resulted in a protracted exchange of correspondence between RNI and JGS attorneys.

The exchange of correspondence between the attorneys

[37] On 15 August 2024 JGS wrote that the respondents were confused by conflicting communications from the applicants and would apply themselves to the demand once the confusion has been alleviated. RNI responded on the same day dealing with the apparent confusion. JGS advised on 20 August 2024 that the respondents were still considering their position. On 28 August 2024 JGS requested an extensive list of documents and

indicated that the respondents will assess the documents upon receipt thereof and reapply themselves to the demand. RNI provided the requested documents on 6 September 2024. On 10 September 2024 the respondents adopted a new stance and contended that the applicants were obliged to provide them with the '*grounds for the advancement of the proposed resolution'* to enable them to meaningfully *'make the legislatively sanctioned representations.'* They are therefore unable to issue notices for the meeting. RNI responded on 11 September 2024 indicating that it was not open to the respondents to refuse to comply with the demands on the said basis as they appear to be doing. The letter nonetheless continued: '*That notwithstanding, as we have already advised your clients, our clients uniformly have lost confidence in the ability of your clients to carry out their responsibilities as directors with the necessary dispassion and independence and in the best interests of the Company and it is for that reason that they wish to consider their removal as directors (subject of course to such presentation as they may see fit to make).'*

[38] JGS replied to the following effect on 12 September 2024:

'2. We are nevertheless instructed to respond as follows to certain pertinent aspects raised in your letter.

2.1 Your clients' position as regards the calling of the shareholders meeting ("the meeting") is unfortunate.

2.2 Our clients are indeed aware of the peremptory nature of the legislation and do not dispute their responsibility to call the meeting. Their basis for contention is simply that they must be placed in a position to call the meeting in a manner which is legislatively compliant.

2.3 Unfortunately, your clients have still not enabled our clients to do so.

2.4 In order for a meeting proper to be called by the board of directors of the Company, the notice convening the meeting is to set out the grounds for the proposed removal of the directors concerned. The rationale for setting out these grounds is to afford the directors who are the subject of the proposed resolution an opportunity to meaningfully respond to the basis for the resolution during their legislatively sanctioned presentation and prior to the shareholders' vote being cast. Given that your clients are of the view

that this position is "misconceived", we regrettably are compelled to direct you specifically to the authority upon which our clients rely and which they are of the view applies to the circumstances of this matter; namely *Pretorius and Another v Timcke and Others 15479/14 2015 ZAWCHC.*

…

2.7 We would like to reiterate our clients' assurance of their intention to call the meeting as soon as they are placed in a position to do so. …

2.8 In your letter you aver that your clients have lost confidence in our clients' ability to carry out their responsibilities as directors "… with the necessary dispassion and independence, and in the best interest of the company". This is not (*sic*) simply not sufficient for the reasons stated in paragraph 2.4.

2.9 Our clients request that your clients provide them with sufficient specificity as to why your clients believe that they are unable to carry out their responsibilities as directors with the necessary dispassion and independence so expected of them.

2.10 Our clients would appreciate if your clients could perhaps provide any example of such deviation from the dispassion and independence which your clients so require, bearing in mind that you also act for Mr Vincent Boutens who himself is a director of the Company. You will know that that (*sic*) a director who serves on a board of a company is obligated to act in the best interests of that company and not in accordance with the whims of the shareholders. As we have previously recorded, our clients instruct that Mr Boutens has by no means discharged his duty as a director of the Company in a manner that admits of sensibility, independence and eagerness to advance the interests of the Company.

2.11 Be that as it may, our clients look forward to calling the meeting upon receipt of your response which they trust will be in accordance with that set out at paragraph 2.4 above.'

(emphasis supplied)

[39] RNI responded as follows on 16 September 2024:

'The aforegoing notwithstanding and despite their firm view that they have no obligation to go further than they have in indicating the basis upon which they wish to consider the resolution to remove them as directors, our clients are prepared to afford your clients a final opportunity to comply with the obligations imposed upon them by the Companies Act.

Our clients have conveyed to your clients in the plainest of terms (*inter alia* in our letter) that your clients no longer enjoy their confidence. Your clients were elected as directors by the shareholders (which are our clients) and serve at their behest and our clients no longer support them, nor do they have our clients' trust. We have referred previously to the influence of Mr John Baeyens in relation to the conduct of your clients of their responsibilities as directors as being one of the bases which has influenced our clients' conclusion. Mr Baeyens is not a director (nor for that matter an employee) of Capeco.

Whilst it is not necessary for our clients to provide your clients with any further detail at all, the influence enjoyed by Mr Baeyens is amply illustrated by the contents of the string of intemperate emails sent by him on 16 July 2024 to the writer (with copies to Ms Tana and in some instances to directors in your firm) and the email of 17 July 2024 from Ms Tana to the writer. On the instructions of our clients, we responded to the latter on that date and did not receive a response from her (although Mr Baeyens has consistently communicated with us ostensibly on his own behalf and that of both your clients, using third person plural pronouns).

…

Unless our clients have received a notice from the directors before 16h30 on 18 September 2024 convening a meeting of shareholders for the consideration of the motion previously sent to them, such meeting to be held no later than a date during the week of 7 to 11 October 2024, our clients will proceed without further notice to your clients to seek the necessary relief in the High Court.'

[40] JGS replied on 19 September 2024 basically reiterating that the respondents accept their obligation to call the meeting but have not been placed in a position by the applicants to do so. The present application then followed on 30 September 2024.

The assessment of the respondents' case

[41] The position of the respondents is set out as follows in their heads of argument:

'47. In essence the respondents contend that statutorily compliant notices cannot be given or ordered, and thus that the application is premature for the following reasons:

47.1 The shareholders have not provided the directors with a copy of the shareholders' resolution as contemplated by the Act; and

47.2 The shareholders have not provided the directors with sufficient clarity and specificity accompanied by sufficient information and/or explanatory material to enable either a shareholder who is entitled to vote on the resolution on the one hand, or the directors on the other hand, to participate in the proposed meeting and to seek to influence the outcome of the vote on the resolution, with the result that any notice will be deficient of the requisite detail.'

[42] In addition, Mr Nepgen submitted firstly with reference to *CDH Investment NV v Petrotank South Africa (Pty) Ltd & Another*[9] that the court would refuse an order under section 61(12) where the applicant itself enjoys the right to call the meeting. Furthermore, that courts are disinclined to interfere in the management of company affairs and that '*a court would generally, unless special circumstances require otherwise, have to be satisfied that calling a members' meeting was bona fide intended, with a legitimate purpose, and in the best interests of the company.'* I am not altogether convinced that the latter considerations do apply. It is not clear why shareholders should be *bona fide* or act in the best interests of the company when they demand a shareholders' meeting, because they do not owe fiduciary or other duties to the company. It is, however, not necessary to express a final view in this regard. Suffice it to say that I am satisfied that there is no basis for finding that the applicants are not acting in good faith or in the best interests of Capeco or for a legitimate purpose.

[43] I turn to the first issue raised by Mr Nepgen. As indicated above, the applicants do not have the right to call the shareholders' meeting in terms of the memorandum of incorporation of Capeco or otherwise. In any event the situation in *Petrotank* was different in that the applicant in that matter had the support of a majority of directors who could have passed a board resolution to convene a shareholders' meeting and there was accordingly no need to enlist the assistance of the court under section 61(12). In the present matter the applicants require the co-operation of the respondents (in the absence of a court order) to call a shareholders' meeting. *Petrotank* furthermore did not deal with

[9] 2018(1) SA 157 (GJ) paras 80 & 82 (*'Petrotank'*).

the removal of directors (that issue was previously resolved) but was concerned with a situation where the applicant, who was a majority shareholder, intended to use the meeting for questionable purposes. One of the intended resolutions patently amounted to oppressive conduct against the minority shareholder. It is clear that the circumstances of *Petrotank* and of the present matter differ materially and that *Petrotank* is distinguishable. The applicants would be left without any meaningful remedy if they are precluded from resorting to the mechanism created by section 61(12).

[44] It is convenient to deal next with the second leg of the respondents' argument, namely that the application is premature because the applicants have not provided any or sufficient information or explanatory material in their demand for the meeting so as to enable the respondents to issue the notice of the meeting. Put succinctly, the issue is whether the respondents are entitled to reasons or the grounds for their intended removal as directors of Capeco.

[45] Section 62[10] of the Act regulates the notice requirements for a shareholders' meeting. In terms of the provisions of this section, the company is obliged to deliver a compliant notice of the meeting to each shareholder, 10 business days (in the case of Capeco) before the meeting is to begin. The notice must be in writing and contain the information set out in section 62(3), which includes the general purpose of the meeting and any specific purpose contemplated in section 61(3)(a). It must also include a copy of

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[10] The section is to the following effect:

'**62. The purpose of meeting**. – (1) The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least –

(a) 15 business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or

(b) 10 business days before the meeting is to begin, in any other case.

…

(3) A notice of a shareholders meeting must be in writing, and must include –

(a) the date, time and place for the meeting, and the record date for the meeting;

(b) the general purpose of the meeting, and any specific purpose contemplated in section 61(3)(a)

(c) a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting, and a notice of the percentage of voting rights that will be required for that resolution to be adopted.'

the proposed resolution received by the company which is to be considered at the meeting.

[46] Section 65(3) of the Act deals with the case of a resolution proposed by shareholders and is applicable to the present matter. It provides in relevant part that:

> 'Any two shareholders of a company –
> (a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and
> (b) when proposing the resolution, may require that the resolution be submitted to shareholders for consideration –
> (i) at a meeting demanded in terms of section 61(3);'

[47] The format or requirements for a resolution are set out as follows in section 65(4):

> 'A proposed resolution is not subject to the requirements of section 6(4), but must be –
> (a) expressed with sufficient clarity and specificity; and
> (b) accompanied by sufficient information or explanatory material,
> to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.'

[48] Section 71[11] deals with the removal of directors. It is readily apparent from the section that the directors to be removed must be given notice of the meeting as well as

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[11] The section provides in relevant part that:

> '**71. Removal of directors. –** (1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in any election of that director, subject to subsection (2).
> (2) Before the shareholders of the company may consider a resolution contemplated in subsection (1)-
> (a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and
> (b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

be provided with the resolution for their removal. The directors are entitled to a notice period '*at least equivalent to that which a shareholder is entitled to receive'*. The company is accordingly obliged to deliver a notice of the shareholders' meeting to the directors concerned (the third and fourth respondents), in the present case 10 business days before the commencement of the meeting ie a notice period at least equivalent to that which the applicants are entitled to receive in terms of section 62(1)(b) of the Act.[12] The notice must be in writing and must specify the date, time and place for the meeting and its record date as well as its general and any specific purposes. It must include a copy of the proposed resolution for the removal of the directors concerned.

[49] The section 61(3) demand[13] delivered to the directors of Capeco on 5 August 2024 proposed that the shareholders' meeting be held on Tuesday, 20 August 2024 at 14h00

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(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company –
(a) has become-
(i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)(a); or
(ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or
(b) has neglected, or been derelict in the performance of, the functions of director,
the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.
(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given –
(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out the reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and
(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.'

[12] Cassim *et al Contemporary Company Law* 3ed (2021) p604 para 10.14.3 ('Cassim').
[13] The demand made by Mark Stewart was to the following effect:
'The writer has been appointed as a director of each of the shareholders, each of which is authorised and directed him to represent it and to make demand in terms of s61(3) of the Act that you convene a meeting of shareholders.
…
This letter, duly signed by the writer on behalf of all of the shareholders, constitutes such demand. The shareholders require that the board convene a meeting of the shareholders of the Company for the following purposes:
1. To consider a resolution pursuant to the provisions of s71(1) of the Act that Nokuthula Tana ('Tana') be removed as a director of the Company;
2. To consider a resolution pursuant to the provisions of s71(1) of the Act that Hendry John Tarr ('Tarr') be removed as a director of the Company;
3. To elect Mark Stewart as a director of the Company.

in Gqeberha. This made sufficient allowance for a notice period of 10 business days. The stated specific purpose of the meeting was to consider resolutions in terms of section 71(1) to remove the third and fourth respondents as directors and further to elect Mark Stewart as a director of Capeco. In my view, this information was clearly sufficient to enable the respondents to prepare a compliant notice of the proposed meeting and its specific purpose. Nothing further was expected of the applicants in so far as the formulation of the notice was concerned. As more fully set out below, it was specifically not required of the applicants that they provide the respondents with a statement setting out the reasons or grounds for their removal as directors. This is unlike the position under section 71(4)(a) that requires such a statement in the case of the proposed removal of a director by the board.

[50] It is common cause that the applicants have not provided the respondents with copies of separately drafted resolutions together with the demand. Mr Nepgen submitted that the duty to draft the resolutions rests on the applicants and that the omission was fatal to the application. He referred in this regard to the provisions of section 65(5)(b)(i) that empower a shareholder or director, who believes that the form of the resolution does not satisfy the requirements of section 65(4), to apply to the court for an order *'requiring the company, or shareholders who proposed the resolution, as the case may be, to … take appropriate steps to alter the resolution so that it satisfies the requirements of sub-section (4).'* He contended that this provision supports the conclusion that where the shareholders demand a meeting they must draft (and where applicable alter) the resolution which has to accompany the notice of the meeting. Although I am not convinced that this is indeed the case, I am willing to assume in the respondents' favour that the contention is correct particularly in the present circumstances. In this case the respondents are required to call the meeting and would otherwise have to draft the

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Given the appointment of the writer to represent each of the shareholders at the meeting to be convened (and given the provisions of s71(2)(a) of the Act and the fact that each of Tana and Tarr is employed and resident in Gqeberha) the shareholders propose that the meeting be held at a venue in Gqeberha.

Yet further, given the requirements of s62(1)(b) and of s71(2)(b) of the Act it is proposed that the meeting be convened at **14H00 on Tuesday, 20 August 2024**.'

resolutions for their own removal as directors. It is not difficult to conceive that the potential for further disputes about the contents of the resolutions are real should this task be left in the hands of the respondents. For pragmatic reasons this prospect should be avoided and I therefore conclude that in the circumstances of this case (regardless of what the true intent in this regard might be), the applicants should be required to formulate the resolutions. In so far as the requirements of section 65(4) are concerned, it is to be noted that all of the shareholders are demanding the meeting and proposing the resolutions for the removal of the respondents. They will be required to formulate the resolutions themselves. It is inconceivable that they would require information or explanatory material not already in their possession in order to determine whether to participate in the meeting or to be able to influence the vote on the resolutions which they themselves propose. Under these circumstances it is readily apparent that the information set out in the demand delivered on 5 August 2024 is sufficient, if incorporated in the resolutions, to comply with the requirements of section 65(4)(a) and (b). Needless to say, the resolutions (which must accompany the notice) have to be provided to the respondents before they would be able to give notice of the meeting.

[51] I revert to the remaining issue whether the respondents must be provided with the reasons or grounds for their proposed removal and sufficient information or explanatory material in order to place them in a position to call the meeting. The respondents relied in this regard firstly on the provisions of section 71(2)(a) read with section 65(4)(b) of the Act. The argument as I understand it is that the provisions of section 65(4)(b) are made applicable to affected directors by virtue of the clause *'at least equivalent to that which a shareholder is entitled to receive'* in section 71(2)(a). Therefore, the proposed resolution that has to be included in the notice to the respondents must be *'accompanied by sufficient information or explanatory material'* to enable the affected director *'to determine whether to participate in the meeting and seek to influence the outcome of the vote on the resolution.'* In this manner the resolution is at least equivalent to that which a shareholder is entitled to receive and thus complies with section 65(4)(b) that is equally applicable to affected directors. This argument is misconceived. On a proper interpretation, the clause in section 71(2)(a) *'at least equivalent to that which a*

shareholder is entitled to receive', refers to the period of notice and not to the proposed resolution. The subsection provides for three jurisdictional requirements before the shareholders may consider the proposed resolution, namely that the affected directors (i) be given due notice of the meeting at least equivalent to the notice period that the shareholders are entitled to receive; (ii) be provided with the proposed resolution; and (iii) be afforded a reasonable opportunity to make a presentation before the resolution is put to a vote. There is no requirement that the resolution that has to be provided to the affected directors should comply with section 65(4)(b). The latter section is expressly limited to shareholders and is of no assistance to the respondents. It is to be expected that there would have been an express reference to an affected director if the intention was to make the provision applicable also to directors.

[52] Mr Nepgen further submitted that section 65(5) supports the respondents' contention in that it provides that not only shareholders, but also directors, may approach the court for appropriate relief if they believe that the form of the resolution does not satisfy the requirements of section 65(4). This is a *non sequitur.* The fact that directors are empowered to approach the court does not mean that the requirements of section 65(4)(b) also apply to them. It simply gives effect to their direct and substantial interest in ensuring that a resolution aimed at their removal complies with section 65(4)(b) and that shareholders who are required to vote on their removal are fully informed. This conclusion is supported by the express exclusion of directors from the latter subsection.

[53] The further leg to the respondents' argument is that the directors' right to make a presentation at the meeting, entrenched in section 71(2)(b), must at the very least be read with section 65(4) thereby entitling them to a proposed resolution *'expressed with sufficient clarity and specificity and accompanied by sufficient information or explanatory material.'* This as well as the provision of the reasons or grounds for the removal are necessary to enable the directors to seek to influence the outcome of the vote on the resolution. To hold otherwise would render the provisions of section 65(5) nugatory. I have already dealt with the proper effect of section 65(5). These considerations relied upon by the respondents are expressly limited to instances where removal is at the

instance of the board when statement of reasons must be provided to the affected directors. Shareholders are not under a comparable duty where they wish to remove directors whom they have elected and whose continuation in office is subject to the will of those shareholders.

[54] The respondents' contention that the *audi alteram partem* principle applies in the present circumstances is linked to their above argument. Mr Nepgen submitted that *Timcke*[14] is authority for this proposition and supports the argument that the respondents are entitled to be provided with reasons or grounds for their proposed removal in satisfaction of the *audi alteram partem* principle. This will inform them of the case they have to meet and will enable them to make meaningful presentations at the meeting.

[55] Mr Richards submitted that *Timcke* is clearly wrong and that the correct legal position is reflected in *Natmed*[15] to the effect that the shareholders are not obliged to provide reasons for the proposed removal of a director.

[56] It is common cause that the court in *Timcke*[16] erred in concluding that the constitutional court in *Motau*[17] held that section 71(2) of the Act requires compliance with the rules of natural justice. This was clearly the basis of the court's conclusion in *Timcke* that directors had to be provided with the reasons for their intended removal and that in the absence thereof the resolutions for their removal as directors had to be set aside.

[57] I respectfully disagree with the decision in *Timcke.* In my view, the correct legal position has been set out in *Natmed.*[18] I agree with the conclusion in *Natmed* that the requirement in section 71(2)(b) that the director concerned be afforded a *'reasonable opportunity to make a presentation … to the meeting before the resolution is put to the vote'* does not support the conclusion that reasons for the intended removal must be given

[14] *Pretorius & Another v Timcke & Others* (15479/14) [2015] ZAWCHC 215 (2 June 2015).
[15] *Miller v Natmed Defence (Pty) Ltd & Others* 2022(2) SA 554 (GJ).
[16] Note 14 at para7.
[17] *Minister of Defence & Military Veterans v Motau & Others* 2014(5) SA 69 (CC).
[18] Note 14 at paras 33-36.

to the director prior to the decision to remove being taken. Section 71(2) contrasts with the provisions of section 71(4) which deal with the removal of a director by the board. The latter section expressly requires, before the board considers a resolution for the removal of a director, that notice of the meeting must be given to the director, including a copy of the resolution and a statement setting out the reasons for the resolution with sufficient specificity to reasonably permit the director to prepare and present a response. It is noteworthy that section 71(4)(b), similarly to section 71(2)(b), affords the director the right to make a presentation to the meeting. However, section 71(2)(a) unlike section 71(4)(a) does not provide for a statement of reasons to be furnished for the director's removal. It follows that where the removal of a director is sought by the shareholders, the latter are not required to provide the director with reasons or grounds for their intended action. It is well-established that directors serve at the behest of the shareholders who elected them. I agree with the conclusion in *Natmed* that the legislature deliberately preserved the right of the majority shareholders to remove, without cause, a director who they no longer support. It follows that the respondents (who were elected by the applicants) are not entitled to reasons or grounds for the proposed resolutions for their removal as directors.[19] The absence of a statement of reasons or of sufficient information or explanatory material accompanying the resolutions, do not preclude the respondents from issuing a notice or calling the meeting demanded by the applicants.

[58] Furthermore, any averred shortcomings in the resolutions as formulated do not constitute justification for not issuing the notice of the meeting. Any issues with regard to the resolutions must be raised at the meeting. It is not open to the respondents to unilaterally decide beforehand that the resolutions are deficient and to rely thereon as a reason not to issue the notice of the meeting. The sufficiency of the resolutions

[19] Cassim *ibid* note 12; Rehana Cassim *'Contesting the Removal of Directors under the Companies Act'* (2016) 133(1) South African Law Journal 136; Caroline Ncube *'You're fired! The removal of directors under the Companies Act 71 of 2008'* (2011) 128 South African Law Journal 33 at 39: '*No grounds for removal are provided for with respect to removals by shareholders. This is because "directors serve at the pleasure of shareholders" and consequently shareholders may effect removals without cause'* and at 50: *' … the 2008 Act does not require that shareholder removals be for cause.'*

accordingly does not arise at this stage. It does not affect the duty of the respondents to call the meeting.

[59] I should add that the respondents' request conveyed in the above letter of JGS dated 12 September 2024 (annexure 'FA31') for *'any examples of such deviation from the dispassion and independence'* which the applicants aver they lack in discharging the responsibilities as directors, is not justified and smacks of being a stratagem and a delaying tactic. It is abundantly clear from the reasons that were provided in the exchange of correspondence between the attorneys that the respondents have lost the applicants' support and trust. The applicants contend in this regard that the respondents are unduly influenced by Baeyens who orchestrates their conduct as directors to the detriment of Capeco. This is clearly the case they will have to meet at the meeting. As things stand and regardless of whether they are entitled to reasons, the respondents are in a position reasonably to prepare for their presentations at the meeting.

[60] To reiterate, the applicants have, in my view, provided the respondents with sufficiently clear and specified reasons for their intended removal in the above quoted exchange of correspondence between RNI and JGS. No further information or explanatory material can conceivably take the matter any further. As indicated, it is readily apparent that there has been a fundamental breach of trust between the parties and that the respondents no longer enjoy the support of the applicants who constitute the entire body of shareholders of Capeco.

CONCLUSION

[61] It follows that the applicants have made out a case for appropriate relief in terms of section 61(12) of the Act compelling the respondents to call a shareholders' meeting in terms of section 61(3) of the Act. However, before the respondents are obliged to call the meeting, the applicants should furnish Capeco with the resolutions which are to be considered at the meeting. These resolutions are to be drafted by the applicants. This will be reflected in the order to be granted in the matter.

ORDER

[62] In the result I make the following order:

(a) the applicants' non-compliance with the provisions of the Uniform Rules concerning time periods, forms and service is condoned and the matter is allowed to be heard as one of urgency in terms of Rule 6(12);

(b) the applicants are directed to furnish the respondents with the resolutions for the removal of the third and fourth respondents as directors of the first respondent to be considered at the shareholders' meeting referred to in paragraph (c) below, within five (5) days of the date of this order;

(c) the respondents are directed, within five (5) days after receipt of the resolutions referred to in paragraph (b) above:

(i) to give notice of a meeting of the shareholders of the first respondent, to each of the applicants (by means of email), to be held at the offices of the first respondent in Gqeberha, Eastern Cape Province at 14h00 on a date no later than 10 business days after the date of delivery of such notice, for consideration of the resolutions referred to in paragraph (b) above that the third and fourth respondents be removed as directors;

(ii) to give notice to each of the third and fourth respondents of the meeting of shareholders referred to in paragraph (c)(i) above, to provide them with the resolutions referred to in paragraph (b) above, and to advise them that each of them will be afforded a reasonable opportunity at the meeting to make a presentation before the resolutions are put to a vote;

(d) the costs of the application shall be paid by the third and fourth respondents, including the costs of counsel on scale C as contemplated in Rule 69(7).

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D.O. POTGIETER

JUDGE OF THE HIGH COURT

Date of hearing:	10 October 2024
Date of delivery of judgment:	28 November 2024
Counsel for the Applicants:	Adv JG Richards SC, instructed by Rushmere Noach Inc., 5 Ascot Office Park, Conyngham Road, Greenacres, Gqeberha
Counsel for the Third and Fourth Respondents:	Adv J Nepgen, instructed by Joubert Galpin Searle, 173 Cape Road, Mill Park,