

# Dispute Resolution

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SOUTH AFRICA

Fast is fine, but accuracy is everything



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DISPUTE RESOLUTION  
ALERT

Fast is fine,  
but accuracy  
is everything



*As Wyatt Earp said: "Fast is fine, but accuracy is final. You must learn to be slow in a hurry."*

It is important for litigants to consider and make use of the relevant available legal mechanisms to ensure that legal issues are properly crystallised. Without that exercise, misguided legal strategies are employed.

In the matter of *Mawerco (Pty) Ltd v Sithole and Others* (322/2023) [2024] ZASCA 91, the Supreme Court of Appeal (SCA) was saddled with, amongst other issues, analysing whether section 71 of the Companies Act 71 of 2008 (Act) provides a mandatory process that ought to have been followed in circumstances where two directors (the first and second respondents – being Mr Sithole and Mr Nitwane), who were appointed to the company's board as representatives of the majority shareholder in terms of a shareholders' agreement (that majority shareholder being the Mawewe Communal Property Association), were removed.

By way of background, Mawerco (Pty) Ltd (Mawerco) is a joint venture and has two shareholders – Mawewe Communal Property Association (Association) with a 51% shareholding and Crooks Brothers Limited, holding the remaining a 49% of the shares of Mawerco.

The shareholders' relationship (in relation to Mawerco) is governed by a shareholders' agreement which provides that each shareholder may appoint three directors to the company's board as its representatives (Agreement). Further, the Agreement provides for the removal of appointed directors as follows:

*"The shareholders will be **entitled to remove any of their representative appointees to the board and to replace any such director who is removed or who ceases for any other reason to be a director.**"*

The Association experienced significant infighting and, as a result of an Anton Piller application that was launched and later confirmed, it was declared that that no other persons, apart from those designated in the court order (emanating from the Anton Piller application), could represent the Association or hold themselves as being authorised to conduct the affairs of the Association (AP Decision).

In accordance with the AP Decision, and three days after the AP Decision was confirmed, the court-designated representatives of the Association resolved that Sithole and Nitwane were removed as directors of Mawerco and replaced as directors by the court-designated representatives instead.

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**Band 2:** Dispute Resolution.

Chambers Global 2018–2024 ranked us in:

**Band 2:** Restructuring/Insolvency.

**Tim Fletcher** ranked by  
Chambers Global 2022–2024 in  
**Band 2:** Dispute Resolution.

**Clive Rumsey** ranked by  
Chambers Global 2019–2024 in  
**Band 4:** Dispute Resolution.

**Lucinde Rhoodie** ranked by  
Chambers Global 2023–2024 in  
**Band 4:** Dispute Resolution.

**Jackwell Feris** ranked by  
Chambers Global 2023–2024 as an  
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dispute resolution lawyer.

**Anja Hofmeyr** ranked by  
Chambers Global 2024 as an  
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dispute resolution lawyer.



Aggrieved by their removal, Sithole and Nitwane approached the High Court of Mbombela on an urgent basis to seek declaratory relief to set aside their "suspensions" from office and to be reappointed as directors immediately. They also sought to have the meetings that were held before, during and after their removal, declared as unlawful for not having been constituted properly.

Somewhat foolhardily, Sithole and Nitwane did not seek to review or set aside the decision that was taken by the Association (in terms of the Agreement) to remove them, nor did they specify precisely which of the decisions they sought to impugn.

At first, it did not seem as though their haste in rushing to court had harmed their prospects, as the High Court that was approached granted the relief sought by Sithole and Nitwane on the basis that section 71 of the Act provides for the process of the removal of directors and, as that process was not followed in their removal, Sithole and Nitwane were entitled to the declaratory relief sought.

**Before the SCA**

On appeal, the SCA disagreed and found that the High Court had misconceived the enquiry required. The SCA found that because Sithole and Nitwane served as directors of Mawerco in their capacity as representatives of the Association and because they had failed (in their haste) to challenge the Association's resolution (which had the effect

of declaring that they could no longer serve as directors of Mawerco), they had not laid any basis for the relief that they sought (and which was granted by the High Court).

In defence, Sithole and Nitwane argued that they did not have knowledge of the exact decisions which would have been susceptible to review at the time of launching their application. The SCA, however, noted that the Rule 53 of the Uniform Rules of Court provides the mechanism (which ought to have been used) that triggers the delivery of a record of the documents or additional information that informed the decision. Had Sithole and Nitwane not been hasty in their rush to obtain relief, the mechanism provided by Rule 53 would have provided them with the information needed.

Following the *locus classicus* decision of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASC 48 (which confirmed that a decision stands until it is set aside), the SCA held that Sithole and Nitwane's application for declaratory relief had to fail because there was no claim for the review and setting aside of, in particular, the Association's decision to remove the respondents as directors. The SCA found that the provisions of section 71 of the Act could not be relied upon in isolation to grant the blanket declaratory relief sought – the appeal was accordingly upheld and Sithole and Nitwane lost their seats at Mawerco's boardroom table.

**Timothy Smit and Paige Winfield**

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**BBBEE STATUS: LEVEL ONE CONTRIBUTOR**

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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