



**REPORTABLE**

CASE NO: SA 63/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**CATHERINE JACQUELINE KOOPMAN**

**Appellant**

and

**ACTING CHIEF EXECUTIVE OFFICER: NAMIBIA  
STUDENTS FINANCIAL ASSISTANCE FUND  
(MR. KENNEDY KANDUME)**

**First Respondent**

**NAMIBIA STUDENTS FINANCIAL ASSISTANCE  
FUND (NSFAF)**

**Second Respondent**

**CHAIRPERSON OF THE DISCIPLINARY  
COMMITTEE**

**Third Respondent**

**TULIMEKE MUNYIKA**

**Fourth Respondent**

**MINISTER OF HIGHER EDUCATION, TRAINING  
AND INNOVATION**

**Fifth Respondent**

**Coram:** SHIVUTE CJ, HOFF JA and FRANK AJA

**Heard:** 4 October 2023

**Delivered:** 7 December 2023

**Summary:** Where in proceedings brought on notice of motion disputes of fact arise on the affidavits, relief may be granted if the facts averred by the applicant and

admitted by the respondent together with the facts alleged by the respondent, justify such an order.

The appellant in an urgent application instituted in the High Court averred that the appointment of the first respondent was unlawful, null and void since a member of the second respondent who had no voting right, as an additional member, sat and voted in favour of the appointment of the first respondent as acting chief executive officer by way of a round robin resolution by the Board of the second respondent.

The first respondent in answer denied that a resolution to appoint him was adopted by means of a round robin procedure, but that the decision to appoint was taken by the Board at an extra-ordinary board meeting.

The court *a quo* accepted the facts deposed to by the first respondent in his answering affidavit.

*Held* – that the appellant failed to prove on a preponderance of probabilities that the appointment of the first respondent as acting chief executive officer of the second respondent was adopted by way of a round robin procedure.

*Held* – that the court *a quo* correctly dismissed appellant’s application.

*Held* – the appeal is dismissed with costs.

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## APPEAL JUDGMENT

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HOFF JA (SHIVUTE CJ and FRANK AJA concurring):

[1] This is an appeal against an order of the High Court (court *a quo*) dismissing an application with costs, instituted by the appellant.

## Background

[2] The application in the court *a quo* was brought on an urgent basis in which the following relief was sought:

- (a) An order declaring the appointment of the first respondent, Mr Kennedy Kandume, (Kandume) as the acting Chief Executive Officer (CEO) of the Namibia Students Financial Assistance Fund (NSFAF) by the NSFAF Board by virtue of a round robin resolution dated 16 April 2018 attached to the applicant's founding affidavit as Annexure 'FA-CJK4' as invalid and of no effect in law, and setting it aside.
- (b) Declaring the approval of and voting for the appointment of the first respondent through a resolution by the fourth respondent, Ms Tulimeke Munyika, (Munyika) as unlawful and *ultra vires* the provisions of s 6(2) (a) of the NSFAF Act 26 of 2000 ('the Act').
- (c) Declaring the resolution dated 16 April 2018, attached to the applicant's founding affidavit as Annexure 'FA-CJK4', and the underlying decision to appoint Kandume as the acting CEO of NSFAF as invalid and setting them aside.
- (d) Declaring all the disciplinary steps taken and instituted at the instance of the first respondent, including the charges attached to the applicant's founding affidavit (Annexure 'FA-CJK8') and the whole ongoing

disciplinary process, including findings and recommendations, as a nullity and setting such processes, decisions and steps aside.

- (e) Declaring the appointment of Munyika by the fifth respondent in terms of s 6(2)(a) of the Act without specifying 'a particular purpose' for which she was appointed as an additional member of NSFAF as unlawful and setting it aside.
- (f) Directing that any of the respondents who oppose this application pay the applicant's costs.

#### The founding affidavit

[3] The appellant deposed to an affidavit in support of her application in which she motivated the relief sought by her on notice of motion. Appellant is employed by NSFAF holding the position of Senior Manager: Finance.

[4] Appellant stated that during April 2018, a vacancy existed for the position of CEO at NSFAF. Prior to 16 April 2018, she was informed telephonically by the first respondent (Kandume) that he was being considered for that position.

[5] On 16 April 2018, staff members were advised by the Board of Directors that Kandume had been appointed as the acting CEO. The Board's chairperson then briefed them that the appointment of the first respondent by the Board was through a round robin resolution.

[6] Later on 16 April 2018, the second respondent circulated to senior management a round robin resolution confirming the appointment of Kandume. The round robin resolution was attached to the founding affidavit and marked 'FA-CJK4'.

[7] On the second page of the resolution appear the names of the board members who voted in favour of the appointment, including that of Munyika.

[8] As soon as Kandume became the acting CEO, the appellant stated that she detected a change in behaviour towards her when Kandume started to take a number of steps that were allegedly aimed at either intimidating or victimising her.

[9] When appellant returned from her annual leave during May 2020 she received a letter from Kandume informing her that she had been transferred, which decision she considered to be unfair and unprocedural. Appellant questioned the procedure and the reason behind her transfer.

[10] On 2 July 2020, she received another letter from Kandume in which she was informed that she was suspended from duty. Appellant was subsequently charged with eight counts *inter alia* gross insubordination, causing a financial loss to NSFAP, gross discourteousness, sabotage and undue influence.

[11] During the disciplinary hearing she was represented by Mr Clement Daniels. After the conclusion of the disciplinary hearing, she was found guilty on four of the eight counts, all of which were dismissible offences. She was subsequently advised to

appoint Mr Sisa Namandje (Namandje) to represent her prior to the disciplinary committee recommending punishment.

[12] The appellant was then advised that it appeared that Kandume had been unlawfully appointed by the Board of Directors because:

- (a) firstly, Kandume's appointment by way of round robin resolution, approved and voted upon by Munyika is *ultra vires* the provisions of s 6(2)(a) of the Act in that Munyika has no voting right, yet voted and approved Kandume's appointment as acting CEO; and
- (b) secondly, based on the appointment letter of Munyika as an additional member of the NSFAP Board, the fifth respondent, contrary to the explicit and mandatory provisions of s 6(2)(a) of the Act, did not appoint Munyika 'for a particular purpose'.

[13] Appellant was thus advised that Kandume, 'in the eyes of the law', did not hold the position of acting CEO of NSFAP and therefore all actions he took against the appellant were nullities of 'serious proportions'.

[14] Appellant subsequently gave Namandje instructions to raise the aforesaid illegalities with the disciplinary committee. After hearing the respective parties, the disciplinary committee on 8 June 2021 ruled that it will forge ahead on 16 June 2021 to finalise the hearing and make recommendations to Kandume for a penalty.

[15] When appellant was informed of the findings of the disciplinary committee, she immediately gave instructions to approach the High Court on an urgent basis 'to protect my rights and vindicate the rule of law'.

[16] Appellant stated that she sought an order declaring the appointment of Kandume by way of the round robin resolution of 16 April 2018 as invalid, of no effect in law, and to be set aside. She further sought an order declaring all actions taken by Kandume in relation to herself, including the institution of charges and the disciplinary hearing as null and void, and should be set aside.

[17] The appellant further sought an order setting aside any steps or actions taken, or findings made, by the third respondent's disciplinary committee on the basis of charges instituted by Kandume purportedly acting as the CEO of NSFAP to be declared null and void and be set aside.

[18] Namandje deposed to a confirmatory affidavit.

#### Opposing affidavit

[19] Kandume deposed to an affidavit on behalf of the first, second and fourth respondents opposing the relief sought by the appellant.

[20] Kandume stated that the appellant is currently on fully paid suspension pending the conclusion of the disciplinary hearing. According to Kandume, the appellant was found guilty on 17 May 2021 on the charges of gross insubordination,

causing financial loss to NSFAF, gross discourteousness, sabotage and acquitted on the other four charges.

[21] On 27 May 2021, when the disciplinary committee was set to hear evidence in mitigation or aggravation of sentence, the appellant submitted an application challenging the legality of Kandume's appointment.

[22] Kandume pointed out that the appellant never took issue with the constitution of the Board nor of his appointment as acting CEO and that all these points were raised at the tail end of the hearing.

[23] Kandume further pointed out that the Employee Relations Policy of NSFAF, provides for an appeal procedure, and in the event an employee remains dissatisfied with the decision of the appeal committee, the employee may approach the office of the Labour Commissioner.

[24] With reference to the appellant's affidavit in support of her urgent application in the court *a quo*, Kandume stated that it is apparent that the appellant approached the court *a quo* out of fear that she would be dismissed or that a penalty might be imposed which would impact her 'integrity' and 'reputation'. The appellant's only lament is, according to Kandume, that she would be dismissed, and that the potential loss of employment gives her sleepless nights because she has a net salary of N\$63 000.

[25] Kandume denied that his appointment as the acting CEO was unlawful and attached the minutes of the extra-ordinary board meeting of NSFAF held on 16 April 2018, as Annexure 'AA2'.

[26] Kandume pointed out that as is apparent from those minutes, Munyika did not take part in the deliberations regarding the appointment of the acting CEO. Subsequent to that meeting and on 28 June 2018, the Board at its ordinary meeting approved the 16 April 2018 minutes appointing him as acting CEO. It was further pointed out that it is apparent from the minutes of 28 June 2018 that Munyika was absent from that meeting.

[27] Kandume stated that the appellant had not demonstrated that his appointment as the acting CEO was preceded by any illegalities as alleged.

[28] Kandume denied that the Board chairperson, Mr Mutumba, made any reference to an appointment being made on a round robin basis, as alleged by the appellant, since the Board had a meeting at which the appointment of himself was agreed. Kandume denied that he afterwards gave a copy of the round robin resolution to the appellant as there was no reason to do so. Kandume denied that he took steps aimed at victimising or intimidating the appellant.

[29] Regarding the appointment of Munyika in terms of the provisions of s 6(2)(a) of the Act, allegedly contrary to those provisions, Kandume referred to the provisions of s 9(5)(b) of the Act, as counter weight.

[30] Kandume denied that the appellant had put up any factual or legal basis for the extra-ordinary relief sought in the court *a quo*.

Affidavit on behalf of fifth respondent

[31] Ms Itah Kandjii-Murangi, the Minister of Higher Education, Training and Innovation deposed to an affidavit on behalf of the fifth respondent.

[32] She confirmed that Munyika had been appointed in terms of s 6(2)(a) of the Act, she denied that she did not appoint Munyika 'for a particular purpose', and denied that the appointment was unlawful.

[33] She stated that there was substantial compliance with the relevant legislative provisions in the appointment of Munyika as an additional member of the NSFAP Board.

[34] The Minister stated that Munyika's appointment was based on her legal expertise and professional background and the Minister continued to list Munyika's expertise and experience. It is not necessary to repeat same.

[35] The appellant deposed to a replying affidavit.

The judgment of the court *a quo*

[36] The application brought by the appellant in the court *a quo* was dismissed with costs. The court *a quo* explained that the first basis for the alleged illegality is that the

round robin resolution approved and voted upon by Munyika was *ultra vires* the provisions of s 6(2)(a) of the NSFAF Act 26 of 2000, which stipulates that Munyika, who was appointed as an additional member had no voting rights. The second basis for the alleged illegality is that the letter appointing Munyika failed to state for what particular purpose the Minister appointed her as required by s 6(2)(a) of the Act.

[37] In paragraph 28 of its judgment, the court *a quo* explained that the ‘applicant’s allegation that the resolution in question was adopted on a round robin basis appears to be premised on the sub-heading in the minutes of the 28 June 2018 ordinary meeting which reads: “Ratification of round robin resolutions”. The first respondent denied that the resolution was adopted by way of round robin, but was adopted at the extra-ordinary meeting of the directors held on 16 April 2018 and was subsequently ratified and incorporated in the minutes of the meeting of the directors held on 28 June 2018. The resolution recorded *inter alia* that the “Board held an urgent special board meeting in the morning of 16 April 2018 . . . after extensive deliberations”. It was signed by all directors who attended that meeting. In light of this respondent’s rebuttal, in my view, the respondent’s denial cannot be said to be far-fetched. It thus prevails over the applicant’s version’.

[38] In the next paragraph the court *a quo* dealt with the effect of the signature of the resolution by Munyika, to the effect that the resolution remains valid as long as it was signed by the majority of the voting members. The court *a quo* considered this situation, the same as provided for by s 222 of the Companies Act 28 of 2004, which

stipulates that the 'acts of the directors are valid notwithstanding any defect that may afterwards be discovered in his or her appointment'.

[39] I shall briefly quote the two provisions of the Act referred to herein, before continuing with the judgment of the court *a quo*.

[40] Section 6(2)(a) provides as follows:

'The Minister may –

(a) If he or she deems it expedient, for a particular purpose and on such terms and conditions and for such period as he or she may determine, but subject to subsection (5), appoint one other fit person as an additional member of the Board, but such additional member shall not have the right to vote at meetings of the Board.'

[41] Section 9(5)(b) provides that:

'No decision or act of the Board or act performed by authority of the Board shall be invalid by reason only –

- (a) of the existence of a vacancy on the Board; or
- (b) of the fact that a person who was not entitled to sit as member of the Board sat as such a member at the time when the decision was taken or the act was performed or authorised, if the decision was taken or the act was performed or authorised by the requisite majority of the voting members of the Board who were present at the time and entitled to sit as such members.'

[42] The court *a quo* found that what was destructive of the applicant's case was s 9(5)(b). The court *a quo* reasoned as follows:

'In this matter, the fourth respondent is not "a person who was not entitled to sit as a member". She is an "additional member" of the Board. Section 6(1) of the Act stipulates that the Board shall "consist of five members". *Ex facie* the resolution concerned it appears that it was adopted by four members. The fifth member declined to approve it. The resolution was thus adopted by the majority of the voting members of the Board who were present at the said extra-ordinary meeting. It follows therefore, in my view, that even if the fourth respondent voted for the adoption of the resolution by signing it, that does not render the resolution invalid because of the provision of s 9(5)(b) of the Act. Her signature is viewed by the law as *pro non scripto* – as not had been written.'

[43] The court *a quo* further found that s 6(2)(a) does not require the Minister to specify the particular purpose for which an additional member had been appointed, ie that the Minister was not obliged to state in the letter of appointment the purpose for which Munyika had been appointed.

#### On appeal

##### *Submissions on behalf of the appellant*

[44] It was submitted on behalf of the appellant that s 9(5)(b) of the Act relied upon by the respondents and the court *a quo* does not discard and displace the prohibition under s 6(2)(a) – it protects decisions of the Board, made by a quorate meeting from being invalidated if a person who was not entitled to sit in that meeting sat in the meeting. It does not deal with a person who is prohibited from voting and who not only sat but also voted.

[45] It was submitted that the appointment of Kandume was unlawful because Munyika, an additional member who was prohibited from voting under s 6(2)(a) of the

Act proceeded to vote and approve the round robin resolution in terms of which the decision was made to appoint Kandume.

[46] It was submitted that on this basis, Kandume's decision to charge and institute disciplinary proceedings against the appellant was consequently invalid and must be set aside.

[47] It was submitted that the court *a quo* erred in relying on s 222 of the Companies Act, because it was not raised by any party in pleadings or during argument and was decided by the court without giving the parties notice of its intention to rely on such distinct ground. That section, it was pointed out, is not applicable to NSFAP or to other public enterprises and in particular to a decision made in contravention of s 6(2)(a) of the Act.

[48] It was submitted that the usage of the phrase 'for a particular purpose' under s 6(2)(a) of the Act would have required the Minister to define, identify and specify in the appointment letter, or at least in the Government Gazette in terms of the Public Enterprises Governance Act 1 of 2019, the purpose for which Munyika was appointed. This was not done.

[49] It was argued that it was not open for the Minister to *ex post facto* identify the particular purpose only in the litigation proceedings. The Minister had to do it at the time of the appointment. The inevitable consequence of this failure is, it was contended, that all disciplinary processes must be set aside.

*On behalf of Kandume, the NSFAF and Munyika*

[50] It was submitted that the relief sought by the appellant was correctly refused by the court *a quo*. It was explained that the answering affidavit filed on behalf of Kandume and Munyika set out the factual basis on which the relief was opposed in the court *a quo*.

[51] It was submitted that the respondents in some respects were of the view that the conclusions reached by the court *a quo* are correct for reasons that might slightly differ from those articulated by the court *a quo*, but that this does not matter. A respondent in an appeal is entitled to defend orders even if it is not necessarily for the exact same reasons set out (or even conclusions reached) by the court *a quo*.

[52] It was submitted that the court *a quo* was correct in accepting respondents' version that the resolution was not adopted *via* round robin but at an extra-ordinary board meeting. This was the evidence presented by the respondents. Munyika never attended the meeting of 16 April 2018 which resolved to appoint Kandume as the acting CEO of NSFAF. At this meeting, the Board considered certain factors taken into account in the decision to appoint Kandume. It is apparent, it was pointed out, from the minutes that the decision to appoint Kandume was not taken by way of round robin.

[53] It was submitted that the relevant resolution was carried and taken at the extra-ordinary board meeting which was attended by five members who were entitled

to vote, that there was full compliance with the provisions of s 6(1) of the Act, and that the quorum provisions of s 9(2) of the Act were fully met.

[54] It was submitted that the issue raised by the appellant regarding the alleged illegality of Munyika as a board member based on s 6(2)(a) of the Act, is a non-issue because at that point in time when the actual decision was taken, Munyika neither voted nor participated in the board meeting of 16 April 2018. So even if she was never properly appointed, there was a validly appointed and fully functioning Board in place consisting of five members as required by s 6(1) which took a valid decision on 16 April 2018.

[55] It was further pointed out that the complaints by the appellant concerning the reliance by the court *a quo* on s 222 of the Companies Act takes the appellant's case no further, since the conclusions reached by the court *a quo* are correct regardless of the provisions of s 222 and without considering whether s 222 had any effect on the issues in question.

*Submissions on behalf of the fifth respondent*

[56] It was submitted that as is apparent from the Minister's affidavit at the time of Munyika's appointment, the Minister deemed it necessary to appoint an additional legal mind to render legal advice as well as address the corporate transformation agenda for the enhancement of the efficiency of the Board.

[57] It was submitted that the provisions of s 6(2)(a) merely require that the Minister must appoint an additional member for a particular purpose and that the omission of

the particular purpose in the appointment letter does not render the appointment unlawful.

[58] It was submitted that the purpose of the appointment does not require publication, otherwise the Legislature would have stated so. It suffices for the Minister to state the purpose if she is called upon to do so, like she did in this matter.

[59] It was submitted that the Act itself under s 9 does not nullify the acts of the Board if a member who sat on the Board and voted was not entitled to do so. The actions would be held *intra vires* the Act and its provisions.

#### Evaluation

[60] In a nutshell the findings of the court *a quo* were the following:

- (a) firstly, Munyika, signed the round robin resolution, which she was not allowed to do because she, as an additional member had no voting power in terms of s 6(2)(a) of the Act;
- (b) secondly, the respondents' version that the resolution was not adopted on a round robin basis, but at an extra-ordinary board meeting held on 16 April 2018, was accepted. The court held that this resolution was signed by all those who attended that meeting and by the majority of the board members; and

- (c) thirdly, Munyika was entitled to be present at the meeting, and even if Munyika voted on the resolution, it did not invalidate it because of *inter alia* the *proviso* contained in s 9(5)(b) of the Act – her signature was *pro non scripto*.

[61] The point raised by the appellant which concerned the alleged defect in the appointment of Munyika was thus dismissed.

[62] The finding of the court *a quo* in paragraph 28 of its judgment that the respondents' denial that the resolution to appoint Kandume as acting CEO, was adopted through a round robin resolution, 'cannot be said to be far-fetched. It thus prevails over the applicant's version'. This finding could only have been based on the rule authoritatively set in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,<sup>1</sup> namely that where proceedings brought on notice of motion disputes of fact have arisen on the affidavits, relief may be granted 'if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order'. It was further held that there may be exceptions to this general rule, eg where the allegations or denials by the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[63] The premise that Kandume's appointment as acting CEO was adopted by the Board of Directors by way of round robin is the foundation of the appellant's

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<sup>1</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634.

application in the court *a quo*, and also on appeal to this court. If this foundation crumbles or is removed then, *cadit quaestio*.

[64] On the basis of the court *a quo*'s finding, and in my view correctly so, that the factual allegations in Kandume's affidavit must be preferred, it follows, as day follows night, that the adoption of the resolution to appoint Kandume as acting CEO on 16 April 2018 was done at an extra-ordinary meeting of the Board and not by way of a round robin resolution.

[65] It is apparent from the minutes of this board meeting held on 16 April 2018<sup>2</sup> that five members of the Board attended this meeting.<sup>3</sup> Munyika did not attend this board meeting. The minutes of this board meeting were signed by and confirmed to 'constitute an accurate and complete reflection of the proceedings of the meeting to which they relate', by the Board chairman and the company secretary. The company secretary deposed to a confirmatory affidavit.

[66] The reason for the appointment of Kandume also appears from the minutes. The signatures of the five board members do not form part of the minutes.

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<sup>2</sup> Attached to the opposing affidavit by Kandume as an annexure.

<sup>3</sup> Jerome Mutumba as Board chairperson, Dr. Christina Swart-Opperman as deputy chairperson, Dr. Natascha Cheikhoussef as member, Dr. Isak Neema as member and Stephen Tjiuro as member.

[67] On 28 June 2018, an ordinary board meeting was held. Six board members attended this meeting.<sup>4</sup> It is recorded in the minutes of this meeting that Munyika (member) was absent. She tendered an apology.

[68] Paragraph 9 of the minutes of this meeting as its heading reads: 'Ratification of round robin resolutions.' Under the sub-heading 'Notes/Discussion' the following appears:

'The meeting noted that if resolutions were already approved on round robin basis, they need no further ratification, but rather just to be noted.'

[69] There were six resolutions referred to in these minutes including that of 16 April 2018 relating to the appointment of the acting CEO of NSFAP. The minutes concluded as follows:

'All round robin resolutions were noted.'

[70] These minutes were confirmed by the company secretary and the Board chairperson and also do not contain the signatures of the board members who attended the meeting.

[71] The 'round robin' resolutions attached to her founding affidavit as Annexure 'FA-CJK4', the first page thereof, is an extract of Annexure 'AA2' attached to the opposing affidavit of Kandume, and reads exactly the same. Far from supporting

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<sup>4</sup> Jerome Mutumba as Board chairperson, Dr. Christina Swart-Opperman as deputy chairperson, Stephen Tjiuro as member, Dr. Natascha Cheikhyoussef as member, Adda Angula as member and Dr. Isak Neema as member.

appellant's version of a round robin resolution adopted by the Board on 16 April 2018, it destroys the premise of her application.

[72] On the second page of Annexure 'FA-CJK4' appear seven signatures, including that of Munyika. It is not clear to which Board resolution these signature have relevance. What must be accepted is that these signatures cannot relate to the resolution adopted on 16 April 2018 (since five board members attended that meeting). It also cannot relate to the ordinary board meeting held on 28 June 2018, since Munyika did not attend that meeting.

[73] The document attached to the appellant's founding affidavit itself does not support her version that the Board on 16 April 2018, adopted a resolution by way of a round robin, appointing Kandume as acting CEO. It is apparent from this Annexure 'FA-CJK4', that the *'Board held an urgent special board meeting in the morning of 16 April 2018 in order to deliberate and ultimately resolve the subject matter'*<sup>5</sup>. There was only one 'subject matter' to be resolved on 16 April 2018, and that was the appointment of the acting CEO.

[74] It is not clear from the documents filed why the 'round robin resolutions', referred to in Annexure 'AA3'<sup>6</sup> (attached to Kandume's answering affidavit), came about because at this stage the decision to appoint Kandume had already been taken by the Board and a further recordal was thus unnecessary and of no consequence.

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<sup>5</sup> Emphasis provided.

<sup>6</sup> Annexure 'AA3' reflects the minutes of the ordinary board meeting held on 28 June 2018.

[75] The minutes of the ordinary board meeting held on 28 June 2018 reflect that the minutes of the meeting held on 16 April 2018 had been approved (which minutes reflect that the resolution to appoint Kandume as acting CEO, was adopted during an extra-ordinary board meeting).

[76] The round robin resolution referred to in para 9 of the minutes of the meeting held on 28 June 2018 stated that the resolutions referred to were for mere noting, (in contrast to ratification).

[77] In paras 26 and 27 of the judgment of the court *a quo* the following appears:

[26] . . . the applicant attached a copy [of] the resolution of the board meeting adopted by the directors on 16 April 2018, appointing the first respondent as acting CEO. It is signed by all the directors including the fourth respondent whose name is appended above the line and below her name and signature.

[27] The first respondent does not deny that the signature is that of the fourth respondent neither does the fourth respondent herself deny this crucial and serious allegation against her in her confirmatory affidavit. Instead she simply states that she confirms the deponent's allegations as far as they relate to her. I therefore hold that the signature on the resolution of the board meeting of NSFAF of 16 April 2018 is that of the fourth respondent. I further hold that the fourth respondent should not have appended her signature to that resolution. What is the effect of the fourth respondent's signature on the said resolution? This is considered below.'

[78] The findings by the court *a quo* are not supported by the facts presented by Kandume in his answering affidavit and accepted by the court *a quo* itself, namely:

- (a) firstly, that no resolution by way of a round robin procedure was adopted by the Board at its extra-ordinary meeting held on 16 April 2018; and
- (b) secondly, that Munyika did not attend the meeting of the 16 April 2018, so even if there was Munyika's signature, it is of no consequence and does not advance the appellant's stated case.

[79] The court *a quo* incorrectly applied the rule enunciated in *Plascon-Evans (supra)* by finding that Munyika signed a resolution of the Board at a meeting held on 16 April 2018. The appellant's case was that the resolution was adopted by means of a round robin resolution. I emphasise this finding by the court *a quo*, since counsel who appeared on behalf of the appellant with great zeal and conviction, found support in this finding for his submission that Kandume had been unlawfully appointed, because Munyika who was not entitled to vote, not only sat in the board meeting of 16 April 2018 but also voted, and appended her signature by way of the round robin procedure adopted by the Board. This submission is without any substance since it is devoid of any factual basis.

[80] The second basis for the alleged illegality of the appointment of Kandume, namely that the letter appointing Munyika as an additional member failed to state for what particular purpose the appointment was made as required by s 6(2)(a) of the Act, has become a non-issue, simply because Munyika never attended the extra-ordinary board meeting held on 16 April 2018, and consequently could not have voted in favour of the appointment of Kandume as acting CEO.

[81] On the proven fact that Munyika had not attended the extra-ordinary board meeting held on 16 April 2018, the provisions of s 9(5)(b) do not find application. The provisions of s 222 of the Companies Act are equally not applicable in these circumstances.

[82] This court, *albeit* for different reasons finds that the court *a quo* did not misdirect itself when it dismissed the appellant's application. It is trite that appeals are against orders and not the underlying reasoning.

[83] The appellant simply failed to prove on a preponderance of probabilities that the appointment of Kandume as acting CEO of NSFAP was adopted by way of a round robin resolution. There is, in my view, therefore no room for further argument.

[84] In the result, the following order is made:

The appeal is dismissed with costs, such costs to include the costs of one instructing and two instructed legal practitioners.

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**HOFF JA**

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SHIVUTE CJ

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FRANK AJA

APPEARANCES

APPELLANT:

S Namandje (with him K Simson)

Of Sisa Namandje & Co. Inc.

FIRST, SECOND and FOURTH

R Töttemeyer (with him U Hengari)

RESPONDENTS:

Instructed by Kangueehi & Kavendjii-Inc.

FIFTH RESPONDENT:

J Ncube

Of Government Attorney