

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case No. 2022/3648

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED: YES/ NO

DATE: 24 AUGUST 2022

JUDGE: T THUPAATLASE AJ

In the matter between:

Breadline Africa RSA (NPC)

1st Applicant

Marion Wagner- Snyders

2nd Applicant

And

Farzeen Bhana

Respondent

JUDGMENT

Thupaatlase AJ

Introduction

[1] This is an unopposed application directing that the respondent to be declared a delinquent director in terms of Section 162(5) (c)¹ of the Companies Act, 71 of 2008 and further directing that respondent pays costs of this application.

[2] The first applicant is a registered NPC with registration number 2006/015075/08. The first Applicant is the genesis of many primary juristic entities of a larger international public benefit organisations called Breadlines Africa (BLA) and was established in 1993.

[3] The stated object of the first applicant is to undertake a range of activities and projects including the provision of funding and other practical assistance in order to address conditions of poverty.

[4] The second applicant is one of the directors of the first applicant. She deposed to a founding affidavit in support of this application. The application is unopposed. The respondent was personally served with a notice of this application on 09th February 2022.

Evidence

¹ (5) A court must make an order declaring a person to be a delinquent director if the person

(c) while a director —

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a) ;

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company contrary to section 76(2) (a);

(iv) acted in a manner — (aa)

that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or (bb) contemplated in section 77(3)(a), (b) or (c);

[5] The affidavit of the second applicant provides in graphic details the conduct of the respondent which it is argued, warrants that she should be declared a delinquent director. The affidavit reveals that during her interview for a position to the board of BLA, she presented a falsified CV. The CV gave a list of University qualifications from Wits University and London School of Economics and other post graduate qualifications. Upon investigations it was established that she didn't have any of those qualifications. She also presented a false reference.

[6] The respondent attended international board meetings of BLA and made false presentations about the work she claimed to be doing in furtherance of the aims and objectives of the first respondent. The respondent also presented a doctored invoice to try and defraud the first applicant. The scheme of fraud perpetrated by the respondent also involved false emails.

Legal Framework

[7] Section 162 (5) (c) of the Companies Act, 71 of 2008 (the Act) read with sections 76 (2)², 76(3)³ and 77(3)⁴ of the Act provides the requirements to be satisfied in order to succeed in an application to declare a director a delinquent director.

[8] As already indicated the affidavit in support of the application was deposed to by the second applicant who is a director of the first applicant. Section 162 of the Act

² (2) A director of a company must —

(a) not use the position of director, or any information obtained while acting in the capacity of a director — (i) to gain an advantage for the director, or for another person other than the company or a wholly owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company;

³(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director —

(a) in good faith and for a proper purpose; (b) in the best interests of the company; and
(c) with the degree of care, skill and diligence that may reasonably be expected of a person —

⁴(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having —

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

gives a very wide range of persons' *locus standi* to can apply to court to declare a director delinquent, this include a director of the company. The second applicant therefore has the requisite *locus standi* to bring the present application.

[9] The question of legal standing is critical to be determined. It is because '*in the light of the extensive range of persons who are empowered to apply to court to disqualify a director from holding office under section 162 (2) of the Act, it becomes important to guard against abuse of the section. This because frivolous and vexatious applications may be lodged by persons with locus standi*⁵'. Upon reading of the founding affidavit, I am satisfied that legal standing has been established and that the applicant is not motivated by malice and further she is not frivolous or vexatious.

[10] In order for an applicant to succeed in obtaining a declaration of delinquency, very serious misconduct must be demonstrated. In the judgment of **Lewis Group Ltd v Woolman and Others** 2017 (2) SA 547 (WCC) at para [18] the following is stated in this regard: '*It follows that for a company or any of its shareholders to succeed in obtaining a declaration of delinquency in respect of any of the company's directors or former directors, they must demonstrate very serious misconduct by the person concerned. The relevant causes of delinquency entail either dishonesty, wilful misconduct, or gross negligence. Establishing so-called 'ordinary' negligence, poor business decision making or misguided reliance by a director on incorrect professional advice will not be enough.*'

⁵ R Cassim "A Comparative Discussion of Judicial Disqualification of Directors under South African Companies Act" **Journal of African Law**, 65 Vol. 65 No. 1 (2021) page 92

[11] It is also important to understand the rationale for the enactment of this provision. In the case of ***Gihwala and Others v Grancy Property Ltd and Others*** 2017 (2) SA SSA 337 (SCA) at para [142] the court held that *'In order to assess these arguments, it is appropriate first to examine the purpose of section 162 (5). Contrary to the submissions on behalf of Mr Gihwala and Mr Manala, it is not a penal provision. Its purpose is to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against misconduct of delinquent directors.'* See also ***Msimang NO and Another Katuliiba and Others*** [2013] 1 SA 580 (GSJ) where the judge of this division expressed the same viewpoint.

[12] The question whether the grounds of complaint, considered in the context of the evidence contain in the founding affidavit in the current proceedings, make out a sustainable case capable of supporting the order sought in terms of section 165 (3) will be considered presently to the extent necessary. It also important to note that the respondent has not opposed the application and the facts as stated in the founding affidavit are not disputed.

[13] The correct legal position is therefore that a director must be declared delinquent director if such a director has by gross negligence inflicted harm on the company. It is correct that if any of the grounds set out in section 162 are satisfied, a court is obliged to make an order declaring a person to be a delinquent director, thereby disqualifying him or her from office. This is made clear by the word 'must' used in section 162(5). The use of the word makes it mandatory for the court to declare a director if the evidence establishes such conduct.

[14] A court has no discretion but to declare a director acting in the manner contemplated in s 77(3)(b) of the Companies Act 71 of 2008 to be a delinquent director in terms of s 162(5)(c)(iv) (bb). The consequence of an order of delinquency is that such a person is disqualified from being a director of the company. See **Rabinowitz v Van Graan and Others** 2013 (5) SA 315 (GSJ)

[15] The evidence shows that the respondent breach the trust, wilfully misconducted herself and abused her position as director of the company. In the process as per Section 162 (c) (1) and (iv) (aa) she also breached various aspects of Sections 76 and 77 of the Act. In particular Sections 76(2) (a); 76 (3); 77 (2) and 77 (3).

[16] The respondent owed a duty not only to the first applicant but also to the international board on which she served. The respondent acted in the most egregious manner towards the first applicant. This is illustrated by her attempt to defraud the first applicant in both February 2020 and June 2020 by presenting false invoices. In seeking her own personal benefit in this fraudulent manner, the respondent grossly misused her position as a director. This conduct falls squarely within section 162 (5) (c) of the Companies Act, 2008. The action involved gross abuse of the position as director. See **Gihwala** at para [138].

[17] It is my considered view that the conduct of the respondent fell short of the standard expected of a director to such an extent that it amounts to wilful misconduct, breach of trust and a gross abuse of her position as a director. The conduct of respondent not only amounts to a serious breach of her fiduciary duty as a director of the first applicant but also led to breach of trust between herself as a director and the first respondent.

[18] While no monetary harm was done to the first and its board, the reputational harm and risk was immense. The respondent intentionally and fraudulently manufactured documents to procure payment from the first applicant, for another company of which she is the sole director.

[19] I find that there can be no justification for the respondent's aforesaid conduct. The relief sought in the Notice of Motion is warranted as measure to protect the first applicant, its clients as well as the general public from the conduct of the respondent. It needs mentioning that the first applicant is a non-profit organization that relies on donor funding. The integrity of the first applicant is its agency to ensure that funds are donated in order to fulfil its objectives.

[20] I accordingly grant the following order:

20.1 The Respondent is declared a delinquent director in terms of the provisions of section 162 (5)(c) of the Companies Act 71 of 2008.

20.2 The Respondent is ordered to pay the costs of this application.

**T Thupaatlase
Acting Judge**

Heard on: 02 August 2022

Judgment Delivered: 24 August 2022

APPEARANCES:

For the Applicant

Attorneys: Shepstone & Wylie Attorneys

Counsel: Advocate Dale Lubbe

For the Respondent: No Appearance