



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO.

(3) REVISED.

2022-09-12

DATE

SIGNATURE

Case Number: 37983/2021

In the matter between:

GLADSTONE REASON MKHATSHWA

Applicant

And

KENNETH MOHULE NDLOVU

First Respondent

PHUMATRA TRANSPORT ENTERPRISE

(PTY) LTD

(REG. NO.: 2006/063964/23)

Second Respondent

AMOGELANG TRANSPORT SERVICES

(PTY) LTD (In business rescue)	Third Respondent
(REG. NO.: 2000/018818/07)	
LOUISA PULANE MKHATSHWA	Fourth Respondent
PULENG NCHOKE NDLOVU	Fifth Respondent
PHILLIP LESSING N.O.	Sixth Respondent
LINCOLN PHAHLANE MKHOMBO N.O.	Seventh Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Eighth Respondent
AMOGELANG LOGISTICS CC	Ninth Respondent
(REG. NO.: 2008/044614/23)	

JUDGMENT

POTTERILL J

Background

- [1] Kenneth Mohule Ndlovu [Kenneth], the First Respondent, started a highly successful transport empire culminating in certain entities being formed *inter alia* a close corporation and two companies. This matter in the main revolved around Phumatra Transport Enterprise (Pty) (Ltd) [Phumatra], the Second Respondent and the

Third Respondent Amogeleng Transport Service (Pty) Ltd (in business rescue) [Amogoleng] and Amogelang Logistics CC, the Ninth Respondent. These businesses generated great wealth and there is no countenance to the fact that the success of the companies can be solely attributed to Kenneth.

- [2] Kenneth offered both Reason Mkhathshwa [Reason], the Applicant, his son in law married to the Fourth Respondent, Louisa Phulane Mkhwatswa [Louisa], Kenneth's daughter, shareholding in the two companies without them having to pay anything towards becoming shareholders. In Phumatra Reason acquired 20 % shareholding and Louisa acquired 9 %. Her brother Phuleng Nchoke Ndlovu [Puleng], the Fifth Respondent, acquired 10 % with Kenneth retaining 51 % of the shareholding. In Amogelang Reason acquired 20 % shareholding, Phuleng 9 %, Phuleng 20 % and Kenneth retained 51 %. Kenneth thus remained the majority shareholder in both the entities. Reason was appointed as director in both Phumatra and Amogelang.
- [3] Lincoln Phahlane Mkhombo, the business rescue practitioner of Amogelang, [the BRP] the Seventh Respondent filed an affidavit neither opposing nor supporting the application, the facts he did set out will be referred to later in the judgment. None of the other respondents filed opposing affidavits. Reason and Kenneth are referred to by name with no disrespect intended, and were also referred to as such in the papers. Kenneth's wife, to whom he was

married in community of property, passed away and the executor of the estate is cited as the Sixth Respondent [Lessing N.O.]

- [4] True to the proverb; “*eat and drink with family, do business with strangers*”, the business relationship went sour and Reason is applying as a director and shareholder in terms of s162(5) of the Companies Act 71 of 2008 [the Act] to declare Kenneth a delinquent director of both Phumatra and Amogelang.
- [5] In the answering affidavit only a point *in limine* was raised with purposefully no answer to the merits. In argument on behalf of Kenneth the point *in limine* was argued, as well as the merits with counsel for Kenneth arguing only on the founding affidavit of Reason as not satisfying the jurisdictional requirements for a delinquency order as set out in the Act.

Did Reason have *locus standi* as a shareholder and director to bring the application?

- [6] The first issue raised was the lack of *locus standi* of Reason to bring this application as he was not a shareholder of Phumatra and Amogelang. I need not decide this issue; when argument on behalf of Kenneth was commenced counsel conceded that Reason was indeed a shareholder of both these entities.
- [7] The only issue left to decide pertaining to *locus standi* was whether Reason was still a director of the two entities. It was common

cause that he was a director of Amogelang and Phumatra, but was removed as director of the Companies. Pursuant to Kenneth filing an objection to the Companies and Intellectual Property Commission [CIPC], the Eight Respondent, he was reinstated by the CIPC as a director.

[8] It is common cause that Kenneth, purporting to act as a shareholder, sent a notice to Reason on 14 June 2021 to attend a shareholders meeting on 28 June 2021 at 11:00 in respect of Phumatra and 13:00 in respect of Amogelang. These notices were issued by Kenneth in his personal capacity as a majority shareholder. It was submitted by Reason that Kenneth had contended that the shares of Amogelang were in fact vested in the Pheko Development Trust [the Trust] and if that was so, the notice was to be given by the Trust and not Kenneth pertaining to the Amogelang meeting. It was also contended that since Kenneth was married in community of property the executor had to act jointly with Kenneth pertaining to Amogelang and Phumatra. Accordingly, Reason did not attend these meetings due to the incorrect procedure followed and the lack of cogent grounds for his removal.

[9] Kenneth averred that Reason was removed because Reason fraudulently filed a COR168 Form on behalf of Phumatra. He also averred that Reason acted as a delinquent director by applying for the companies' liquidations and sought the rescission of the business rescue proceedings. He also withdrew R119 000 from Phumatra's bank account.

[10] Reason denied that he filed a COR168 pursuant to the June 2021 events, but did so as a result of the April 2021 events. He had the authority to file an objection by means of COR168. He acted in good faith to only, as an alternative to his main prayer, seek liquidation with his main aim with the previous application to prevent the plundering of the companies. He had the right to withdraw the R119 000 from the bank account as his salary that was owed.

[11] In oral argument it was argued that Reason had followed the incorrect process to be reinstated as a director. He should have utilised s71(5) of the Act; he should have approached a Court and not the CIPC to have him reinstated. Reason was accordingly correctly removed as a director and with no lawful setting aside of the removal as director Reason had no *locus standi* to bring this application.

[12] Section 71 of the Act reads as follows:

“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 an election of that director, subject to subsection (2).

(2) Before the shareholders of a 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.

(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 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.

(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)(a)(i), if applicable, may apply within 20 business days to a court to review the determination of the board.

(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be –

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and.....”

- [13] It is common cause that the removal of Reason is not reflected at the CIPC and factually he is a director. I cannot find that the actions of the CIPC reinstating Reason as director, pursuant to his objection to his removal, was unlawful because it was the incorrect procedure followed. Section 71(5) is required when a director was removed in terms of s71(3), the purported removal of Reason was done in terms of s71(1), as a majority vote and s71(5) is not applicable. Reason is accordingly *de facto* and *de jure* a director and had *locus standi* to bring this application. But, in any event the procedure followed by Kenneth to remove Reason was invalid.

Must Kenneth be declared to be delinquent director?

- [14] In terms of Section 162(5) of the Act “A court must make an order declaring a person to be a delinquent director if the person -
- (a) ...
 - (b) ...
 - (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);

- (i) *intentionally, or be gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);*
- (ii) *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);*
- (a) *has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation.”*

[15] Perhaps a good starting point is what the BRP has uncovered since the business rescue proceedings have commenced. He has addressed letters, flowing from his report, to the South African Revenue Services because of tax returns that were not submitted or incorrect returns that were submitted. A letter was sent to the South African Police Services due to financial impropriety allegedly committed prior to the commencement of the business rescue proceedings. The Independent Regulatory Board for Auditors was informed that annual financial statements of which some were audited contained incorrect or unverifiable financial information. The CIPC was informed that assets belonging from one entity had been transferred to another entity without board resolutions. In his report he confirmed that the grants received by the companies

from the Department of Transport were not exclusively used for the companies and some R4 million was transferred to the Trust, which is a personal Trust of Kenneth, without any board resolution approving such transfer. The auditor confirmed that the averment that the trust has 100 % shares is false; in fact, the Trust had no shares in the companies. The BRP further reported that the directors received loans and the company issued loans to related companies without adhering to the provisions of the Act. On 11 April 2017 and 11 April 2017 amounts of R9.7 million and R300 000 were again from payments from the Department granted as "*temporary relief*" to Amogelang, paid over to the personal Trust without any legitimate authorisation from Amogelang.

- [16] It is not denied that Kenneth withdrew substantial amounts from Phumatra's bank accounts in the period prior to the end of 2017 and transferred those funds to Ntshole Trading and Projects (Pty) Ltd, a business owned by Kenneth's girlfriend, Mrs Deliwe Buthelezi. Funds from Phumatra were used to buy a townhouse, Unit 11 Trevonia Mews, Garsfontein for Mrs Buthelezi with no such resolutions being taken.
- [17] Phumatra paid R1.6 million cash for a specially outfitted luxurious Range Rover for Kenneth. No resolution was adopted by Phumatra for this purchase. The vehicle was later sold for R1.1 million cash but the proceeds did not go back to Phumatra but instead to the personal Trust.

- [18] Phumatra also paid for a Porche Carrera 911 4 S in the amount of R1 435 029.00. The car was sold but the proceeds did not flow back to Phumatra.
- [19] Amogelang did not timeously submit and pay ENP201 monthly returns for the financial year 2017 resulting in SARS levying penalties and interest amounting to R142 266.
- [20] SNG Grant Thornton (SNG) reported concern to the BRP about the audit opinion for 2015 and 2016 financial statements and accuracy of the books of the company and reported that Amogelang and Phumatra issued loans and the directors received loans without adhering to the Companies Act. The Companies failed to maintain proper accounting records.
- [21] I do not find it necessary to refer to any other facts set out as grounds in support of the application for delinquency simply because the facts set out above are undisputed and sufficient to make a finding. The facts tell a sad story of a success story rapidly deteriorating to a disaster. The Act requires a director of limited liability companies to fulfil his duties and functions in good faith and for a proper purpose and in the best interests of the companies. Company monies simply cannot be siphoned off without proper purpose, without resolutions and with no accounting. Even though a director has built up a company he or she cannot utilise the company funds as his own; the correct procedures and bookkeeping procedures must be followed and

monies must be utilised for the companies' benefit. As so aptly penned by Ngcobo J :

“Limitations on the right to freely choose a profession are not to be lightly tolerated. But we live in a modern and industrial world of human interdependence and mutual responsibility. Indeed we are caught in an inescapable network of mutuality. Provided it is in the public interest and not arbitrary or capricious, regulation of vocational activity for the protection both of the persons involved in it and of the community at large affected by it is to be both expected and welcomed.”¹

[22] In *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) the Court found that s162 has a protective service:

“Its aim is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands. And it is required in the public interest that those who enjoy the benefits

¹ *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC) para [60]

*of incorporation and limited liability should not abuse their position.*²

[23] The facts in this matter do not constitute trivial misdemeanours. On these facts it is clear that Kenneth was grossly abusing his position as director, recklessly so, and in breach of trust of his functions and duties as a director by instead of protecting the company he stripped the company of assets.³ Kenneth must accordingly be declared delinquent.

[24] In terms of s162(7) a declaration of delinquency is for a period of 7 years, but a court has the power to relax the period after three years and then probation can take effect.⁴ No submissions were made seeking a shorter period of delinquency or reasons why that should be appropriate. I accept that the Legislature had sound reasons as to why the period of seven years was seen as fit. The only argument was that Kenneth did in fact act in good faith by seeking Amogelang's business rescue. The business rescue application was in fact a kneejerk reaction to an application brought by Reason and Amogelang could barely be described as being in financial distress. This fact on its own cannot sway me to deviate from the period of 7 years.

² Para [144]

³ S162(5)(c)(iv)(aa) of the Act

⁴ s162(11)

[25] The fact that there was no reply to the merits of this application, the factual inaccuracies in the answering affidavit and the conduct of Kenneth renders the punitive costs order appropriate.

[26] I accordingly make the following order:

[26.1] The First Respondent is declared a delinquent director;

[26.2] The delinquency declaration is unconditional and will subsist for seven years from the date of the order;

[26.3] The CIPC is directed to act in accordance with this order and remove the First Respondent from the directorship of the Second and Third Respondents and the Ninth Respondent if applicable.

[26.4] The First Respondent is ordered to pay the costs of the application on an attorney and client scale.

S. POTTERILL
JUDGE OF THE HIGH COURT

CASE NUMBER: 37983/2021

HEARD ON: 19 July 2022

FOR THE APPLICANT: ADV. M.P. VAN DER MERWE SC

INSTRUCTED BY: Barnard & Patel Inc.

FOR THE 1st RESPONDENT: ADV. W.R. MOKHARE SC

ADV. T.B. HUTAMO

INSTRUCTED BY: Rams Inc.

DATE OF JUDGMENT: 12 September 2022