



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 62755/2018

DELETE WHICHEVER IS NOT APPLICABLE

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

.....
DATE

.....
SIGNATURE

In the matter between:

THE COMPANIES & INTELLECTUAL PROPERTY COMMISSION	Applicant
and	
M MAJA	First Respondent
T N SINDANE	Second Respondent
DR S S SIBIYA	Third Respondent
M S TSIE	Fourth Respondent
T MOTLOGELOA	Fifth Respondent
B G IMBOKODVO	Sixth Respondent
M M TSHISHONGA	Seventh Respondent

Summary: Company Law – application declaration of delinquency – s 162(5)(c)(aa) and 162(5)(d) of Companies Act 71 of 2008 considered and applied-found directors entitled to fair hearing – court not passive bystander – involved in inquiry whether requirements for declaration of delinquency were met – dispute of fact – *Plascon-Evans* rule applied – found gross negligence willful conduct and breach of trust envisaged in s162(5)(c)(aa) not proven – further found that s 162(d) to be interpreted in context of whole section – the circumstances and evidence to be considered in order to determine whether declaration of delinquency appropriate. Application dismissed. Counter application for declaratory relief that directors complied with.

ORDER

- 1) The points in *limine* are dismissed.
- 2) The supplementary affidavits are allowed.
- 3) The application is dismissed with costs, including costs of two counsel, where applicable.
- 4) The counter application is dismissed with costs.

JUDGMENT

TOLMAY J

INTRODUCTION

1. The applicant, the Companies and Intellectual Property Commission (CIPC) brought an application to declare the respondents delinquent directors in terms of s 162 of the Companies Act 71 of 2008 (the Act). The application was opposed by the first to fifth and the seventh respondents. Selective Empowerment Investments Ltd, (SEI 1) was incorporated during 2007 and all the respondents were directors of SEI 1 at one

time or the other. The alleged mismanagement of SEI 1 premised the launching of this application during 2018.

2. During the hearing counsel for CIPC indicated that he abandoned the case against the second to fifth respondents and only sought relief against the first and the seventh respondents.

POINTS IN LIMINE

3. In the answering affidavit the first to fifth respondents raised several points in *limine*. None of these were dealt with in the respondents' heads of argument or argued during the hearing. I therefore deal with it only for the sake of completeness.

4. The first was that the sixth respondent does not exist. It is common cause that Bethany Governance Imbokodvo indeed does not exist and does not require determination. The second point was that there was no proper service of the application on the first, second and fourth to sixth respondents. It is abundantly clear that all the respondents were well aware of the application opposed it and filed affidavits. The purpose for service is to bring a lawsuit under the attention of the parties, if that is accomplished a technical objection should not be entertained by the court.

5. The third was that the former directors Mr. Goosen (Goosen) and Mr. Preller (Preller) should also have been cited as they were directors within 24 months from the institution of the application and according to the respondents they were the real culprits who caused the failure to comply with the provisions of the Act. Although the respondents persisted with blaming Preller and Goosen and suspects that CIPC did not pursue a similar application against them for nefarious reasons, the point of non-joinder was not raised in argument and seems to have been abandoned by the respondents. The sixth point was that the deponent to the founding affidavit was not duly authorised to depose to it. This point was also not addressed in argument or in the heads and seems to be abandoned. None of the points in *limine* have any merit and should in any event be dismissed.

THE ISSUES

6. The following issues remain to be decided:
 - a) Whether the supplementary affidavits should be struck.
 - b) Whether the first and seventh respondents should be declared delinquent directors.
 - c) Whether declaratory relief should be granted as set out in the counter application.

THE MERITS

7. SEI 1 was incorporated during 2007 and was established to be an investment company for small investors to invest primarily in the Johannesburg Stock Exchange (JSE) and to take advantage of Broad Based Black Economic Empowerment (BBBEE) and other investment opportunities. SEI 1 invested in both listed and unlisted instruments. It subscribed to BBBEE transactions and invested in collective investment schemes and money market investments. It had approximately 26000 shareholders, mainly black and only a small percentage of shares are held by other races.
8. The seventh respondent became a director of SEI 1 during 2007 until 30 April 2018, and the first respondent became a director during November 2013. The second to fifth respondents only became directors during 2017.
9. During 2020 CIPC launched a liquidation application against SEI 1, and it was placed under liquidation by order of court on 24 April 2023. The court was informed during the hearing that an appeal against that order was pending in the Supreme Court of Appeal.
10. CIPC alleges several contraventions of the Act by the respondents, including non-compliance with s 30 of the Act, which deals with the preparation of annual financial statements, a failure to maintain a share-register, non-compliance with s 61(7) of the Act, dealing with the convening of Annual General Meetings (AGM's). Various other irregularities are also alleged. It is common cause that at least some of the non-

compliances and irregularities did occur. There is no point in listing all the irregularities and the parties' respective versions thereof here.

11. The respondents blame the previous board, primarily Goosen and Preller for the sorry state of affairs that SEI 1 finds itself in. It was argued on behalf of the first respondent, that he joined the board long after the malfeasance had begun and although it continued during his tenure, he made numerous attempts to address the problems. The affidavits that he deposed to are replete with examples of the attempts he made to call in the assistance of all involved, including CIPC, all to no avail. He also explains how he and the second to fifth respondents brought SEI 1 ultimately to compliance.

12. The seventh respondent alleges that he raised the problems at SEI 1 with the CIPC. He also blames Goosen and Preller for the initial problems and questioned why they had not been cited or joined in this application. His relationship with the other respondents has also broken down and he blames the first respondent for the numerous problems at SEI 1.

13. There is a dispute of fact between all the parties as to whom should carry the blame for the demise of SEI 1 and who caused and/or contributed to the non-compliance with the statutory requirements and even whether there was actual non-compliance.

LEGAL FRAMEWORK

14. Section 162(3) of the Act reads as follows:

162. Application to declare director delinquent or under probation

(1) ...

(2) ...

(3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if –

(a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and

- (b) any of the circumstances contemplated in –
 - (i) subsection (5) apply, in the case of an application for a declaration of delinquency; or
 - (ii) subsections (7) and (8) apply, in the case of an application for probation.’

15. CIPC relies on sections 162(5)(c)(aa) and (d) of the Act for the declaration of delinquency that reads as follows:

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

...

- (c) while a director –

...

(aa) that amounted to gross negligence, willful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

...

(d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation.’

16. It was argued on behalf of CIPC that the aforesaid section is prescriptive and does not afford the court any discretion. In *Gihwala and Others v Grancy Property Ltd and Others*¹ (*Gihwala*) the Supreme Court of Appeal ruled that a delinquency order against two directors were justified as their conduct fell within the scope of s 162(5)(c). Section 162(5)(c) read with s 162(6)(b)(ii) does not give a court a discretion to refuse a declaration of delinquency if the requirements of the section are met. The court held that s 162 passes constitutional muster it was stated as follows: ‘Patently it is an appropriate and proportionate response by the legislature to the problem of delinquent directors and the harm they may cause to the public who place their trust in them’ and ‘rationality is the touchstone of legislative validity, and s 162(5)(c) read with s 162(6)(b)(ii), is rational’.²

¹ *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) paras 142-145 and para 150.

² *Ibid* para 145.

17. Regarding the challenge under s 34 of the Constitution the court said the following:³

'The challenge under s 34 was misconceived. The court is involved at every stage of an enquiry under s 162(5). It is the court that makes the findings on which a delinquency order rests. It is the court that decides whether the period of delinquency should be greater than seven years or should be limited to particular categories of company and whether conditions should be attached to a delinquency order and, if so, their terms. It is to the court that a delinquent director turns if they believe that the period of delinquency should be converted into one of probation. The fact that a delinquency order of a specific duration follows upon the factual finding by a court that the director is delinquent is no different from any other provision that provides for a statutory consequence to follow upon a finding in judicial proceedings. It is apparent therefore that before a declaration of delinquency is made the errant director has an entirely fair hearing before a court. It is not the absence of a fair hearing that is in issue but the consequences of an adverse decision. That consequence cannot be challenged under s 34 on the basis that the delinquent director has been deprived of a right of access to court. It can only be challenged on the basis that it is an irrational legislative response to the particular problem, in this case that of directors' delinquency. It stands on the same footing as any statutory provision that disqualifies a person from pursuing a trade, occupation or profession in consequence of their disability or misconduct. Countless examples of such disqualifications such as minority, insanity, insolvency, criminal conduct, other misconduct or absence of qualification are to be found in legislation.⁴

18. The following is important to note from the above. In a declaration of delinquency, the court is not a passive bystander that merely rubberstamps the order. The errant directors are entitled to a fair hearing. It is the court that considers the evidence and determines whether the requirements are met. It is the court that makes the findings that lead to the declaration of delinquency. It is only when the court finds that all the requirements are met that the court must declare a director delinquent.

19. In this instance there is a factual dispute between CIPC and even between the respondents about what irregularities did occur and who is responsible for the mess SEI

³ Ibid para 147.

⁴ The constitutionality of citizenship as a requirement for registration as a security guard was upheld in *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* [2006] ZACC 23; 2007 (4) SA 395 (CC).

1 ended up in, which is, to put it lightly, regrettable considering the laudable intentions that led to the setting up of the company.

20. Section 165(c) is premised on gross negligence, willful conduct or breach of trust. In *Msimang NO and Another v Katuliiba and Others*⁵ (*Msimang*) the court considered the development of the concepts of ‘gross negligence, willful conduct and recklessness’ and said the following:

[36] Our courts have had occasion to consider and develop the concept of “gross negligence” in numerous cases. In *Transnet Ltd t/a Portnet v Owners of the MV “Stella Tingas” and Another* 2003 (2) SA 473 (SCA) para 7, the Supreme Court of Appeal observed:

“. . . It follows, I think, that to qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.”

[37] In the earlier judgment of *S v Dhlamini* 1988 (2) SA 302 (A) at 308D-E, “gross negligence” was described as follows:

“Gross negligence in our common law, both criminal and civil, connotes a particular attitude or state of mind characterised by an entire failure to give consideration to the consequences of one’s actions, in other words, an attitude of reckless disregard of such consequences.”

The Supreme Court of Appeal, in considering the reference to “reckless disregard” in *S v Dhlamini* observed, in *Philotex (Pty) Ltd and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998(2) SA 138 (SCA) at 143G-J to 144A-B, that:

“The test for recklessness is objective insofar as the defendant’s actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge: *S v Van As* 1976 (2) SA 921 (A) at 928C-E. One should add that there may also be a subjective element present if the defendant has the risk-consciousness mentioned in [*S v Van Zyl* 1969 (1) SA 553 (A) at 559D-G] but that, as indicated, is not an essential component of recklessness and its existence is no impediment to the application of the objective test referred to the above.

⁵ *Msimang NO and Another v Katuliiba and Others* [2012] ZAGPJHC 240; [2013] 1 All SA 580 (GSJ) paras 36-38.

It remains, as far as subjectivity is concerned, to warn that risk-consciousness in the realm of recklessness does not amount to or include that foresight of the consequences ('gevolgsbewustheid') which is necessary for *dolus eventualis*: Van Zyl at 558, 559E-F. Accordingly, the expression 'reckless disregard of the consequences' in Dhlamini must not be understood as pertaining to foreseen consequences but unforeseen consequences – culpably unforeseen – whatever they might be.

In its ordinary meaning, therefore, 'recklessly' does not connote mere negligence but at the very least gross negligence and nothing in s 424 warrants the words being given anything but its ordinary meaning."

[38] The meaning of the concept "willful misconduct" has also been considered by our courts in the past. In *Rustenburg Platinum Mines Ltd v South African Airways and Pan American World Airways Inc* 1977 (1) Lloyds LR 19, (Q.B (Com.Ct.) 564, Ackner J (at 569) held:

"it is common ground that 'willful misconduct' goes far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness maybe."

The above dictum was approved and adopted into our law in *KLM Royal Dutch Airlines v Hamman* 2002 (3) SA 818 (W), at para 17.'

21. The seventh respondent sets out why he was not always involved in the day-to-day running of the company, how he relied heavily on the expertise of Goosen the Chief Executive Officer and only executive director at the time He further sets out how he turned to CIPC for assistance in respect of the material deficiency of the company register which prevented the calling and holding of AGM's. He explains the history behind the deficiency of the company's share register, which on his version cannot be attributed to him. He gives various examples of the measures taken by him to secure proper governance of SEI 1. He concedes that he was unable to resolve the problems at SEI 1 and to remedy it with the compliance notices issued by CIPC. He blames CIPC who failed to act timeously when the problems were brought to its attention and failed to hold the people responsible for it accountable.

22. The first respondent asserts that he is being punished for joining Preller and Goosen's 'delinquent' board while CIPC deems it fit not to include the real culprits in this

application. He asserts that the SEI 1 was already non-compliant when he joined it and although the non-compliance continued during his tenure, it was also him and the second to fifth respondents that brought the company to compliance as set out in the further affidavit filed during July 2021. It was also alleged that this application was motivated by ulterior motives and not by a desire to comply with its statutory duty.

23. The question arises if, considering the facts of this case, the court can find that the first and seventh respondents were grossly negligent, willful and reckless in the execution of their duties as directors. I think not. Seeing that CIPC chose to bring this application on motion proceedings the court is constrained to apply the so called *Plascon-Evans* rule that final 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.⁶ On the papers before me it cannot be said that CIPC made out a case that the respondents acted in the way envisaged in s 162(5)(c).

24. CIPC relied also on s162(5)(d) of the Act. It was argued on behalf of the seventh respondent that it remains to be determined whether section 162(5)(d) likewise contemplates that there should be no judicial discretion at all insofar as the provision requires that previous compliance notices have been delivered and does not allow for the court's adjudication as to the merits of such notices in the first place. The argument by CIPC was that s 162(5)(d) stands to be distinguished on the basis that it does not contemplate any enquiry by the court as to the existence of any willful or grossly negligent conduct, but simply contemplates that previous compliance notices have been delivered 'repeatedly'

25. On 17 September 2017 a compliance notice was issued calling on SEI 1 to comply with certain matters set out in the notice. On 7 December 2017 an inspector's report was issued against SEI 1 aligned to the Financial Services Board (FSB). On the same date CIPC issued a notice regarding reckless trading or trading under insolvent

⁶ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620.

circumstances. SEI 1 responded on 16 January and denied any conduct described in terms of s 22(1) of the Act. CIPC on 14 February 2018 issued a report in which various findings were made against SEI 1 and also issued a further notice. The notices and contents of it were placed in dispute and it was brought under the attention of CIPC. In subsequent years SEI 1 alleges that it complied and filed all annual statements and documents for compliance purposes. No further compliance notices were issued by CIPC after that.

26. The analysis in *Gihwala* requires a court to first make certain factual findings. Once the factual findings are made, the court is mandated to make a declaration of delinquency. It was argued that contrary to the circumstances contemplated in s 162(5) in general, s 162(5)(d) requires only that a director has been repeatedly and personally subjected to a compliance notice, or similar enforcement mechanism for substantially similar conduct in terms of any applicable legislation. No enquiry, it was argued, is contemplated as to the nature, seriousness or merit of the notice or enforcement mechanism.

27. It was argued on behalf of the respondents that the use of the term 'repeatedly' is inherently ambiguous. The question arises how many notices shall be deemed to have constituted 'repeated' notices. No enquiry as to the facts and circumstances would curtail the court's function and role significantly. It was furthermore argued that the use of the phrase 'personally subject to a compliance notice . . .' calls into question whether it should suffice for purposes of a declaration of delinquency that a compliance notice has been sent to an individual in his capacity as an office bearer at the time. It was submitted that where a compliance notice is delivered to all directors in their capacities as such, it should be distinguished from an instance in which a compliance notice is delivered in a director's personal capacity *per se*.

28. The aforesaid indicates that s 162(5)(d) requires interpretation. In *Natal Joint Municipal Pension Fund v Endumeni Municipality*⁷ (*Endumeni*) the court expressed itself as follows regarding the interpretation of statutes:

‘Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own.⁸ It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School*.⁹ The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁰ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made.

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 18.

⁸ Spigelman CJ describes this as a shift from text to context. See ‘From Text to Context: Contemporary Contractual Interpretation’, an address to the Risky Business Conference in Sydney, 21 March 2007 published in J J Spigelman *Speeches of a Chief Justice 1998–2008* 239 at 240. The shift is apparent from a comparison between the first edition of Lewison *The Interpretation of Contracts* and the current fifth edition. So much has changed that the author, now a judge in the Court of Appeal in England, has introduced a new opening chapter summarising the background to and a summary of the modern approach to interpretation that has to a great extent been driven by Lord Hoffmann.

⁹ *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 (SCA) paras 16-19. That there is little or no difference between contracts, statutes and other documents emerges from *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009 (4) SA 399 (SCA) para 39.

¹⁰ Described by Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98 as an iterative process. The expression has been approved by Lord Mance SCJ in the appeal *Re Sigma Finance Corp (in administrative receivership) Re the Insolvency Act 1986* [2010] 1 All ER 571 (SC) para 12 and by Lord Clarke SCJ in *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2012] Lloyd’s Rep 34 (SC) para 28. See the article by Lord Gribiner QC ‘The Iterative Process of Contractual Interpretation’ (2012) 128 *LQR* 41.

The “inevitable point of departure is the language of the provision itself”,¹¹ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

29. Section 162(d) must be interpreted in the context of the whole section. It will lead to an absurdity if the court is required to determine whether the requirements of the section have been met in terms of s 162(5)(c) but is on the other hand called upon to follow a mere literal interpretation of s 162(5)(d) without considering the relevant facts and circumstances relevant to the non-compliance with the section. *Gihwala* envisaged the court’s involvement during the inquiry in terms of s 162, the court will have to investigate in what capacity the compliance notice was sent to the director. What is meant by the word ‘repeatedly’ will be determined by the circumstances of the matter. The objective of a declaration of delinquency is to protect the public and the company from abuse of power by directors and not to punish directors without considering the evidence, not to allow for a fair hearing will constitute a transgression of s 34 of the Constitution.

30. There is no evidence regarding any willful non-compliance by the directors with reference to these notices. To the contrary they all explain what they attempted to do to rectify the situation and accuse CIPC of non-responsiveness, having an ulterior motive, and going after the wrong directors. To summarily declare the respondents delinquent on these facts, without the benefit of evidence will be manifestly unjust and will defeat the purpose the section.

THE SUPPLEMENTARY AFFIDAVIT AND COUNTER APPLICATION

31. The first to fifth respondents proceeded to file a supplementary founding affidavit, which expanded on the original founding affidavit. A counter application was also included in this. This led unavoidably to CIPC also filing a further affidavit.

¹¹ Per Lord Neuberger MR in *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98. The importance of the words used was stressed by this court in *South African Airways (Pty) Ltd v Aviation Union of South Africa & others* 2011 (3) SA 148 (SCA) paras 25 to 30.

32. It is by now trite that only three sets of affidavits should generally be filed in application proceedings, unless the court allows another set and that should only be allowed if a proper explanation is given on why the issues raised were not raised from the onset. The respondents argue for some flexibility primarily because CIPC only set the application down approximately two years after it was issued. I have perused these affidavits. This application was issued during 2018 and it is evident that a lot of water would have run in the sea since then. I am inclined to allow the supplementary affidavits, but whether the counter application should be granted is another matter altogether.

33. The first and seventh respondents do not sing from the same hymn sheet. The seventh respondent blames not only CIPC for its failure to act when the malfeasance was brought to its attention, but also blame the first respondent for some of the non-compliance and irregularities that occurred. Due to the dispute of facts that exists between the parties it is not possible to grant any declaratory relief that the respondents have complied with their obligations in terms of the Act. The counter application should therefore be dismissed.

34. The following order is made:

- 1) The points in *limine* are dismissed.
- 2) The supplementary affidavits are allowed.
- 3) The application is dismissed with costs, including costs of two counsel, where applicable.
- 4) The counter application is dismissed with costs.

R G TOLMAY

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

Counsel for Applicant	: H C (Christoff) Janse van Rensburg
Attorney for Applicant	: W (William) Motsepe
Counsel for 1 st to 5 th Respondent	: Adv M R Maphutha
Attorney for 1 st to 5 th Respondent	: M M Matlala
Counsel for 7 th Respondent	: R S (Reg) Willis
Date of Hearing	: 28 November 2023
Date of Judgment	: 2 April 2024