REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, PRETORIA

CASE NO.: 24564/2022

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:
DATE	SIGNATURE

In the matter between:

FRED NDLOVU	Applicant
and	
HALEKOPANE MATSIPA	First Respondent
PHESOLO JACKSON MPHAFUDI	Second Respondent
THEKISO MZWANDILE SELELE	Third Respondent
GRANT SEAN NEWTON	Fourth Respondent

JUDGMENT

GROBLER AJ:

1. The applicant applies on motion for:

   1.1 the payment of R7,855,861.32 as arrear dividends due and payable by Sechaba Group Holdings (Pty) Ltd (Sechaba) to the applicant for the period from 2006 to 2015 (including interest);

   1.2 relief relating to obtaining certain documents of Sechaba previously requested from Sechaba in accordance with section 53(1) of the Promotion of Access to Information Act 2 of 2000 (the PAIA Act);

   1.3 relief to obtain Sechaba’s financial statements for the 2021 financial year and certain documents relating to the period between 15 October 2021 and 31 December 2021;

   1.4 an order for the imprisonment of the respondents for contempt of court resulting from the non-compliance with a court order that was previously granted in terms of the PAIA Act on 3 February 2016;

   1.5 an order that the respondents be declared delinquent directors or placed under probation; and

   1.6 an order for costs on the punitive scale as between attorney and client.

2. Mr Mphahlane on behalf of the applicant indicated during argument that the applicant is not persisting with the relief claimed in prayer 8 of the notice of motion, to refer the application for the hearing of oral evidence.

3. The following time line represents the back drop for the relief claimed by the applicant:

   3.1 The applicant received his last dividend from Sechaba in 2005;[1]

1 Paragraph 3.12 of the founding affidavit

3.2 The applicant instructed Mapulana Maponya Attorneys during 2011 to demand payment of arrear dividends due to the applicant from Sechaba.[2]

3.3 Mapulana Maponya Attorneys requested records from Sechaba in terms of the Promotion of Access to Information Act, Act 2 of 2000 (PAIA Act) on 15 April 2011[3], which was refused by Sechaba.[4]

3.4 The applicant applied to court, and an order was granted in favour of the applicant against Sechaba in terms of the PAIA Act on 3 February 2016, compelling Sechaba to provide certain documents to the applicant relating to the financial years from 2006 to 2015.[5]

3.5 Sechaba furnished certain documents to the applicant (in response to the order of 3 February 2016) on 2 March 2016[6], responded to queries raised in respect of alleged non-compliance with the order per letter dated 15 March 2016[7], and denied that Sechaba was in contempt of the order per letter dated 28 November 2016[8].

3.6 The attorneys acting for Sechaba realised that Sechaba's annual financial statements for 2014 and 2015 were erroneously not furnished to the applicant earlier and the applicant was furnished with these financial statements on 9 January 2017[9];

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2 Pargaraph 3.1 of the founding affidavit.

3 Annexure" MHM06".

4 Pargaraph 3.3 of the founding affidavit.

5 Pargaraph 3.3 of the founding affidavit. Annexure" MHM07".

6 Annexure "MHM08" / "AA24".

7 Annexure "AA26".

8 Annexure "AA23".

9 Annexure "AA28".

3.7 The applicant requested independent auditors to determine "*the minimum dividends due to the applicant based on the records provided by (Sechaba)..*" per letter dated 24 May 2021[10] and received a report from the auditors dated 27 August 2021[11];

3.8 On the basis of the aforesaid report, the applicant issued the application presently under consideration and claims *inter alia* arrear dividends (R2,865,213.60) and interest (R4,990,647.72) for the period from 2005 to 2015 (i.e. a total amount of R7,855,861.32);[12]

3.9 The independent auditors determined the "*minimum dividends due to the applicant*" on the basis of the Financial statements of Sechaba for 2006 to 2015. [13]

3.10 The application presently under consideration was issued on 5 May 2022 and served on the first respondent on 5 May 2022 and on the third and fourth respondents on 11 May 2022. A return of non-service of the application on the second respondent dated 10 May 2022 has been filed on the electronic court file (caselines 004- 4).

4. Settled law determines that a final order can only be granted if the facts stated by the respondent together with the facts alleged by the applicant which are admitted by the respondent justifies such an order, unless the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly

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10 Annexure MHM12.

11 Annexure MHM14.

12 Annexure MHM14.

13 Annexure MHM14.

untenable or so palpably implausible as to warrant its rejection merely on the papers. [14]

5. It is incumbent on the applicant to place evidence before the court which is sufficient to discharge the onus he carries.[15]

6. Before dealing with the relevant facts, it should be noted that there is not a particularly high degree of clarity to be found relating to the relevant facts deposed to in the founding, answering and replying affidavits. The answering affidavit provides a higher degree of clarity on certain issues, but clarity on some issues are hamstrung by the lack of records and the passage of time.

7. The answering affidavit was deposed to by the first respondent, being the only respondent who is opposing the applicant's application (refer to the notice of intention to oppose dated 12 May 2022)[16]. The first respondent became a director of Sechaba on 22 April 2012[17] and much of what he is required to respond to, namely *inter alia* what happened in respect of the applicant's shareholding in the period from 2005 to 2011, occurred before he became a director of Sechaba.

8. The relevant facts as they appear from an analysis of the affidavits seems to be the following:

   7.1 The applicant became a 3% shareholder of Sechaba on 24 February 1997[18], was the general manager of Sechaba from 1992 to 2003[19] and

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14 ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (A), ***National Director of Public Prosecutions v Zuma*** 2009 (2) SA 277 (SCA) at paragraph 26 et al.

15 ***Quartermark Investments (Pty) Ltd v Mkhwanazi and Another*** 2014 (3) SA 96 (SCA) at 13, ***Hart v Pinetown Drive-in Cinema*** (Pty) Ltd 1972 (1) SA 464 (D) at 496C, S***wissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others*** 1999 (2) SA 279 (T) at 324D, ***Die Dros (Pty) Ltd and Another v Yelefon Beverages CC and Others*** 2003 (4) SA 207 (C) at 28.

16 On caselines 005- 1.

17 Paragraph 2.10 of the founding affidavit.

18 Annexure "AA18".

19 Paragraph 6.4 of the answering affidavit.

served as a director of Sechaba from 26 June 2003 to his resignation on 28 October 2004[20].

7.2 The applicant made no attempt to explain why he is unable to prove his shareholding in Sechaba by the production of a share certificate. He relied on other sources to prove his shareholding without explaining why he is not in possession of a shareholders certificate.

7.3 The applicant acknowledged in the founding affidavit that he was notified per letter dated 24 May 2021 (i.e before the application under consideration was launched) that Sechaba disputed the applicant's shareholding.[21]

7.4 The applicant acknowledged in the founding affidavit that allegations were made against him about certain "*prima facie illicit practices*" that he allegedly was involved in prior to leaving Sechaba, which he denied in the founding affidavit without elaboration.[22]

7.5 The first respondent provided details of investigations that were conducted before the applicant left Sechaba in 2004, which involved the applicant.

7.6 The first repondent stated that[23]: "*The applicant was suspended from Sechaba under a cloud of serious allegations of fraud, theft, financial mismanagement, and misconduct. These allegations were supported by several independent forensic reports*. …". The applicant's response

20 Paragraph 6.1 to 6.3 and paragaraph 7 of the answering affidavit.

21 Paragraph 3.12 of the founding affidavit, Annexure "MHM12".

22 Pargaraph 3.11 of the founding affidavit.

23 Paragraph 21 of the answering affidavit.

in the replying affidavit was that the allegations of the first respondent were made without providing proof of the allegations. [24]

7.7 The first respondent provided details of an investigation that was conducted by Friedland Hart Inc in 2002 into Sechaba's board of directors at the time and in particular into the conduct of the applicant.[25]

7.8 The report was attached to the answering affidavit[26], the findings of the investigation were set out in the answering affidavit[27] and it is fair to state that the report provided information of illicit practices that involved the applicant.

7.9 Even though the first repondent referred to certain objections that were raised by an individual referred to in the report (not the applicant), the first respondent specifically state in the answering affidavit that Friedland Hart Inc responded to and rebutted the objections and that the applicant did not take any steps to review or otherwise challenge the findings of the investigation.[28]

7.10 The applicant's response to the 2002 Friedland Hart investigation and report and the allegation that the applicant did not take steps to review or otherwise challenge the findings of the investigation was to state in the replying affidavit that the first respondent's avernments in that regard are irrelevant.[29]

24 Paragraph 11 and 12 of the replying affidavit.

25 Paragraph 36 of the answering affidavit.

26 Annexure "AA3"

27 Paragraph 38 of the answering affidavit.

28 Paragraph 42 and 45 of the answering affidavit.

29 Paragraph 17 of the replying affidavit.

7.11 The first respondent also stated that the appointment of the applicant as a director of Sechaba on 26 June 2003 was questioned[30] and a motivation was penned for the removal of the board of Sechaba based on what again can be described as illicit practices that involved the applicant.[31]

7.12 There was an attempt to remove the board of directors of Sechaba on 28 April 2002 (after the Friedland Hart report), which failed[32], but a further attempt to remove the board on 24 August 2003 (i.e. after the applicant was appointed as a director on 6 June 2003) was successful. The first respondent referred to a letter that was written to shareholders after the meeting wherein the reasons for removing the directors were referred to and the first respondent concluded that "*Based on the above, it appears that the Prior Board of Sechaba (including the applicant) had been removed by 5 September 2003*".[33]

7.13 The applicant's response to the allegations about the unsuccessful attempt to remove the board in 2002 and the further successful attempt in 2003 was again to simply state in the replying affidavit that the first respondent's avernments in that regard are irrelevant.[34]

7.14 After the removal of the board in August 2003, Sechaba sought advice from PWC about matters that required immediate management

30 Paragraph 52 of the answering affidavit.

31 Paragraph 53 of the answering affidavit.

32 Paragraph 48 of the answering affidavit.

33 Paragraph 54 to 59 of the answering affidavit.

34 Paragraph 17 of the replying affidavit.

attention and some of the matters listed by PWC that can again be described as illicit practices that involved the applicant.[35]

7.15 Deloitte & Touche was instructed to investigate the conduct of the removed board of directors (which included the applicant) in September 2003[36] and a forensic report dated 23 October 2003 concluded that the applicant was involved in what can be described as illicit practices of a very serious nature (it involved *inter alia* irregularities relating to the ownership of a particular buiding and the diversion of payment of management fees in the amount of at least R5.6 million due to Sechaba to one of its subsidiaries Micawber 148 instead).[37]

7.16 The applicant's response to the allegations about the advice of PWC and the forensic report of Deloitte & Touche was again to simply state in the replying affidavit that the first respondent's avernments in that regard are irrelevant.[38]

7.17 Based on the forensic report of Deloitte & Touche, Sechaba instituted legal action against *inter alia* the applicant "*to undo the damage caused to it by the applicant*"[39] and "… *with regards to the building and management fees. …*".[40] The first repondent, with reference to the

35 Paragraph 60 to 63 of the answering affidavit.

36 Paragraph 64 of the answering affidavit.

37 Paragraph 66 to 70 of the answering affidavit. "At least" R5.6 million because the circular of 14 November 2005 (referred to in paragraph 84 of the answering affidavit) puts it at R6,3 million.

38 Paragraph 17 of the replying affidavit.

39 Paragraph 71 of the answering affidavit.

40 Paragraph 72 to 74 of the answering affidavit.

minute of a Sechaba board meeting of 17 May 2006, stated that the litigation against the applicant appears to have been successful.[41]

7.18 The applicant's response to the allegations about the legal action that was instituted against *inter alia* the applicant was again to simply state in the replying affidavit that the first respondent's avernments in that regard are irrelevant.[42]

7.19 The applicant relocated to Zimbabwe in 2003/2004.[43]

7.20 The first respondent stated that it cannot be disputed that the applicant was at a point in time a shareholder in Sechaba, but that that is not the end of the matter. [44]

7.21 The first respondent stated, having regard to the reports of the applicant's illicit practices, that it would seem counter intuitive that the applicant would have retained his shareholding.[45]

7.22 The first respondent stated that the applicant pledged his shares in the company to the company in terms of a resolution passed by the directors of Kwacha (Pty) Ltd (the predecessor in name of Sechaba) on 4 June 1997.[46]

7.23 The pledge was made as collateral security for the due fulfilment by the applicant of all his obligations under a suretyship for his indebtedness to the company as set out and arising from a suretyship and provides

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41 Paragraph 92 of the answering affidavit.

42 Paragraph 17 of the replying affidavit.

43 Paragraph 88 of the answering affidavit.

44 Paragraph 104 of the answering affidavit.

45 Paragraph 96.3 of the answering affidavit.

46 Paragraph 105 of the answering affidavit, annexure "AA19".

that the company is authorised to dispose of the shares pledged to it if the company foreclose under the pledge.[47]

7.24 The first respondent stated that the suretyship could not be found[48], but that "*The overwhelming probability is that the applicant did not repay his debt and that the pledge was foreclosed upon. The irresistible inference is that this is the reason the applicant was not able to produce a share certificate in Sechaba. It also explains why no dividends were paid to him.*".[49]

7.25 The applicant's response to the allegations about the counter intuitiveness of the applicant retaining his shareholding and the alleged overwhelming probability that the pledge was forclosed upon, was to state that it is noted that "… *the first respondent does not deny that the applicant was a shareholder of Sechaba as stated in the founding affidavit.*".[50]

7.26 The entire business of Sechaba was sold to Numsa Investment Company per agreement entered into on 29 April 2021, Sechaba subsequently ceased to carry on business, was divested of assets and was deregistered as a company on 24 November 2021.[51]

<u>The claim for the payment of R7,855,861.32 in prayer 1 of the notice of motion:</u>

9. The applicant can only succeed with the relief claimed if the court is placed in a position to find that the applicant was a shareholder of Sechaba after 2005.

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47 Annexure "AA19".

48 Paragraph 108 of the answering affidavit.

49 Paragraph 111 of the answering affidavit.

50 Paragraph 18 of the replying affidavit.

51 Paragraph 142.5 to 142.12 of the replying affidavit.

10. I am accordingly required to determine whether I can find that the applicant was a shareholder of Sechaba after 2005 on the facts stated by the first respondent together with the facts alleged by the applicant which are admitted by the first respondent, unless I am satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, or is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.

11. The first respondent admitted that the applicant obtained shareholding in Sechaba in 1997 and did not deny that the applicant received dividends until 2005, but does not admit that the applicant was a shareholder of Sechaba and entitled to dividends after 2005.

12. The first respondent, having only been appointed as a director of Sechaba in 2012, is not able to provide any concrete evidence of the termination of the applicant's shareholding, but he relies on several salient features of the applicant's tenure at Sechaba to conclude that the reason why the applicant was not paid dividends after 2005 was that his shareholding was terminated.

13. The salient features of the applicant's tenure at Sechaba relied upon by the first respondent for the aforesaid conclusion included the pledge of the applicant's shareholding, the evidence of illicit practices that the applicant was involved in, the suspension of the applicant from Sechaba, the removal of the board of directors of Sechaba on 24 August 2003 after the applicant was appointed as a director on 6 June 2003 and the litigation that was instituted by Sechaba against *inter alia* the applicant relating to the ownership of a buiding and the diversion of payment of a large amount of management fees that was due to Sechaba.

14. I am satisfied that the respondent's version does not consist of bald or uncreditworthy denials, does not raise fictitious disputes of fact, and is not so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection on the papers.

15. I can, on the facts stated by the first respondent together with the facts alleged by the applicant which are admitted by the respondent, not find that the applicant was a shareholder of Sechaba after 2005.

16. The applicant is accordingly on this basis not entitled to the relief claimed in prayer 1 of the notice of motion.

17. Furthermore, it was submitted on behalf of the first respondent that the applicant's claim for arrear dividends for the period 2006 to 2015 prescribed before the application was served on the respondents on 5 and 11 May 2022.

18. Mr Pullinger argued on behalf of the first respondent and Mr Mphahlane conceded on behalf of the applicant, correctly so in my view, that the claim for arrear dividends is a claim for a debt as contemplated in section 11(d) of the Prescription Act, 68 of 1969.

19. Section 12 of the Prescription Act provides that prescription shall commence to run as soon as the debt is due and that a debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.

20. I was referred to the established legal principles regarding the commencement of the running of prescription as set out in *inter alia* ***Uitenhage Municipality v Molloy*** 1998 (2) SA 735 (SCA) at 742 A – D,

Drennan Maud & Partners v Pennington Town Board 1998 (3) SA 200 (SCA) at p209 F – G, ***Truter & Another v Deysel*** 2006 (4) SA 168 (SCA) and ***Links v Department of Health*** 2016 (4) SA 414 (CC), par 42, p428.

21. I was also referred to the well established principle that the respondent bears the onus to prove that the claim prescribed as per the well-known reported decision in ***Macleod v Kweyiya*** 2013 (6) SA 1 (SCA), par 10.

22. It was submitted on behalf of the first respondent that the applicant obtained knowledge, or by the exercise of reasonable care could have obtained knowledge, of the facts from which the debt arised by no later than 9 January 2017. The applicant was furnished with the financial statements of 2014 and 2015 on the aforementioned date, and with the financial statements of the relevant preceding financial years before then.

23. The applicant, on 12 July 2021, instructed independent auditors to determine the dividends due to the applicant on the basis of financial statements the applicant had in his possession since 9 January 2017. The independent auditors provided the applicant with a report dated 27 August 2021 that contained the amount claimed in prayer 1 of the notice of motion.[52]

24. I agree with Mr Pullinger that the applicant could have instructed independent auditors to determine the outstanding dividends due to the applicant at any time after 9 January 2017 and that prescription commenced to run at the latest on 9 January 2017.

25. The claim for the arrear dividends for the period 2006 to 2015 accordingly prescribed at midnight on 8 January 2020, i.e. before the application was served on the respondents.

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52 Paragraph 3.9 of the founding affidavit, Annexures “MHM13” and “MHM14”.

26. The applicant is accordingly on the basis of prescription also not entitled to the relief claimed in prayer 1 of the notice of motion.

27. In light of the findings above, it is not necessary to deal with the argument raised on behalf of the first respondent regarding the effect of the *in duplum* rule on the interest component in the amount claimed in prayer 1 of the notice of motion.

28. In light of the findings above, it is also not necessary to deal with the liability of the respondents for the debts of Sechaba.

<u>The claim to be provided with documents previously requested from Sechaba in accordance with section 53(1) of the PAIA as set out in prayer 2 of the notice of motion:</u>

29. The applicant requested certain documents from Sechaba in terms of the Promotion of Access to Information Act, 2 of 2000 per letter dated 19 October 2021.[53]

30. The applicant had 180 days to prosecute the aforesaid request[54], i.e. until approximately 19 April 2022.

31. Sechaba was, however, deregistered as a company on 24 November 2021.

32. The applicant served the current application outside of the prescribed 180 day period in May 2022 as set out above and brought the application against the respondents, not against Sechaba.

33. The applicant failed to make out any case in the founding affidavit for an entitlement to the relief claimed against the respondents.

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53 Paragraph 5.1 and 5.2 of the founding affidavit, annexure "MHM26".

54 Section 78(2)(d) of the Promotion of Access to Information Act, 2 of 2000, Regulation 2(3) of the Promotion of Access to Information Rules and Administrative Review Rules, 2019

34. The applicant furthermore failed to apply for condonation for its failure to bring the application within 180 days and failed to address this issue in the affidavits placed before court.

35. The first respondent opposes the granting of the relief set out in prayer 2 of the notice of motion *inter alia* on the basis that the applicant failed to comply with the prescribed 180 day period.

36. I am unable to find that the applicant has a right to the relief claimed against the respondents and I am unable to condone the applicant's failure to comply with the prescribed time period in cumstances where the applicant has not applied for condonation and where no facts have been placed before court to show that it would be in the interest of justice to do so.

37. The applicant is accordingly not entitled to the relief claimed in prayer 2 of the notice of motion.

The claim for Sechaba's financial statements for the 2021 financial year and certain documents relating to the period between 15 October 2021 and 31 December 2021 as set out in prayer 3 of the notice of motion:

38. The applicant claims final interdictory relief against the respondents.

39. The requirements for the granting of a final interdict are (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of a satisfactory alternative remedy.

40. The applicant has not presented any evidence to court in either the founding affidavit, or in the replying affidavit that any of the respondents are in possession of the records requested - the records requested are not the

records of any of the respondents individually or jointly, but the records of Sechaba.

41. I am unable to find that the applicant discharged the onus of satisfying the requirements for the granting of a final interdict.

42. The applicant is accordingly not entitled to the relief claimed in prayer 3 of the notice of motion.

The claim for a finding of contempt of court for non-compliance with the court order that was granted in terms of the PAIA Act on 3 February 2016 as set out in prayers 4 and 5 of the notice of motion:

43. Contempt of court is defined as "*the deliberate, intentional (i.e. wilful), disobedience of an order granted by a Court of competent jurisdiction.*" (***Consolidated Fish Distributors (Pty) Ltd v Zive and Others*** 1968 (2) SA 517 (C) at 522B)

44. The applicant in contempt proceedings has the onus to prove three requisites namely (i) the granting of an order, (ii) service of the order on the respondent and (iii) non-compliance with the order. The respondent then has the onus to provide evidence that the non-compliance was not wilful and mala fide.

45. The test for contempt of court was explained as follows in ***Fakie N.O. v CCH Systems (Pty) Ltd*** 2006 (4) SA 326 (SCA) paras 41-2:

"[41] Finally, as pointed out earlier (in para [23]), this development of the common law does not require the applicant to lead evidence as to the respondent's state of mind or motive: Once the applicant proves the three requisites (order, service and non-compliance), unless the

respondent provides evidence raising a reasonable doubt as to whether non-compliance was wilful and mala fide, the requisites of contempt will have been established. The sole change is that the respondent no longer bears a legal burden to disprove wilfulness and mala fides on a balance of probabilities, but need only lead evidence that establishes a reasonable doubt. It follows, in my view, that Froneman J was correct in observing in Burchell (in para [24]) that, in most cases, the change in the incidence and nature of the onus will not make cases of this kind any more difficult for the applicant to prove. In those cases where it will make a difference, it seems to me right that the alleged contemnor should have to raise only a reasonable doubt.

46. The above test as set out in Fakie N.O. was endorsed by the Constitutional Court in ***Pheko v Ekurhuleni City*** 2015 (5) SA 600 (CC) par 36.

"[36] … Therefore the presumption rightly exists that when the first three elements of the test for contempt have been established, mala fides and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."

47. ***Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma and Others*** 2021 (5) SA 327 (CC) applied the test as follows:

"[37] As set out by the Supreme Court of Appeal in Fakie, and approved by this court in Pheko II, it is trite that an applicant who alleges contempt of court must establish that (a) an order was granted against the

alleged contemnor; (b) the alleged contemnor was served with the order or had knowledge of it; and (c) the alleged contemnor failed to comply with the order. Once these elements are established, wilfulness and mala fides are presumed and the respondent bears an evidentiary burden to establish a reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established." [Footnotes omitted]

48. The obvious problem for the applicant with the relief claimed for contempt of court is that the order of 3 February 2016 was granted against Sechaba and the relief claimed for contempt of court is sought against the repondents. The applicant failed to make any allegations to lay a proper basis for his alleged entitlement to the relief claimed against the respondents.

49. Without finding so, but assuming in favour of the applicant that the first three requisites were met, I find that the first respondent provided evidence that raises a reasonable doubt as to whether any possible non-compliance was wilful and *mala fide*.

50. The order granted 3 February 2016 listed nine categories of documents which Sechaba was ordered to provide to the applicant.

51. Sechaba's attorneys of record furnished the applicant with a letter dated 3 February 2016 (Annexure "AA21") wherein it was stated that Sechaba did not intend opposing the granting of the order sought, but that they were instructed to advise the applicant that all reasonable steps are being taken to locate and collate all the documants referred to in the application.

52. Sechaba's attorneys of record furnished the applicant with a letter dated 2 March 2016 (Annexure "MHM08") that meticulously dealt with each of the nine

catagories of documents. The documents that were available to Sechaba were listed and copies thereof were furnished to the applicant. Where documents were not available, the applicant was informed that the documents have, despite a diligent search, not yet been located but that a further search will be conducted.

53. A further letter was sent by Sechaba's attorneys of record dated 15 March 2016 (Annexure "AA26") wherein it was indicated that no further documents can be furnished in compliance with the court order.

54. Faced with a contempt of court application based on the alleged failure of Sechaba to comply with the order of 3 February 2016 (the first contempt application), Sechaba's attorneys of record furnished the applicant with a further letter dated 28 November 2016 (Annexure "AA23") wherein each of the nine catagories of documents were listed and dealt with again. In respect of each of the categories of documents that were not available previously, Sechaba's attorneys of record stated that the documents do not exist or cannot be located by Sechaba, notwithstanding doing everything in its power to comply with the court order.[55]

55. Sechaba noted that its annual financial statements for the years ending 2014 and 2015 was not delivered to the applicant due to an oversight and furnished to the applicant under cover of an e-mail dated 9 January 2017 (Annexure "AA28").

56. The applicant withdrew the first contempt application against Sechaba by notice dated 6 July 2017 (Annexure "AA30")[56].

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55 Also see paragraph 130.23 of the answering affidavit.

56 Also see paragraph 130.58 to 130.61 of the answering affidavit.

57. I therefor conclude that the first respondent discharged the onus to provide evidence that any non-compliance that may have existed was not wilful and *mala fide.*

58. The applicant can accordingly not succeed with the relief claimed in prayers 4 and 5 of the notice of motion, even if the applicant proved the first three requisites for a contempt of court order.

The claim for the respondents to be declared delinquent directors under section 162(5) of the Companies Act, Act 71 of 2008, alternatively to be placed under probation for a period of five years in terms of section 162(7) of the Companies Act, Act 71 of 2008 as set out in prayers 6 and 7 of the notice of motion:

59. I can, as stated above, not find on the papers before me that the applicant was a shareholder of Sechaba after 2005.

60. The applicant accordingly does not have *locus standi* to bring an application to declare a person delinquent or to place a person under probation in terms of section 162(2) of the Companies Act, Act 71 of 2008.

61. I am in any event unable to find on the papers before me that the respondents grossly abused their positions as directors or that the respondents otherwise acted in a manner materially inconsistent with the duties of a director on the basis of either the non payment of dividends to the applicant after 2005, or on the basis of an alleged failure on the side of the respondents to provide the applicant with documents that he requested.

62. The applicant can accordingly not succeed with the relief claimed in prayers 6 and 7 of the notice of motion.

Costs:

63. Costs should follow the result. The applicant is unsuccessful with the application and should be ordered to pay the first respondent's costs.

64. The first respondent requested that a punitive costs order be granted against the applicant on the attorney and client scale.

65. Mr Pullinger submitted on behalf of the first respondent that the application was ill-conceived, vexatious, brought *in terrorem* and that it amounts to an abuse of court process.

66. Mr Pullinger referred me to *inter alia* to ***In Re Alluvial Creek Ltd*** 1929 CPD 532 at 535, ***Cassimjee v Minister of Finance*** 2014 (3) SA 198 (SCA) and ***De Souza and Another v Technology Corporate Management (Pty) Ltd and Others*** 2017 (5) SA 577 (GJ).

67. In ***Public Protector v South African Reserve Bank*** 2019 (6) SA 253 (CC), the Constitutional Court confirmed that attorney and client costs may be granted against a litigant whose claim is frivolous, vexatious or manifestly inappropriate.

68. I am required to exercise my discretion regarding the scale of costs to be awarded on the general principle that an attorney and client costs order will generally not be awarded unless some special grounds are present such as for example that a party has been guilty of dishonesty or fraud or that his motives have been vexatious, reckless and malicious, or frivolous or that he has acted unreasonably in his conduct of the litigation or that his conduct is in some way reprehensible.

69. I have considered the submissions on behalf of the first respondent relating to the evidence presented, more particularly relating to:

a. the illicit practices that the applicant was involved in and the failure of the applicant to deal with it openly and frankly in either the founding affidavit or the replying affidavit;

b. the unsavoury circumstances of the applicants departure from Sechaba and the failure of the applicant to deal with it in the papers;

c. the fact that the applicant failed to deal with the pledging of his shares;

d. the fact that the applicant is silent on the reason for 6 year delay between 2005 and 2011;

e. the long delay between the first request for documents in 2011 and the order granted in February 2016;

f. the appointment of the first, third and fourth respondents as directors of Sechaba in 2012 and the fact that the application was not served on the second respondent who is the only respondent that had been a director prior to 2012;

g. the further long delay in the prosecution of the claim for arrear dividends for the period from 2006 to 2015 to the institution of the application in May 2022;

h. the failure of the applicant to personally depose to either the founding or the replying affidavit himself;

i. the delay in requesting documents and the persuing of a claim for dividends after 2015 until the request for documents in 2021 and the institution of the application in May 2022;

j. the lack of a proper case for contempt of court (and incarceration) against the respondents;

k. the lack of a proper case for declaring the respondents delinquent or to place the repondents under probation; and

l. the vexatious and *in terrorem* nature of the application.

70. Even though it would have served the interests of the applicant well to deal properly and with circumspection with the abovementioned aspects, the failure to do so does not on my understanding of the facts necessarily lead to the conclusion that the applicant acted dishonestly or vexatiously, or that he has acted unreasonably in the conduct of the litigation.

71. Accordingly, I decided not to exercise my discretion in favour of granting a punitive costs order against the applicant.

72. In the premises, the following order is granted:

a. The application is dismissed with costs.

DATED AND SIGNED AT PRETORIA ON THE __ST DAY OF APRIL 2024.

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JF GROBLER
Acting Judge
High Court of South Africa
Gauteng Division
Pretoria

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Instructed by: Webber Wentzel