

Republic of South Africa



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 3232/2016

Before: The Hon. Mr Justice Binns-Ward

Hearing: 28 April 2016 (papers supplemented on 9 May 2016)

Judgment delivered: 12 May 2016

In the matter between:

ENTREPRENEURIAL BUSINESS SCHOOL (PTY) LTD

First Applicant

MAURITZ RYK HENDRIK VAN GINKEL BEKKER

Second Applicant

DANIEL FREDERICK BUYS

Third Applicant

JOHANNES FREDERICK VISSER

Fourth Applicant

And

AFRICA CREEK INVESTMENT (PTY) LTD

First Respondent

JONTON SNYMAN

Second Respondent

ANDRE MANUEL

Third Respondent

ABSA BANK LTD

Fourth Respondent

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

Fifth Respondent

JUDGMENT

BINNS-WARD J:

[1] Reduced to its essence this case concerns relief sought to reverse the consequences of the alleged hijacking of a company. The company in question is Entrepreneurial Business School (Pty) Ltd. For convenience I shall refer to it in this judgment simply as ‘the company’.

[2] Four parties have been cited as applicants. The company itself was cited as the first applicant. Proceedings were instituted in the company’s name on the basis of a resolution to that effect taken by the second, third and fourth respondents, purportedly in their capacity as the company’s directors. As will become apparent, there has been some confusion and dispute about who the company’s directors actually are. It is unnecessary, however, to decide whether the proceedings have been validly instituted in the company’s name as the relief that will be granted is relief that could have been sought by the second to fourth applicants as individuals. As will become apparent, it is evident in any event that the application by the company is supported by a majority of the persons who on any approach arguably currently comprise its board of directors. Messrs M.R.H. van G. Bekker, D.F. Buys and J.F. Visser are the second, third and fourth applicants, respectively.

[3] There are five respondents. The first respondent is a company called Africa Creek Investment (Pty) Ltd. The second and third respondents are Messrs J. Snyman and A. Manuel, respectively. The fourth respondent is Absa Bank Ltd. The company’s banking account (account no. [9.....]) is conducted at the Parow branch of Absa Bank. The Companies and Intellectual Property Commission (‘the CIPC’) was cited as the fifth respondent. The respondents have opposed the application. The fourth and fifth respondents have not played an active role in the proceedings. It would appear that they abide the result.

[4] In terms of s 70(6) of the Companies Act 71 of 2008 (‘the Companies Act’), every company must deliver to the CIPC a notice within 10 business days after a person becomes or ceases to be a director of the company. The notice falls to be given by the company concerned in the form prescribed in terms of regulation 39 of the Companies Regulations, 2011. The CIPC is required, in terms of s 187(4)(d) of the Act, to ‘register and deregister’ directors.

[5] The records kept by the CIPC reflect that the second, third and fourth applicants resigned as directors of the company on 2 April 2015. The CIPC records also reflect that the second and third respondents were both appointed as directors of the company on the date upon which the second to fourth applicants are shown as having resigned. According to the

CIPC records, the second and third respondents became the only members of the company's board upon their appointment as directors contemporaneously with the resignation of the aforementioned applicants.

[6] The second, third and fourth applicants deny having ever resigned as directors of the company. The second applicant became aware of the information in the CIPC records suggesting the contrary in early October 2015, but he appears to have done nothing effective to rectify the position. He only reported the matter to the police. He did nothing to actively address the situation even when he received a letter from the respondents' attorneys claiming that he was no longer a director of the company and should desist from holding himself out as such. He was galvanised into action only some months later, in February 2016, when he unexpectedly found himself unable to transact business on the company's bank account on the internet.

[7] The second applicant had been accustomed to transacting on the company's bank account using internet banking. He and the company's bookkeeper, Nicolaas Rheeder, were the authorised signatories in respect of the account. Upon enquiry at the Parow branch of the fourth respondent he established that the company's mandate to the bank had been amended without his knowledge. His authority to transact on the account had been cancelled and the internet banking login details for the account had been changed. The bank informed him that the changes had been effected on the instructions of the second and third respondents. The bank declined to accede to requests to freeze the account. It maintained it would do so only if so directed by a court order. The bank justified its position by pointing to the CPIC records that reflect that the second and third respondents had replaced the second, third and fourth applicants as the directors of the company.

[8] The second to fourth applicants deny that the second and third respondents have been appointed to the company's board of directors. They admit that agreements were concluded in terms of which the first respondent was to acquire 50 per cent of the issued shares in the company from the original shareholders and an additional one share from the second applicant, with the result that it would hold 51 per cent of shares in the company. These arrangements were entered into to improve the company's BEE rating with a view to enhancing its ability to attract business. They alleged that the first mentioned agreement, which also provided that the first respondent could appoint half of the company's board of directors, was void *ab initio* because of various allegedly fatal defects in the deed of the agreement. It was common cause, however, that the company had provided the second

respondent, who is the sole director and only shareholder in the first respondent company, with a certificate purporting to vouch that the first respondent was the holder of 51 shares in the company. (The issued shares in the company total 100 shares.) It was alleged, however, that no effective transfer of shares had occurred because the provisions of s 51 of the Companies Act had not been complied with. It was also alleged by the applicants that the sale by the second applicant of a single share to the first respondent had fallen through or been consensually cancelled. It was also in dispute whether payment had been made for the single additional share allegedly acquired by the first respondent from the second applicant and what the agreed price for it had been.

[9] The applicants obtained an order *ex parte* suspending the conduct of business on the company's bank account. That order, which was granted as part of a rule *nisi* acting as an interim interdict, is still in place pending the further determination of the final relief sought in the current proceedings on the extended return date of the rule. On the initial return date of the rule, on 18 March 2016, an order was made by Henney J by agreement between the parties. It recorded an undertaking by the first, second and third respondents that any funds withdrawn by them prior to the suspension of business on the company's bank account would be paid into the trust account of their attorneys of record pending the final determination of this application. Several hundred thousand rand was withdrawn from the account during the relevant period, but the applicants have not been able to obtain confirmation from the respondents' attorneys that the respondents have complied with their recorded undertaking.

[10] The rule *nisi* calls upon the respondents to show cause why the applicants should not be granted orders directing -

1. that the second and third respondents' appointment as directors of the company be declared invalid, and that they be removed as directors;
2. that the second and third respondents' signing powers in respect of the company's bank account be terminated;
3. that the status of the second, third and fourth applicants as directors of the company be restored; and
4. that the status of the second applicant and one Nicolaas Rheeder, who had attended to the company's bookkeeping, as signatories in respect of the company's bank account be restored.

[11] The respondents maintain that the first respondent is the owner of the majority of the shares in the company. They allege that any invalidity that might have attended the written agreement in terms of which it was provided that the first respondent would acquire 50 per cent of the shares with the right to appoint half of the company's directors is irrelevant. They allege that the first respondent's entitlement to the shares was founded on a prior oral agreement with impeccable credentials. The authorship of the deed of agreement is yet another matter in dispute on the papers. The applicants allege that it was presented by the second respondent, while the second respondent avers that it was presented to him for signature by the second applicant. The respondents claim that the second and third respondents were '*duly appointed as directors by the First Respondent pursuant to the terms of the oral agreement*'. The respondents alleged that it had been '*suggested*' by the second applicant that the third and fourth applicants should be removed as directors of the company because they were not involved in its day to day management, and it was inconvenient to have to track them down when the board had to take urgent decisions. The second respondent averred further in this regard (in para 15 of the principal opposing affidavit deposed to by the second respondent) that '*[t]he Second Applicant took the necessary steps in this regard and subsequently attended to the removal of the inactive directors from the board. It can hardly be expected from (sic) the Respondents to account for this*'.

[12] I propose to deal first with the issue concerning the status of the second to fourth applicants as directors of the company. The respondents claim that they have no knowledge of how the second to fourth respondents came to be reflected in the CIPC records as having resigned as directors of the company. They claim not to be able to say how the alleged suggestion by the second applicant that the continuance of the third and fourth respondents in office should be reviewed came to be translated into the deregistration by the CIPC of the second, third and fourth respondents as directors.

[13] Any letters of resignation the second to fourth applicants might have written would have had to have been addressed to the company for the attention of the board. Had such letters been received by the company, one would have expected the second and third respondents, who are recorded in the CIPC's records as currently the company's only directors, to be able to produce them.

[14] In the context of the allegations in the answering affidavit concerning the abovementioned suggestion by the second applicant, it is appropriate to address the position of the third and fourth applicants separately from that of the second applicant. Why should

the third and fourth applicants have resigned? They are both shareholders in what appears to be a small private company. They became founding directors of the company when it was converted to a company from a close corporation, of which they had both been members. Non-executive directors are not required to be involved in the day to day management of a company. The notion that they should resign and essentially give unfettered control of the company in which they had a foundational interest to the representatives of a new shareholder is inherently improbable. The respondents have not even attempted to contradict their evidence. The evidence that the third and fourth applicants did not resign is not only uncontroverted, it is in accordance with the inherent probabilities.

[15] Assuming *ex hypothesi* in favour of the respondents that the second applicant had indeed suggested the removal from office of his two co-directors, he had no power by himself to effect that result if they were unwilling to accede to the suggestion that they should go. The manner of removing directors who do not resign willingly or leave office in the ordinary course is provided in terms of s 71 of the Companies Act. It may be done by majority vote at a meeting of shareholders at which the director whose removal is sought must be given a reasonable opportunity to make a presentation as to why he should not be removed. There has been no suggestion from any quarter that any such meeting was ever convened.

[16] The notion that the second applicant, who was the director responsible for the day to day management of the company, and who, at a shareholders' meeting on 12 August 2014 attended, amongst others, by the second and fourth applicants, had been appointed as its managing director, would have resigned to give the second and third respondents complete control of the board is fanciful. Equally far-fetched is any suggestion that he would have procured the amendment of the CIPC's records to reflect the second and third respondents as the company's only directors.

[17] Paragraph 15 of the respondents' answering affidavit offers an inadequate explanation for the removal of the names of the third and fourth applicants from the register of directors. It gives no reason whatsoever for deregistration of the second applicant as a director. Indeed, the resignation or removal of the second applicant as a director goes against the tenor of the relevant part of the opposing affidavit.

[18] In the circumstances there is no reason not also to accept the evidence of the second applicant that he has never given up his directorship.

[19] It is not necessary to determine who was responsible, ostensibly on the company's behalf, for misrepresenting to the CIPC that the second to fourth applicants had resigned as directors. The applicants allege that it was the second and third respondents. The question has reportedly been referred to the police for criminal investigation. It is in that context that this aspect of the matter perhaps most appropriately falls to be determined.

[20] The relief sought by the applicants is couched in language that would imply that the second to fourth applicants should have their status as directors 'restored'. That suggests that they had effectively been removed from office by their deregistration in the CIPC records. Any such apprehension is misguided. The procurement of a falsification of the CIPC records had no effect on the second to fourth applicants' actual position as directors of the company. Absent their resignation or removal from office in terms of s 71 of the Companies Act, they continued as directors of the company notwithstanding the indications to the contrary in the records kept by the CIPC. The appropriate relief in the circumstances would be an order an order declaring that the second, third and fourth applicants are, and have at all times since the registration of the company on 4 March 2009, remained as duly appointed directors of the company. Such an order will afford the company a basis to obtain the rectification by the CPIC of its register of directors.

[21] It is convenient next to consider the question of the amendment of the company's mandate to its bankers by the change of the authorised signatories on the account. It is apparent from the evidence that the fourth respondent acceded to the change on the basis of the information in the CIPC records incorrectly reflecting the second and third respondents as the company's only directors. It is alleged that the second and third respondent procured the change. In this respect it was averred in the founding affidavit that the company's bookkeeper, Rheeder, had ascertained from the bank that during the week of 15 February 2016 the second and third respondents had visited the bank and, on the strength of their being reflected in the CIPC's records as the company's only directors, had arranged the change in signatories to the account. These averments were not directly addressed by the respondents, who responded to the pertinent paragraphs in the founding affidavit with a general bald denial. In the context of it being undisputed that the respondents have been operating the account since Rheeder and the second applicant had been removed recently as signatories without notice, the respondents' bald denial is insufficient to create a *bona fide* dispute of fact; cf. *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA), at para 13.

[22] Even assuming *ex hypothesi* in their favour that they had been appointed as directors of the company and remained in office as such, it is clear that the second and third respondents, being two out of the company's five directors, had no authority to change the company's mandate to its bankers. In the context of the established arrangement whereby only one of the directors - the second applicant - and the company's bookkeeper had authority to operate the bank account, a resolution by the company's board of directors would have been required to authorise a change. The second to fourth applicants would have had to have been invited to participate in making any such decision were it to be validly made. It is not suggested that they were. On the contrary, it is evident that the second and third respondents purported to act on the basis that they were the only directors of the company according to the CIPC records. For the reasons given earlier that was a factually unfounded approach.

[23] The instruction given to the fourth respondent by the second and third respondents was therefore unauthorised, and invalid. It follows that the *status ante quo* was never validly altered and must be restored. An order will be made declaring that the second applicant and Nicolaas Rheeder have at all times material been, and currently remain, the only authorised signatories on the company's bank account conducted at the fourth respondent's Parow branch. The fourth respondent will be directed to cancel any amendments to the company's mandate purportedly effected at the instance of the second and/or third respondents, and to give effect to the aforementioned declaratory order. There is no need for the orders sought by the applicants directing the second and third respondents to sign documentation to reverse the changes they procured to company's mandate to the fourth respondent. An order in the terms I propose to make will be sufficient by itself to bind the fourth respondent to reverse the changes effected by the second and third respondents.

[24] Turning now to the issue of the declaratory relief sought in respect of the alleged invalidity of the appointment of the second and third respondents as directors of the company. It is necessary to deal with the question in relation to the two respondents individually.

[25] In the founding papers it was alleged that the second respondent had been convicted during 2014 on a count of fraud for which he had been given a sentence that triggered the effect of s 69(8)(b)(iv) of the Companies Act. That provision provides that subject to the further provisions of the section – which require no discussion on the facts of this case - a person who has been convicted of committing any of the various offences involving

dishonesty listed in the provision, including fraud, and who is imprisoned without the option of a fine, or fined more than the prescribed amount, is disqualified from being a director of a company. The prescribed amount is R1000; see rule 39(4) of the Companies Regulations, 2011. In terms of s 70(1)(b)(v) of the Companies Act, a vacancy on the board arises if a serving director becomes disqualified in terms of s 69.

[26] There was some confusion about the sentence actually imposed. This was resolved when an application by the respondents to supplement the answering papers after the hearing had been concluded was eventually allowed without objection on 9 May 2016. An uncertified copy of the pertinent charge sheet (Form J15) was attached to the supplementary affidavit *jurat* 6 May 2016. It indicates that the second respondent, having pleaded guilty to the charge, was convicted on 28 October 2014 in the district court at Worcester in case no. A880/14 on one count of fraud. He was sentenced on the same day to a fine of R3 000, alternatively, six months' imprisonment, the whole of which was conditionally suspended for five years.

[27] The second respondent averred in the supplementary answering affidavit (at para 25) that he is '*advised and verily believe[s] that the suspended nature of the sentence does not bring s 69 of the Companies Act into operation*'. In my judgment, the second respondent's apprehension of the import of s 69(8)(b)(iv) is misconceived. The misconception flows from a misunderstanding of the juristic character of a suspended sentence and the object of the provision under consideration.

[28] As pointed out in S.S. Terblanche, *Guide to Sentencing in South Africa*, 2nd ed (LexisNexis, 2007) at p.5 '*A sentence may be suspended only conditionally and is therefore, always a composite measure: it consists of the sentence itself ... [the R3 000 fine in the current case], which is suspended, and the condition, or conditions it is subject to. The sentence must be appropriate, and it makes no difference in principle that it, or any part of it, is suspended.*' Thus the fact that the fine imposed on the second respondent was conditionally suspended does not affect the character of the fine, considered by itself, as the sentence that was imposed as part of a composite measure by the sentencing court. It follows that there is no doubting that the second respondent was '*fined*' R3000.

[29] The types of sentences that a court may impose are provided for in s 276(1) of the Criminal Procedure Act 51 of 1977 ('the CPA'). They include imprisonment (s 276(1)(b)) and a fine (s 276(1)(f)). They do not include a suspended sentence as a generic form of

punishment. Section 287(1) of the CPA provides for a sentence of imprisonment to be imposed as an alternative to a fine. This is a statutory device to encourage payment of the fine imposed as a primary punishment. The suspension of sentences is regulated in terms of s 297 of the CPA. A sentence of imprisonment or a fine that is suspended is not different in its juristic character to a so-called ‘effective sentence’. The point of distinction is in the operation of the sentence, not in the sentence itself. This much is confirmed in the wording of s 297(1)(b) of the Criminal Procedure Act 51 of 1977, which provides:

Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion –

(b) *pass sentence* but order *the operation* of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order; (My italicisation.)

Sections 276(1)(f), 287(1) and 297(1)(b) are the provisions in terms of which the district court acted when imposing sentence on the second respondent. The provisions make it quite clear that what the sentencing court did when sentencing him was to pass sentence in the form of a fine (in terms of s 276(1)(f) of the Act) with the alternative of a period of imprisonment (in terms of s 287(1)), and order (in terms of s 297(1)(b)) that the operation of that sentence be suspended on the given conditions.

[30] The objects of conditionally suspending imposed sentences have been variously identified in the jurisprudence. In many cases the object has been described as one of deterrence. It is reasoned that the consideration that there is ‘a sentence hanging over him’ affords a disincentive to recidivism; see e.g. *S v Scheepers* 2006 (1) SACR 72 (SCA) at para 11. Mitigation of the effect of the sentence has been cited as another object. In *S v Herold* 1992 (2) SACR 195 (W), at 197j – 198a, Cloete J referred to the effect of suspension as being ‘*to lessen the effect of the punishment imposed (particularly where the personal circumstances of the accused render such an approach desirable) without, at the same time, derogating from the seriousness of the offence*’. Facilitating the rehabilitation of the offender has also been recognised as a reason for conditionally suspending a sentence; see *S v Rosscoe* 1990 (2) SACR 125 (W), at 129b-c. Those objects are sought to be achieved by regulating *the operation* of the sentence that has been imposed by suspending part or the whole of it.

[31] When considering the application of s 69(8)(b)(iv) of the Companies Act, it is only the sentence that was passed that is relevant. It is of no consequence for the purposes of the Companies Act whether all or part of the sentence was conditionally suspended or not. The

provision in the Companies Act is concerned with the nature of the sentence imposed, not with its operation. This is entirely consistent with the attainment of the evident object of the provision, which is to disqualify any person who has been convicted of committing any of listed offences from being a director except in those matters in which the punishment is so light as to suggest that only a very minor instance of the offence had been involved.

[32] A suspended sentence is not a lesser sentence than a fully effective sentence, as the second respondent professes to believe.¹ This much is illustrated by the reasoning in judgments such as *S v Olyn en andere* 1990 (2) SA 73 (NC), at 74G-75G, and *S v Labuschagne and 19 Other Cases* 1990 (1) SACR 313 (E), at 315-316, that the correct approach for the trial court is first to decide upon the appropriate term of imprisonment and thereafter to determine whether to suspend that sentence wholly or partially, or not at all. (See also Du Toit et al, *Commentary on the Criminal Procedure Act* (Juta, looseleaf Service 53, 2014), at 28-48F.)

[33] Thus, if a person is sentenced to a fine of more than R1000 for fraud, that is a *prima facie* indication² for the purposes of the Companies Act that the person has not measured up to the high standard of honesty and trustworthiness required of directors and is not fit to be entrusted with the fiduciary duties incumbent on anyone holding office as a company director. (See the commentary on s 69 of the Companies Act in P. Delport et al, *Henocheberg on the Companies Act, 71 of 2008*, s.v. 'General Note'.) It makes no difference that the court that has determined that a fine of more than R1000 is the appropriate sentence orders that the

¹ Van den Heever JA expressed the position as follows in his concurring majority judgment in *Jaga v Dönges, N.O. and Another* 1950 (4) SA 653 (A), at 668H-669B:

Where a sentence has been suspended and upon a breach of any condition it is subsequently enforced, it is still the same sentence which is put into operation, not a different one. To say that it is within the power of the person sentenced to incur or avoid it and that therefore the sentence to imprisonment is merely minatory and so alternative, does not impress me. Courts have a wide discretion to frame conditions subject to which sentences are suspended. Where the condition relates to restitution or the payment of aliment, the event may prove that the person sentenced had in reality no selection at all and unless he applies and is granted a fresh suspension the original and only sentence will be put into execution. Suspension of sentence may be an act of mercy *Bolon v Rex* (1910, T.S. 410); *Rex v Nowayile* (1920, E.D.L. 234). The Court passes sentence, 'but orders the operation of the whole or any part of the sentence to be suspended for a period . . .' (Cf. sec. 12 Act 38 of 1909 (T.); sec. 3 (b) Act 40 of 1914 and sec. 360 (b) Act 31 of 1917). The order for suspension is something outside the sentence: it does not diminish or enlarge it but suspends its operation. The fact that, where all the conditions specified in the order have been observed, *the sentence* shall not be enforced, is something which flows neither from the sentence nor from the order, but is a benefit *ex lege*.

(Italicisation in the original.)

² Section 69(11) of the Companies Act permits a court to exempt a person from the application of any provision of s 69(8)(b) of the Act. A court considering any such application would be conscious that granting an exemption would constitute an exception to the ordinary incidence of the disqualification criteria and accordingly be astute to the undesirability of making any order that would tend to defeat the purpose of the subsection.

operation of the whole or part of the sentence be suspended. The court's direction that part, or the whole of the sentence be conditionally suspended is intended merely to conditionally ameliorate the effect of the imposed sentence on the convicted person. It does not affect the character of the sentence component of the order as the measure of the court's assessment of the appropriate punishment for the offence.

[34] The respondents' attorney sought in supplementary written argument submitted after the hearing with the court's leave to rely on a judgment of the Electoral Court in *Freedom Front Plus v African National Congress and another* [2009] ZAEC 4 (31 March 2009), 2011 JDR 0054 (EC) to contend that an effective term of imprisonment or an effective fine was required for the application of s 69(8)(b)(iv) to be triggered. That case concerned the interpretation of s 47(1)(e) of the Constitution, which concerns the disqualification from eligibility for membership of the National Assembly of certain persons who have been convicted of criminal offences and sentenced to more than 12 months' imprisonment without the option of a fine. In that connection the court was particularly concerned with the effect on the import of the provision of the following sentence: '*A disqualification under this paragraph ends five years after the sentence has been completed.*' The contention by the appellant in that case that the sentence referred to included a suspended sentence was rejected. In deciding the matter the court emphasised the importance in statutory interpretation of determining the meaning of the words employed in a provision with proper regard to the context. That is a principle that has been emphasised in countless reported judgments. It was on that basis that the court distinguished the majority judgments in *Jaga v Dönges, N.O. and Another* cited in note 1, above. The court illustrated, at para 13, that to construe the sentence referred to in s 47(1)(e) to include a suspended sentence of imprisonment would lead to absurdity: Mthiyane JA pointed out that an '*... anomaly ... would result if the appellant's interpretation were correct. It lies therein that a person who commits a more serious offence for which he or she serves a prison term of twelve months would be eligible to hold public office much earlier than a person who did not actually serve a prison term, but [had] his or her sentence suspended for a period of five years for example. This could never have been the intention of the Legislature ...*'. It is trite that legislation should not be construed in a way that would give rise to absurdity.

[35] The position in relation to the relevant provisions of the Companies Act is quite distinguishable from that which obtained in the *Freedom Front* matter. Section 69(9)(a) of the Act provides:

A disqualification in terms of subsection (8) (b) (iii) or (iv) ends at the later of-

- (a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or...

The basis for absurdity identified in the judgment in *Freedom Front Plus* does not arise. It is excluded by the effect of the phrase ‘*at the later of*’. The effect is that in the case of a suspended sentence that is not put into operation (five years is the outer limit of the period for which a sentence may be suspended), the disqualification ends five years after the date of the imposition of the sentence (which by virtue of s 70(1)(b)(v) of the Act corresponds with the date upon which an incumbent director is removed from office if he becomes disqualified in terms of s 69(8)(b)(iv)), and, in the case where the sentence is brought into operation, five years from the date upon which the period of imprisonment is completed or the fine paid, as the case may be. The fact that the period of disqualification might in certain circumstances be longer if a suspended sentence is brought into operation than it would be had an effective sentence been imposed does not give rise to the irrational inequalities identified by the Electoral Court in the construction of s 47(1)(e) of the Constitution contended for by the appellant in that case. This is so because if the suspended sentence is brought into operation it will in most cases be indicative that the offender has committed a further offence of the type identified in s 69(8)(b)(iv), and would only afford further confirmation of his unfitness to hold office as a director.

[36] The respondents’ attorney also sought to avoid the effect of s 69(8)(b)(iv) on the second respondent by relying on s 69(12) of the Act, which provided:

Despite being disqualified in terms of subsection (8)(b)(iii) or (iv), a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by-

- (a) that disqualified person; and
- (b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company.

The argument was that because the first respondent holds a majority shareholding in the first applicant, the latter fell to be regarded as a subsidiary of the former, and if the second respondent were permitted to be a director of the holding company, he could surely not be excluded from being a director of the subsidiary. I do not think there is any validity in that argument because the second respondent (as ‘*the disqualified person*’) does not hold any shares in the first applicant, but it is unnecessary to determine it because s 69(12) of the Act was deleted in terms of s 46(c) of the Companies Amendment Act 3 of 2011 on the same date as the Companies Act was brought into operation. It never came into effect. Sub-

section 69(12) had it ever come into operation would have militated against the evident object of s 69(8)(b)(iv) and given rise to an internal contradiction in the section. The legislature appears to have come to appreciate as much; hence, no doubt, its decision to delete it.

[37] It follows that the second respondent has been disqualified since 28 October 2014 from being a director of the first applicant, and indeed, any other company. It is unnecessary in the circumstances to determine whether he was validly appointed as a director, or falls to be removed as such. Whatever the position, it is obvious, for the reasons given above, that his name must be deregistered in the records of the CIPC as a director of companies. Indeed, this should have happened in the ordinary course consequent upon the transmission of the particulars of the conviction by the clerk of the criminal court to the CIPC as required in terms of s 69(11A) of the Companies Act.³

[38] It is not possible in my view to determine on the papers whether or not the third respondent was validly appointed as a director of the company. The matter is beclouded by too many material disputes of fact. It is clear that the company's affairs were not conducted in faithful compliance with the formalities prescribed by the Companies Act. So, for example, the company had failed to cause the resignation in early 2014 of two of its founding directors (Ms Helene Marais and Mr Christiaan Schoeman) to be registered in the records of the CIPC. It had also purported to issue a share certificate to the first respondent reflecting the latter as the holder of 51 shares in the company. It is evident that the company failed in material respects to comply with the provisions of s 51 of the Act in issuing the certificate. The second applicant and one H Marais, who is a shareholder and at the time appears to have still been a director of the company, signed the share certificate on behalf of the company.

[39] The basis for the apparent transfer of the shares and the terms and subsistence of the underlying agreements in terms of which the certificate came to be issued are in dispute. It is apparent, however, that the second respondent was accepted to have been entitled to attend and take part in a shareholders' meeting on 12 August 2014 at which all the original shareholders (i.e. those who are alleged to have disposed of some of their shares to the first respondent) were present in person or by proxy. The only shareholder not present in person was the third applicant, who was represented by proxy. It appears from the minutes of that meeting, which were signed by Rheeder, as 'Maatskappy Sekretaris' and the second respondent as 'Uitvoerende Voorsitter', that the second respondent referred to his being in

³ The term '*Registrar of the Court*' in s 69(11A) quite clearly falls to be read as '*Clerk of the Court*', in matters in which the conviction is entered in one of the lower courts.

receipt of dividends from the company. He could only have been referring to dividends to which the first respondent might have been entitled. The tenor of the minutes is consistent with the recognition by all present that the second respondent had some form of proprietary interest in the company. In context, it is evident that the interest must have been through the first respondent.

[40] It is also evident from the minutes of the meeting that the second respondent was elected as ‘executive chairman’ of the company, which on the face of it indicates an acceptance by all present that he served on the board of the company. The minutes show that it was the second applicant who proposed the second respondent as executive chairman.

[41] These are all features that support the respondents’ allegation that the second respondent was appointed as a director of the company, and that all the shareholders had knowledge of it and accepted it. The second and third respondents have averred that they were appointed as directors in terms of the aforementioned oral agreement in terms of which the first respondent acquired fifty per cent of the shares in the company. Having regard to the factual context described above their evidence cannot be rejected on the papers as far-fetched and untenable.

[42] I remarked earlier that it is evident that the company’s affairs were not conducted with formal compliance with the Companies Act. It is therefore unsurprising that there appears to be no record of a shareholders’ meeting in respect of the second and third respondents’ election as directors. That does not mean, however, that their appointment would be ineffective as between the company and the shareholders if, as on their evidence would appear to be the case, they were nevertheless so appointed in terms of an agreement to which all the original shareholders were privy.

[43] It also does not follow that if the third respondent had been effectively appointed as a director – an allegation I cannot reject on the papers – his appointment would expire merely because the agreement in terms of which that had occurred had been cancelled, or was void. The appointment would have been as a consequence of the contract, but nevertheless *dehors* it. Once he had been appointed, a process for his removal in terms of s 71 would have to follow in order to terminate the appointment.

[44] For all these reasons I am left uncertain by the evidence, as I must treat it for the purpose of determining these proceedings on motion, as to whether or not the third respondent is currently a director of the first applicant. In the circumstances the applicants

have not established a case for the declaration they seek that the third respondent's appointment as a director of the company is invalid.

[45] The applicants have achieved substantive success in the application and are entitled to a costs order in their favour. The applicants sought costs against the respondents on a punitive scale. Such an order might have been indicated had I been able to completely reject the second respondent's evidence out of hand and find that he and/or the third respondent were responsible for misrepresenting to the CIPC that the second to fourth respondents had resigned as directors. There is cause for suspicion in that regard, but I have not been able to make a determinative finding on the papers. In the circumstances costs will be awarded against the respondents jointly and severally on the ordinary scale, as between party and party.

[46] The following orders are made:

1. It is declared that the second, third and fourth applicants are, and at all times since the registration of the company on 4 March 2009 have been, duly appointed directors of the first applicant company.
2. It is declared that the second applicant and Mr Nicolaas Rheeder have at all times material been, and currently remain, the only authorised signatories on the company's bank account (account no. [9.....]) conducted at the fourth respondent's Parow branch.
3. Pursuant to the declaration in paragraph 2, above, the fourth respondent is hereby directed to cancel any amendments to the company's mandate in respect of the conduct of the said account purportedly effected at the instance of the second and/or third respondents, and to give effect to the said declaration.
4. The suspension of activity on the account ordered in terms of paragraph 1.1 read with paragraph 2 of the order made by this court on 18 March 2016 shall cease to be of effect upon the fourth respondent's compliance with the aforementioned direction to cancel the amendments to the company's mandate effected by the second and/or third respondents.
5. It is declared that the second respondent has by reason of the effect of the provisions of s 69(8)(b)(iv) of the Companies Act 71 of 2008 been disqualified since 28 October 2014 to serve as a director of companies and that he is deemed on that account to have

vacated any position he may have held on that date as a director of the first applicant company.

6. The application for a declaration that the third respondent's appointment as a director of the first applicant company be declared invalid and that he be removed as a director is refused.
7. The respondents shall be liable, jointly and severally, the one paying, the other to be absolved, to pay the applicants' costs of suit.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES**Applicants' counsel:****M. Holderness****Applicants' attorneys:****Frost Attorneys****Cape Town****Respondents' counsel:****D. Filand****Respondents' attorneys:****D.E. Korabie****Wellington****C&A Friedlander****Cape Town**