

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
Signature <i>[Handwritten Signature]</i>	
Date <i>27/11/2019</i>	

CASE NO: 2631/2019

In the matter between:

ROKA PHASHA MAKGALANOTO COMMUNITY TRUST APPLICANT
TRUST (IT 760/2011)

and

KGOBOKO NELSON PHASHA	FIRST RESPONDENT
SEFATENG CHROME MINE (PROPIERTARY) LIMITED	SECOND RESPONDENT
MAMPA SEROLE COMMUNITY TRUST	THIRD RESPONDENT
(IT 000136/2011)	
TJIBENG COMMUNITY TRUST	FOURTH RESPONDENT
BOLEPU HOLDINGS (PROPIERTARY) LIMITED	FIFTH RESPONDENT
CORRIDOR MINING RESOURCES (PTY) LTD	SIXTH RESPONDENT
THE COMPANIES AND INTELLECTUAL PROPERTY	SEVENTH RESPONDENT
COMMISSION	

JUDGMENT

MAKGOBA JP

- [1] In this application the Applicant seeks following relief:
- 1.1. That the First Respondent be declared a delinquent director in terms of section 162 (5) of the Companies Act 71 of 2008 ("the Companies Act").
 - 1.2. That the First Respondent be removed as representative director on the board of the Second Respondent's company on behalf of the Applicant.
- [2] The Applicant is a duly registered community Trust of the Roka Phasha Makgаланoto Traditional Community and a shareholder in the Sefateng Chrome Mine (Pty) Ltd, the Second Respondent. The First Respondent is a member of the Roka Phasha Makgаланoto Traditional Community and has been delegated by the said community to be their representative director on the board of the Second Respondent Company. The other Respondents, namely 3rd, 4th, 5th and 6th Respondents are also shareholders in the Second Respondent company i.e Sefateng Chrome Mine (Pty) Ltd.
- [3] This application is opposed by only the First Respondent. The Second Respondent, though it gave a notice to oppose, filed what it referred to as an answering affidavit but indicated that it abides the decision of the Court.

Common Cause Facts

[4] The following facts are common cause or not disputed:

- 4.1. The Applicant is the shareholder holding 166 par value shares at Sefateng Chrome Mine (Pty) Ltd.
- 4.2. On or about 6 June 2017 the Roka Phasha Makgalanoto Traditional Community ("the Community") of which the deponent to the founding affidavit, Tlakale Maria Phasha, is the traditional leader, (Kgoshigadi) took a resolution in terms of which the First Respondent was removed as their representative director at the Sefateng Chrome Mine (Pty) Ltd.
- 4.3. Pursuant to this resolution of the community taken on 6 June 2017, on 25 July 2018 the Trustees of the Applicant took a resolution to the effect that
"Kgoboko Nelson Phasha's appointment as Trust Representative at Sefateng Chrome Mine (Pty) Ltd is hereby set aside, nullified and revoked forthwith"
- 4.4. The above resolutions were brought to the attention of the Second Respondent (Sefateng Chrome Mine (Pty) Ltd) but the latter failed to implement the resolutions.
- 4.5. The relationship and communication between the Applicant, the Community and the First Respondent has irretrievably broken down but the Second Respondent still retains the First Respondent on its board of directors.

Issues for Determination

- [5] There are two issues before me for determination.

First, whether the First Respondent has, according to the Applicant, by his conduct contravened the provisions of sections 76(2); 76(3) and section 162(5) of the Companies Act for him to be declared a delinquent director.

Second, whether the Applicant has made out a case for the nullification and withdrawal of the First Respondent's representation of the Applicant at Sefateng Chrome Mine (Pty) Ltd.

Declaration as Delinquent Director

- [6] The effect of a declaration of a person as a delinquent director is that he is thereupon disqualified, for so long as the declaration remains in force, from being a director of any company.
- [7] In the declaration of a person as a delinquent director what is required to be established is conduct intended to harm the company, alternatively an attitude of recklessness by the director in the face of an appreciation that his conduct could cause the company harm. The relevant causes of delinquency entail either dishonesty, willful misconduct or gross negligence. The applicant in such proceedings must allege that the respondent conducted himself with the intention of harming the company.

See **Lewis Group Ltd v Woollam and Others (1)** [2017] 1 All SA 192 (WCC).

[8] The following sections of the Companies Act 71 of 2008 are relevant for my determination of the issues in this matter:

Section 76 (2) read as follows:

“(2) A director of a company must—

(a) not use the position of director, or any information obtained while acting in the capacity of a director—

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company”

Section 76(3) reads:

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

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.”

Section 162(5) reads:

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

(a)

(b)

(c) while a director—

(i) grossly abused the position of director;

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

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

(iv) acted in a manner—

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

(bb) contemplated in section 77(3)(a), (b) or (c).”

- [9] It is the Applicant's contention that the First Respondent has by his conduct violated the provisions of sections 76(2), 76(3) and 162(5) of the Companies Act.
- [10] The Applicant's complaints against the First Respondent are the following:
- 10.1. The First Respondent used his position as a director of the Second Respondent to form a parallel Trust, which in turn conducted business with the Second Respondent.
 - 10.2. The First Respondent used his position as a director of the Second Respondent to form and register a company known as PHATJIMA, and that the latter company is allocated business by the Second Respondent.
 - 10.3. The First Respondent created a company known as Dirangtota Transport and Projects and this company was awarded mining contracts by Sefateng Chrome Mine. That in this regard he has used his position as a director of Second Respondent to benefit personally to the detriment of the Applicant.
- [11] The existence of a parallel Trust was denied by the First Respondent. The Applicant did not attach any documentary proof to its founding affidavit to confirm the existence of such a Trust. Under the circumstances I am unable to make a finding that such a parallel Trust does in fact exist.

Regarding Phatjima and Dirangtota issues, the allegations of the award of mining contracts or any business to these entities are denied by the First Respondent. The First Respondent's version is confirmed by the Second Respondent in the latter's supporting affidavit.

In the absence of any company records, copies of contracts or any corroborating evidence annexed to the founding papers these alleged breached of section 76(2) of the Companies Act cannot be established.

- [12] As a matter of law the Applicant relies on the following cases to submit that an order of delinquency is justified against the First Respondent, namely **Grancy Property Limited v Manala and Others [2013] 3 All SA 111 (SCA)** and **Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd & Others 2014 (5) SA 179 (WCC)**.

For the reasons that follow hereunder I am of the view that reliance on the aforementioned cases is misplaced.

- [13] The **Grancy** case is founded on section 163 of the Companies Act. The section provides a shareholder with a remedy against any oppressive or unfairly prejudicial acts or omission of a company or related person that unfairly disregards the interests of a party such as the Applicant. The applicant in **Grancy** made a multiple allegations of malfeasance and moral turpitude against the first respondent in that case.

Such allegations were alleged breach of fiduciary obligations, misappropriation and misuse of assets, misrepresentations, fraud, unauthorised use of Company funds and denying its entitlement as a shareholder.

Needless to say that the circumstances in **Grancy** differ with the case before me, hence the legal principles in **Grancy** are not applicable in the present matter.

[14] In **Visser** the applicant therein based its section 163 claim on the alleged breach by the respondent's directors of their section 76 fiduciary duties (Section 76 provides that a director must act in good faith and for a proper purpose and in the best interests of the Company). The Court held, in **Visser**, that the circumstances would have to be exceptional for a decision taken in accordance with section 76 to cause unfair prejudice in terms of the Companies Act.

Still, the **Visser** case had to do with the provisions of section 163 and not section 162(5) as in the present case.

[15] The appropriate case dealing with an order of delinquency of a director is that of **Gihwala and Others v Grancy Property Ltd and Others [2016] 2 All SA 649 (SCA)**. Even in that case the bar is set too high to justify an order of delinquency. It was held that delinquency was justified where it was found that

the directors have been guilty of gross abuses of their positions in circumstances where they owed a fiduciary duty to ensure that the Company complied with terms of an investment agreement.

This entails a breach of trust in relation to the performance of one's duty as a director.

[16] In essence, the Supreme Court of Appeal held in **Gihwala** that for an application to succeed in terms of section 162(5) of the Companies Act a delinquency order can only be made in consequence of serious misconduct on the part of a director.

[17] In the present case I am not persuaded that the conduct of the First Respondent make out a case for delinquency.

Removal of the First Respondent as representative of the Applicant

[18] As already stated above, the Community and subsequently the Trustees of the Applicant have both passed resolutions in terms of which the First Respondent is withdrawn as their representative on the board of the Second Respondent. It is common cause that the Second Respondent failed to implement those resolutions. The result is that the First Respondent is still on the board of directors of Sefateng Chrome Mine (Pty) Ltd.

[19] The removal of the First Respondent as a representative of the Trust (Applicant) and the community on the board of directors of the Second Respondent was occasioned by the following circumstances and grounds:

- 19.1. The First Respondent usurped the powers of the Trust (Applicant) and took decisions by himself without consulting fellow Trustees.
- 19.2. The First Respondent continued to call unlawful community meetings in the name of Roka Phasha Makgalanoto Traditional Authority and imposed himself as the community leader. He organized other Community members to rebel and undermine the authority of the Kgoshigadi.
- 19.3. The First Respondent unlawfully formed a parallel Traditional Authority and illegally obtained the Applicant Trust's stamp, consequently usurping the Trust and the functions of the Traditional Authority and powers of the traditional leader, being the Kgoshigadi.
- 19.4. The First Respondent started and continued a reign of terror against the Trustees, Kgoshigadi and members of the Roka Phasha Makgalanoto Traditional Authority by intimidating and threatening members of the Traditional Authority.

[20] In the light of the aforementioned grounds in paragraph 19 above, I make a finding that the Trustees as well as the Community had good cause to revoke the First Respondent's representation at the Sefateng Chrome Mine (Pty) Ltd.

The relationship between the parties has reached such a state of disintegration that all trust is lost between them and with little chance of reconciliation. It is common cause that the First Respondent was appointed to the board of directors of the Second Respondent by virtue of the mandate given by the Applicant and the Community. Consequently the termination of the mandate or withdrawal of authority should result in his resignation from the board of directors of the Second Respondent.

- [21] It is strange to note that the Second Respondent persists in retaining the First Respondent on its board despite the termination of his mandate by the Applicant. One wonders what the Second Respondent stands to gain in this impasse. This is nothing else but the divide and rule tactics practiced by some members of Corporate South Africa. This cannot be in the interests of the community the Second Respondent purports to serve.
- [22] It is quite disturbing to note that even though the Second Respondent purports not to oppose this application but abide the decision of the Court, it went on to file an answering affidavit which supports the case for the First Respondent. Mr Venter, the attorney for the Second Respondent at all material times, now acts on behalf of the First Respondent in this case. This is a clear conflict of interests situation because the Applicant (who is in conflict with First Respondent) is a shareholder of the Second Respondent company.

[23] Although the Applicant has been unsuccessful in its relief relating to the order of delinquency, it has however succeeded in the order to revoke and annul the First Respondent's representation at the board of the Second Respondent.

A substantial success has been achieved in this regard. It is therefore only fair that the Applicant should be absolved from payment of legal costs of this application.

[24] I accordingly grant the following order:

1. The application to declare the First Respondent as a delinquent director in terms of section 162(5) of the Companies Act is dismissed.
2. The application for the removal of the First Respondent as a representative of the Applicant on the board of the Second Respondent is granted and the First Respondent's mandate to represent the Applicant therein is revoked and / or annulled.
3. It is ordered that the First Respondent be replaced as a representative of the Applicant on the board of directors of the Sefateng Chrome Mine (Pty) Ltd.

4. Each party shall pay own costs.



**E M MAKGOBA
JUDGE PRESIDENT OF THE
HIGH COURT, LIMPOPO
DIVISION, POLOKWANE**

APPEARANCES

Heard on	: 13 November 2019
Judgment delivered on	: 27 November 2019
For the Applicant	: Adv K Mokwena
Instructed	: Mpshe Tsatsi Attorneys
For the First Respondent	: Mr D W Venter
	Venter De Villiers Attorneys
	c/o Mathopo-Makweya Inc