

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 73548/2018

In the matter between:

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
08/08/19..... DATE		 SIGNATURE

PHUMULANI ZWELITHINI RAPHAEL ZWANE

Respondent

JUDGMENT

Tuchten J:

- 1 The applicant (CIPC) applies to have the respondent disqualified from serving as a director under s 69(8) of the Companies Act, and/or declared delinquent or under probation under s 162(3) of the Companies Act.¹ For this purpose, counsel for CIPC offered three draft orders, marked A, B and C respectively, depending on the conclusions to which I come.

- 2 It is not in dispute that CIPC has standing to seek these orders and I shall not extend this judgment with a recitation of why this is so.
- 3 The respondent is an experienced chartered accountant. He used to be employed by the National Development Agency (the NDA). From 2010 to 2015, he was the chief financial officer of the NDA. On 6 November 2011, the respondent was appointed by the Minister of Energy to the board of directors of the South African Nuclear Energy Corporation SOC Limited (NECSA).
- 4 In the letter of that date appointing the respondent to the board of NECSA, the Minister referred the respondent to the Nuclear Energy Act² and the Public Finance Management Act³ and "other applicable governance prescripts" to which the Minister said the appointment was subject. The Minister wrote in the letter:

The [Nuclear Energy] Act provides that a director who is in the full-time service of the State shall not be paid any remuneration for the services rendered by him as a director of NECSA, nor shall any such director be paid any travel and subsistence allowances at a rate other than that applicable to him by virtue of such service.

² 46 of 1999

³ 1 of 1999

- 5 In fact, the respondent did claim and accept director's fees for his services as a board member of NECSA. He even declared in his declarations of interests which he rendered annually to the NDA that he was doing so. The Minister took the view that in receiving and retaining the remuneration from NECSA, the respondent had acted "in direct breach of the instructions of the National Treasury" and decided to remove the respondent from office as a director of NECSA. The Minister informed the respondent of her decision on 6 November 2014.
- 6 The respondent tried through a number of avenues to reverse the Minister's dismissal decision. He first laid a complaint with CIPC itself. An inquiry was instituted. Then, before CIPC reached any conclusion, the respondent brought an application to this court under case no. 21254/2015 (the respondent's application). The respondent cited the Minister of Energy, NECSA and the CIPC as first, second and third respondents respectively.
- 7 In the respondent's application, the respondent sought orders declaring his termination as board member of NECSA unlawful and setting it aside, reinstating him and reimbursing him for board meetings he had not been allowed to attend and costs.

- 8 Several of the issues which arose before me were also in issue in the respondent's application, which came before Molopa-Sethosa J. It is part of CIPC's case before me that I should decline to revisit those findings on the basis of issue estoppel.
- 9 Molopa-Sethosa J dismissed the respondent's application. He tried to appeal the judgment, all the way up to the Constitutional Court but was never granted leave to appeal.
- 10 Using the findings in the judgment on the respondent's application, CIPC has brought the present application. This is an appropriate point to explain the three draft orders which counsel for CIPC presented.
- 11 Draft A seeks a declaration that the respondent is disqualified under s 69(8)(b)(iii) read with s 69(9)(a) of the Companies Act from serving as a director of any company for a period of five years calculated from 1 November 2014.
- 12 Subsections 69(8) and (9), as far as they are relevant for present purposes read:

**Ineligibility and disqualification of persons to be director
or prescribed officer**

- (1) ...
- (2) A person who is ineligible or disqualified, as set out in this section, must not-
 - (a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director; or
 - (b) act as a director of a company.
- (3) A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.
- (4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to section 70 (2).
- (5)
- (6) ...
- (7) ...
- (8) A person is disqualified to be a director of a company if-
 - (a) ...
 - (b) subject to subsections (9) to (12), the person-
 - (i) ...
 - (ii) ...
 - (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or
 - (iv) ...
 - (aa) ...
 - (bb) ...
 - (cc) ...
- (9) 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
- (b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).

- 13 Draft B asks that the respondent be prohibited and permanently disqualified under s 69(8)(a) of the Companies Act from serving as a director of any company. Section 69(8)(a) may be engaged if a court has prohibited a person from being a director or declared the person to be delinquent under s 162 of the Companies Act.
- 14 Draft C seeks to have the respondent declared delinquent under s 162(3) read with s 162(5)(c) of the Companies Act and disqualified under s 69(8) read with s 165(6)(b) from serving as a director for a period of seven years calculated from the date on which the order is made.
- 15 Subsections 162(4), (5) and (6), upon which CIPC relies, read in relevant part:
- (4) Any organ of state responsible for the administration of any legislation may apply to a court for an order declaring a person delinquent if-

- (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
- (b) any of the circumstances contemplated in subsection (5) (d) to (f) apply with respect to any legislation administered by that organ of state.
- (5) A court must make an order declaring a person to be a delinquent director if the person-
 - (a) consented to serve as a director, or acted in the capacity of a director or prescribed officer, while ineligible or disqualified in terms of section 69, unless the person was acting-
 - (i) under the protection of a court order contemplated in section 69 (11); or
 - (ii) as a director as contemplated in section 69 (12);
 - (b) while under an order of probation in terms of this section or section 47 of the Close Corporations Act, 1984 (Act 69 of 1984), acted as a director in a manner that contravened that order;
 - (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);
 - (d) ...
 - (e) ...

- (f) ...
- (6) A declaration of delinquency in terms of-
 - (a) subsection (5) (a) or (b) is unconditional, and subsists for the lifetime of the person declared delinquent; or
 - (b) subsection (5) (c) to (f)-
 - (i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and
 - (ii) subsists for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration, subject to subsections (11) and (12);

16 Although, as I shall show, CIPC's case is that the respondent is indeed a person disqualified under s 69 and that while so disqualified, the respondent acted as a director, it is not CIPC's case in the present application that the court should act under s 162(5)(a). I shall therefore say no more about this aspect. CIPC's case at this level is that the respondent intentionally or by gross negligence inflicted harm on NECSA by soliciting and accepting director's emoluments. That situation is contemplated by s 162(5)(c)(iii). Counsel for CIPC submitted that relief should be granted in terms of in terms of Draft A together with either Draft B or Draft C.

- 17 Before I consider the central factual issue in the case, I must deal with one more legal aspect: whether the respondent was an employee of the state. In the respondent's application, he argued that he was, as an employee of a state owned entity, not an employee of the state. The argument was repeated before me, on the analogy with companies, where each has a separate legal personality; so that at common law an employee of a subsidiary is not an employee of the holding company.
- 18 The argument was dealt with by Molopa-Sethosa J in her judgment. She pointed out that the NDA was a public entity as contemplated by s 1 of the PFMA (which meant that the NDA as such was subject to its provisions) and held in paragraph 35 that (I paraphrase) the distinction which the respondent sought to draw between the state and the entities it created to achieve its governmental purposes was not one of substance. The learned judge rejected the argument of the respondent and held that, as a matter of law, as an employee of the NDA, the respondent was indeed an employee of the state.
- 19 This is an aspect of the case where I think issue estoppel should be applied. Issue estoppel is a recognised part of our law. Where an issue of fact or law has been decided in an earlier court case between the same parties and it is unlikely that inequitable or unfair

consequences will arise, a party will be precluded from rearguing the issue. Each case will depend on its own facts. A court asked to invoke issue estoppel must consider, amongst others, questions of equity of fairness not only to the parties themselves but to others. See *Smith v Porrit and Others*.⁴

20 I can think of no considerations, whether of fairness and equity or otherwise, that might preclude the application of issue estoppel on this issue. The determination of the issue was central to the determination of the respondent's application. It must therefore have been considered by all the other courts to which the respondent sought to appeal the order in the respondent's application. Those other courts included the Constitutional Court. To the extent that the finding constitutes precedent, it settles the law for many public servants in a similar position to the respondent. I hold that the respondent is indeed estopped from seeking the reconsideration of the finding.

21 If I am wrong and I ought to reconsider the position afresh, then I would hold that the finding is clearly correct. Interpretation of documents requires a unitary consideration of text, context and purpose.⁵ In the present case, the purpose of the measure guides the

⁴ 2008 6 SA 303 SCA paras 10-11

⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA and the cases which followed it.

correct interpretation. The purpose of the measure is to ensure that public servants in the full time service of the state receive their remuneration from one source only, thereby reducing the risk of conflicts of interest and preferential treatment of some public servants over others. And, I might add, preventing public servants from being paid from the public purse twice for their time. There can be no rational distinction in this regard between the two categories of public servants under discussion.

- 22 Although counsel for the respondent did not address the point in oral argument, in his heads of argument counsel submitted *in limine* that the present application was incompetent because, so the argument ran, under s 162(3) of the Companies Act, CIPC was required to bring the present application within 24 months of the date on which the respondent was removed as a director of NECSA.

- 23 This is not correct. Section 162(3) reads in relevant part:

The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if-

- (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
- (b) any of the circumstances contemplated in-
- (i) subsection (5) apply, in the case of an application for a declaration of delinquency; or

(ii) ...

- 24 On CIPC's case, the circumstances in s 162(5)(c)(iii) apply. Whether they have been established is of course the question I must decide. But the essence of a point *in limine* such as this is that the case of the opponent is, as it were, excipiable. I think the argument proceeded on the misconception that s 162(3)(a) required CIPC to establish in the present case that the respondent was a director of *NECSA* in the preceding 24 months. But that is to misread the measure. It requires an applicant in the position of CIPC merely to allege and prove that the respondent was a director of *a* company, not any specific company.
- 25 To recapitulate, it is established that the respondent received director's emoluments while he was a full time employee of the state. It is common cause that the respondent was removed from the office of director of *NECSA* on the grounds of misconduct involving dishonesty. Section 69(8)(b)(iii) of the Companies Act provides in terms that a person who has so been removed from office is disqualified to be a director of a company.

- 26 I am of course well aware that the respondent denies misconduct. But he was held by the Minister to have so misconducted himself and the Minister's opinion was upheld by all the courts in which the respondent sought to challenge and overturn it. Unless and until the decision to remove the respondent as a director of NECSA for misconduct is overturned, it has legal consequences, one of which is that the respondent is disqualified to be a director of a company.
- 27 A disqualification under s 69(8)(a)(iii) ends, under s 69(9), five years after the removal from office. It then follows, inevitably, that the declaration in Draft A must issue.
- 28 Counsel for the respondent, commendably in my view, conceded this point forthrightly in oral argument. Counsel further accepted that the respondent was indeed presently a director of certain companies. Counsel said that the directorships flowed from the respondent's current position as chief financial officer of the University of South Africa.
- 29 Counsel's concession prompted me to invite the respondent whether he should not reconsider his position as to Draft A, apologise for acting as a director while disqualified from doing so and seek an accommodation with CIPC in relation to the balance of the relief

sought. I adjourned the proceedings for this purpose but no apology or change of stance was forthcoming from the respondent.

- 30 The way is now clear to determine the central factual issue in the case.
- 31 One of the important factual findings in the respondent's application related to the date on which the respondent sought approval from the NDA's executive authority, its chief executive officer Dr Nhlapo. It will be recalled that the Minister offered to appoint the respondent to the NECSA board by letter dated 6 November 2012.
- 32 The respondent's case is that he wrote a letter dated 13 November 2012 to the CEO of the NDA asking for approval so to act and that such approval was promptly granted in writing on a copy of the letter dated 13 November 2012. I shall call the copy of the letter dated 13 November 2012 conveying the alleged approval "the 2012 approval letter". The respondent says that he lost the 2012 approval letter but in 2014 found that he needed it. He then, in 2014, sent a fresh copy of the letter dated 13 November 2012 to the CEO and a copy of the letter of 13 November 2012 was once again returned to him by the CEO signifying approval for him to act as a director of NECSA but dated 10 October 2014.

- 33 In the papers in the respondent's application, the CEO disputed this version and said that the first time that she, the CEO, was approached for approval for the respondent to act as a director of NECSA was in 2014 and that no such letter dated 13 November 2012 had been sent to her in 2012.
- 34 Molopa-Sethosa J found that the respondent's version in this regard fell to be rejected on the papers as untrue. CIPC submitted before me that issue estoppel ought to be applied to this finding.
- 35 But in the present case, the respondent submitted credible evidence, which had not been before the court in the respondent's application, ie that a letter relating to an "appointment to serve on NECSA Board" had indeed been received by the CEO's assistant on 13 November 2012. I think that on this evidence, the version of the respondent that he wrote to the CEO in November 2012 asking for approval to sit on the NECSA board and that such approval was granted ought not to be rejected on the papers as false.
- 36 I of course intend no criticism of the judge in the respondent's application or any of the other judges who considered that case. But on the evidence now before me, I think it would be unfair to estop the respondent from asserting that he indeed sent the letter of 13

November 2013 to the CEO on that date. Having regard to the *Plascon-Evans* principle, I must decide this case on the footing that the respondent did send the letter as he alleges and that he received the CEO's approval to act as a director of NECSA.

- 37 Justice therefore requires that I assess, independently of the findings in the respondent's application, whether he, as contemplated by s 162(5)(c)(iii) of the Companies Act, acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of his functions within and duties to NECSA.
- 38 By soliciting and receiving director's emoluments from NECSA in circumstances in which he was not entitled to do so, the respondent misconducted himself and breached his trust to NECSA. The crucial question is whether he did so wilfully (ie in the knowledge that he was not entitled to receive such emoluments and NECSA was not obliged to pay them to him) or was grossly negligent in doing so. I shall now address that question.

- 39 One ought then to ask this question: why, at the time that the Minister appointed the respondent a director of NECSA, or indeed at any time thereafter, did the respondent not directly seek a ruling on his own specific individual situation?
- 40 In his founding affidavit in the respondent's application, the respondent contended that as a matter of law he was not an employee of the state and for that reason did not regard the Minister's warning in his appointment letter dated 5 November 2011 as applicable to him. In his answering affidavit in the present application, the respondent makes the case that as at that date his "understanding at the time" was that the Minister was referring only to people who were directly employed by the state and not those employed by state owned entities or institutions, such as the NDA.
- 41 Why would the respondent conceivably have thought that a distinction in this regard was being drawn between employees of the state and employees of its entities and institutions? He said in his answering affidavit that the Minister's appointment letter was sent to him under cover of an email dated 9 November 2012 from the company secretary of NECSA. He points out that this email called on him to provide his banking details for "purposes of payment of Board fees".

- 42 This request for banking details, the respondent asserted, grounded his belief that he was entitled to receive directors' emoluments. He demonstrated that NECSA drew the same distinction and paid all its other directors in the respondent's position director's emoluments. Although CIPC seeks to cast doubt on this allegation, it is not contradicted. Additionally, the respondent annually completed and submitted returns to the NDA declaring that he received director's emoluments from NECSA. The Auditor General reported on these disclosures and reported, apparently with approval, that the management of NECSA had commended the respondent for having made these disclosures.
- 43 A factor which weighs against the respondent's general credibility on this issue is that he did not take unpaid leave from the NDA for the time that he spent attending to the affairs of NECSA. The respondent admits that he began in 2014 to have doubts about the correct interpretation of the categorisation of those employees of the state who were not allowed to receive director's emoluments from NECSA.
- 44 Nevertheless, I cannot reject on the papers the respondent's version that for some time he believed that he was entitled to receive director's emoluments. There appears to have been a prevalent belief in the NDA and NECSA that, arbitrary as it may have been, a

distinction existed between persons employed directly by the state and persons employed by the state through its agencies for purposes of director's emoluments.

- 45 But at a later stage, the respondent began, on his version, to have doubts. These arose from directives put out by the Treasury. The directive in force in 2012 provided that:

Employees of National, Provincial and Local Government, Agencies and Entities of Government serving on Public Entities are not entitled to additional remuneration.

- 46 The 2012 directive, the respondent says did not cause him to doubt that he was entitled to director's emoluments. But in 2014, the language of the directive changed. It read:

Employees of National, Provincial and Local Government ***Institutions***, Agencies and Entities of Government serving ***as office-bearers*** on Public Entities are not entitled to additional remuneration.⁶

- 47 The respondent says that the change in language between the two directives gave rise to his doubts and that these doubts caused him to seek clarification from the Treasury. The clarification sought by the

respondent was first done over the telephone and then formalised in emails. The respondent did not ask for a ruling specific to himself. But the respondent, speaking as a director of NECSA, sought in general terms clarification of the directive which might cover his own situation. The answer that he got, in an email dated 13 October 2014 from a Mr Chris Kruger was this:

Any person working for a public entity can technically serve on another public entity's board. The question which needs to be clarified beforehand may be the one on "conflicting interests". I do not think that an executive manager of the same entity can serve on its board as an independent (private) member, besides being there in an ex officio capacity.

Should a person from another entity want to serve on your board, he/she should obtain the necessary approval from the executive authority to take up remunerative work outside his/her official duties (the principle is established for public servants appointed in terms of the Public Service Act, 1994 (Proc. No. 103 of 1994) (see section 30 of the said Act), and there should be a similar provision for each entity.

- 48 The respondent says in his answering affidavit in the present case that he understood Mr Kruger's clarification to mean that he had to get the necessary approval from his executive authority, in this case the CEO of the NDA, to "take up remunerative work outside" his duties.⁷

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Para 4.20.2 of the respondent's answering affidavit

- 49 It was this understanding that prompted the respondent to re-send his initial request for permission to serve on the NECSA board to his CEO in 2014. So far, so good.
- 50 But as the respondent must have known, the position (on the respondent's version) had changed; and not so subtly, either. The respondent believed (again on his version) in 2012 that once he had been given permission to act as a director of NECSA, it followed as a matter of law (because of the interpretation he gave to the phrase "employee of the state") that he was entitled to director's emoluments. But in 2014, the respondent knew that he had to ask his executive authority for permission to be remunerated. Yet he did not do so.
- 51 The respondent says that it was the very Treasury clarification that he received which prompted him to obtain confirmation of the approval he had received from the CEO of the NDA to take up his NECSA position. But he did not need it for confirmation that he was authorised to act as a NECSA director. At that stage nobody disputed that he was entitled to act as a director. What had changed was that the Treasury had emphasised the need to obtain permission *to receive remuneration* for acting as a director.

- 52 Why did the respondent not ask his executive authority for permission to be remunerated as a director of NECSA? There can be only one answer. He knew that such permission would be refused. I cannot think of any reason why an honest CEO would agree to the respondent's being paid twice for his time. And that explains the true reason why the respondent in 2014 sought confirmation of the permission to act as director which he had received in 2012. Not because he thought that he needed to show he had permission to act as director. Because he wanted to use the letter as cover after the event of the 2014 Treasury directive, even though he knew it was not cover, for his double remuneration.
- 53 The respondent is thus in the position of a person who sedulously avoids taking the very action that would lead to perfect clarity on his position.⁸ He must have known, and therefore did know, that he required permission to receive director's emoluments. In fact, he says that he knew so. He must have known that if he drew attention to his position by asking for permission *to be paid*, permission would be refused.

⁸ Compare *R v Myers*, 1948 1 SA 375 AD 382, where it was said that a belief is not honest which, though in fact entertained by the representor was itself the outcome of fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe.

- 54 Counsel for the respondent referred in argument to the situation around the necessity to ask for permission to be paid as a grey area. But it was not a grey area as far as the respondent was concerned. He knew what the correct position was. He thought that if he was ever called to account for his conduct, he could profit from the doubt that had, or still, existed amongst his colleagues in similar positions.
- 55 The conclusion, then, is that from the date the respondent received the email dated 13 October 2014 from Mr Kruger of the Treasury. He knew he was not entitled to receive director's emoluments from NECSA unless he had permission from the CEO of the NDA to do so. He did not seek such permission. He continued to receive emoluments. He has kept all the emoluments he received. He has not apologised at all for his conduct but has tried, without justification, to claim that he behaved honestly and correctly.
- 56 CIPC has thus established that the respondent, in soliciting and accepting director's emoluments from NECSA, at least from 13 October 2014, acted in a manner that amounts to wilful misconduct and breach of trust in relation to the performance of the respondent's duties to NECSA. CIPC has thus brought the respondent within the scope of s 162(3) of the Companies Act and is thus entitled to an order declaring the respondent delinquent.

- 57 I turn to the question of sanction. I am mindful, although I use the term sanction, that s 162(5) of the Companies Act is not a penal provision. Its purpose is to protect the investing public against the type of conduct which leads to an order of delinquency and to protect those who deal with companies against the misconduct of delinquent directors. The measure aims to protect those who deal with companies by ensuring that the management of companies is in fit hands.⁹
- 58 I bear in mind that the misconduct which I have found proved against the respondent was, on the respondent's version, prevalent amongst his colleagues in full time employ of the state who served as directors of entities such as and similar to NECSA. As the respondent's counsel submitted, too, the respondent must not be made a scapegoat for the misconduct of others.
- 59 Against that, the respondent has persisted in his untenable attempts to portray himself as a victim and escape all the consequences both of his own conduct and of law, as it was found to be in the judgment on the respondent's application and its subsequent conformation by appellate bodies. Even after being given a chance to reflect on his conduct by this court, he has remained intransigent.

⁹

Gihwala and Others v Grancy Property Ltd and Others 2017 2 SA 337 SCA paras 142 and 144

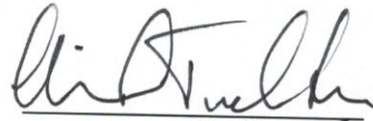
60 Under s 162(6)(b), the declaration of delinquency, which under s 162(5) I must make, subsists for seven years from the date of the order or such longer period as determined by the court at the time of making the declaration. In Draft C, CIPC asks for an order for disqualification for seven years. I shall therefore not consider whether a more severe sanction would be warranted.

61 Relief must therefore issue under Drafts A and C. Costs will follow the result.

62 I make the following order:

- 1 The respondent is declared to be disqualified in terms of s 69(8)(b)(ii) read with s 69(9)(a) of the Companies Act, 71 of 2008 (the Companies Act) from serving as a director of any company for a period of five years calculated from 1 November 2014.
- 2 The respondent is declared delinquent in terms of s 162(3) read with s 162(5)(c) of the Companies Act.
- 3 The respondent is declared disqualified in terms of s 69(8)(a) read with s 162(6)(b) of the Companies Act from serving as a director of any company for a period of seven years calculated from the date upon which this order is handed down.

- 4 The respondent must pay the applicant's costs in this application, including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'NB Tuchten', written over a horizontal line.

NB Tuchten
Judge of the High Court
8 August 2019