



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No. 4153/2016

In the matter between:

**MAKALIMENG BERLINA MAKANDA
PITSO FAIRBRIDGE MOGOREGI
MPATI GRACE ERICA KALANE
MOSOEUNYANE SHADRACK RAMATHE**

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant

and

**LEHLOHONOLO MOSOTHO
MARIRIPE OLEHILE PHILLIP MOLEMA
ELIAS PULE MATJOA
DANNYBOY POLIMPOTE PITSE
AFRNNAI HEALTH (PTY) LTD
COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION**

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent

JUDGMENT BY: P MOLITSOANE

HEARD ON: 23 NOVEMBER 2017

DELIVERED ON: 8 FEBRUARY 2018

- [1] This is an application in terms of s162 of the Companies Act 71 of 2008 to declare the first, second, third and fourth respondents(hereinafter referred to as respondents) as delinquents, alternatively to place them, in their respective capacities as directors of the fifth respondent under probation. Applicants further, inter alia, seek an interdict against the first to the fourth respondents. There is no relief sought against the fifth and sixth respondents as they were cited only due to the interest they may have in these proceedings. The application is opposed.
- [2] The respondents raised two points *in limine* and it was agreed by counsels of the parties that those points should be adjudicated and disposed of first. I agreed to the request and I so ordered.

ISSUES FOR DETERMINATION (POINTS IN LIMINE)

- [3] The contention of the respondents is twofold:
- 3.1 Firstly, whether the relief sought can be obtained by way of application proceedings as opposed to action proceedings
 - 3.2 Secondly, whether there is a material defect of non-joinder of the rest of the shareholders.

SUBMISSIONS BY COUNSEL

- [4] On the first point *in limine*, Mr Metlae for the respondents contends that in the determination of whether the conduct of the respondents as directors of the fifth respondent were reckless or negligent in the

running of the affairs of the Fifth respondent, the enquiry to be conducted should be both objective and subjective. The argument further goes on to say that the particular circumstances of the fifth respondent must be taken into account.

- [5] Mr Metlae further argues that the respondents have denied recklessness. He further submitted as to why such alleged conduct of the respondents cannot be regarded as amounting to recklessness, which conduct included factors that negated any subjectivity by reasonable persons in circumstances of the respondents.
- [6] The respondents rely also on the evidence in previous proceedings in this court, to wit, Case 3590/2014 and 1050/16. Counsel for respondents argues that such reliance was misplaced as the court in those previous cases were seized with different points in issue, namely, the fifth respondent's obligations and contempt of court respectively.
- [7] On the other hand, Mr Snellenburg SC, argued that the submission that the relief sought cannot be obtained on motion proceedings is without merit. He submits that there is no bona fide dispute regarding the fact that the first to the fourth respondents breached the basic obligations and duties in terms of the Act.
- [8] On the second point *in limine*, it is contended on behalf of the respondents that the rest of the shareholders should have been joined.

- [9] Applicants, however, submit that shareholders have no say in whether the directors are to be found to be delinquent or not. The interest of shareholders is not affected by the order of declaration of delinquency as the directors owe a fiduciary duty the fifth respondent.

THE APPLICABLE LEGAL PRINCIPLE AND MERITS

- [10] It is indeed so that the ultimate central issue for determination in this matter is whether the conduct of the respondents amounted to recklessness, and consequently whether such conduct renders them delinquents in terms of the Act. It is apposite in this regard to refer to the decisions delivered in particular to s424 (1) of the previous Companies Act 71 of 1973 where recklessness was an issue. Recklessness or an intention to defraud creditors was also a determinative factor in an enquiry in terms of Companies Act, 1973.
- [11] **In Philotex (Pty) Ltd and others v Snyman and others 1998(2) SA 138 (SCA) at 143 E-H the court said:**
- "In *S v Dlamini* 1988(2) SA 302(A) at 308 D-E gross negligence was described as including an attitude or state of mind characterised by an 'an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences'.**
- The test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and is subjective insofar as one has to postulate that notional**

being as belonging to the same group or class as the defendant, moving in the same sphere and having the same knowledge: *S v Van As* 921 1976 (2) SA 921(A) at 928 C-E. One should add that there may also be a subjective element present if the defendant has the risk-consciousness mentioned in *Van Zyl* but that, as indicated, is not an essential component of recklessness and its existence is no impediment to the application of the objective test referred to above.”

- [12] Respondents argue that recklessness is denied and they further argue that evidence was advanced to explain both their conduct as well as what they did to assist the 5th respondent. In an enquiry into recklessness, the court will have regard to the circumstances of the company itself. The enquiry will thus encompass looking into the alleged failure of the respondents to consider their actions which will include the alleged breach of both their statutory and common law duties.
- [13] The question whether motion proceedings are the only competent proceedings for relief under section 424(1) of Act, 1973 was left open by the full bench of the Transvaal Provincial Division in *Joh-Air (Pty)Ltd v Rudman* 1980(2) SA (TPD). In *Food and Nutritional Products (Pty) Ltd v Neumann* 1986(30 SA 464 (W) it was held that s424 (1) of Act, 1973 did not restrict a litigant to application proceedings and that relief may be sought in action proceedings. Conversely this would imply where a litigant due to the circumstances of his case proceeded to seek relief by way of an action that did not exclude proceeding by way of motion proceedings if the rules allowed.

[14] The mere fact that the subjective element of recklessness may be an issue does not necessarily imply that relief cannot be obtained by way of motion proceedings. Further, fact that the respondents deny recklessness does not in itself also necessarily bar the applicants to proceed by way of an application. The court is still enjoined in the context of declaration of delinquency to enquire whether the respondents breached their statutory and common law duties.

[15] The question whether to proceed by way of motion proceedings or action remains whether there is a bona fide, genuine point of dispute which cannot be resolved on the affidavits. The court in **Tamarillo (Pty) Ltd v BN Aitken (Pty) Ltd** 1982(1) SA 398 at 430G - 431A laid the approach as follows:

"A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application.(Room Hire Co (Pty) Ltd 1943(3) SA 155(T) at 1168) But if notwithstanding that there are facts in dispute on the facts stated by the respondent, together with the admitted facts in the applicant's affidavits, the applicant is entitled to relief(whether in respect of all his claims or one or more of them) it will make an order giving effect to such finding, with an appropriate order as to costs. (Cf. Stellenbosch Farmers Winery Ltd v Stellenvale Winery(Pty) Ltd 1957(4) 234 (C) AT 235; Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point)(Pty) Ltd 1976 (2) SA 938).The Court does not exercise a discretion in motion proceedings whether or not to grant claims established by the admitted or undisputed facts: except perhaps

in very extraordinary circumstances the applicant has a right to an order in respect of such established claims.(Room Hire case at 1166”

- [16] This application is essentially premised on s162 of the Act. In its application reference and incorporation of previous litigation between the parties is made. Respondent is of the view that such reference cannot be made in view of the fact that the issues in those cases were different from the issue *in casu*. I find it difficult to discern how this argument can be sustained. Admittedly not all parts of the evidence in those cases can be relied upon. The central consideration in the admissibility of evidence is its relevancy to the issues before court. It is my considered view that the court best suited to make that consideration will be the court seized with the main application. I can find no reason why reliance cannot be made on previous cases between the parties.
- [17] I cannot find on the documents before me that there is a serious or bona fide genuine point of dispute between the parties which cannot be resolved on the affidavits filed.
- [18] Respondents also argue that the shareholders should have been joined in view of their interest in this matter.
- [19] The test for joinder of parties has been formulated thus by Erasmus-Superior Court Practise Volume 2 at D1-124:
“The test is whether or not a party has a ‘direct and substantial interest’ in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.”

On page D1-125 the learned author further goes on to say:

“The rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party, the court is satisfied that he has waived his right to be joined”

- [20] Directors are appointed in terms of ss66 (4) and 68 of the Act. It is apparent from the reading of the said sections that the shareholders would have a substantial interest in the tenure of the directors simply because they appoint them. It is indeed so that directors only owe a fiduciary duty to the company but shareholders also have a direct interest that the said directors conduct the business of the company for the benefit of the shareholders. If the shareholders can have a say in the appointment of directors I cannot see how they would not have an interest when they are declared delinquent or placed under probation.
- [22] It is my considered view that the shareholders should have been joined in these proceedings.
- [23] Against this backdrop it must be borne in mind that there is no securities register or its equivalent as envisaged by s24(4) of the Act. This was the finding by this court in case number 3590/2016. This court in case 3590/2014 brought by the applicants ordered, inter alia, that the fifth respondent furnish the applicants with a securities register. Apparently contempt of court proceedings were

initiated against the fifth respondents and the fifth respondents was found to be in contempt. None of the respondents were found to be in contempt of the order of Naidoo J presumably because only the fifth respondent is obligated to maintain a securities register or its equivalent. Such a register has still not been furnished to the applicants.

[24] The respondents cannot be hampered by non-production of this document which essentially is out of their hands. In case number 2584/2016 the applicants obtained an interdict against the respondents and "other interested parties." It would appear that those other interested parties were presumably people having an interest in this matter. Mr Metlae also alluded to the fact that applicants could have joined those people. In the absence of the securities register I cannot find a reason why the applicants cannot serve this application on "other interested parties" as listed in case number 2584/2016.

[25] I will consequently uphold the second point raised *in limine* by the respondents.

[26] With regard to the question of costs the respective litigants were partially successful and it will be in the interest of justice that I make the order below.

ORDER:

1. The first point *in limine* on the question of a dispute of fact is dismissed;

2. The second point *in limine* on the question of non-joinder is upheld subject to paragraphs 2.1 and 2.2 below
 - 2.1 Applicants are ordered to join shareholders as listed in the securities registers of the Fifth respondent,
 - 2.2 If the said securities register cannot be obtained, Applicants are hereby granted leave to join all the respondents as listed in case number 2584/16.
3. The parties are granted leave to approach this court on the same documents (amplified further if necessary) for finalisation of this matter.
4. Each party shall bear his or her own costs.



P. MOLITSOANE, AJ

For the Applicants: Adv. N Snellenburg SC
Instructed by : Rossouws Attorneys
 BLOEMFONTEIN

For the Respondent: Adv D Metlae
Instructed by : Bezuidenhouts Inc
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