



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1) Reportable: Yes
(2) Of interest to other
Judges: Yes
(3) Revised: No

Date: 24/07/2025

CASE NO: 2022/22021

In the matter between:

PILLAY, POOVANDEREN

Applicant

and

STOKES, JUSTIN RAYNER

First Respondent

SWART, CRAIG WILLIAM

Second Respondent

HOGAN, ERIC PETER

Third Respondent

GARSDIE, DANIEL MARK

Fourth Respondent

PERSIMMON ENERGY VCC LIMITED

Fifth Respondent

COMPANIES AND INTELLECTUAL

PROPERTY COMMISSION

Sixth Respondent

JP VISAGE

Seventh Respondent

J MATTHEWS

Eighth Respondent

J U D G M E N T

MAIER-FRAWLEY J:

Introduction

1. The applicant brought an application on 21 June 2022 to declare the first to fourth respondents delinquent directors as contemplated in s 162 of

the Companies Act 71 of 2008 (the Act). The first to fourth respondents opposed the application and filed answering affidavits,¹ however, only the fourth respondent participated in the hearing of the matter. At the hearing, the applicant's counsel indicated that the applicant abandoned the case against the first respondent and would only seek relief against the second, third and fourth respondents.

2. The fifth respondent, Persimmon Energy VCC Limited (the company), was incorporated as a private company on 20 October 2017. It was converted to a public company on 12 January 2018. The first to fourth respondents were all directors of the company at one or another time, although it was not disputed that the first and third respondents tendered letters of resignation as directors on 30 April 2020 and 31 August 2020 respectively.²
3. The applicant and the seventh and eighth respondents are shareholders in the company.
4. The applicant amended his initial Notice of Motion³ pursuant to a Notice of Intention to Amend to which no objection was received. The amendment took effect on 21 August 2023 when the amended pages were delivered. The relief sought in the Amended Notice of Motion was for orders: (i) declaring the first to fourth respondents delinquent, as contemplated in sections 162(2)(a) and (b)(i) read with sections 162(5)(c)(i), (ii) and (iv)(aa) of the Companies Act, 71 of 2008 (the Act); (ii)

¹ The second respondent filed a composite answering affidavit on behalf of himself and the third respondent. Attached thereto was a confirmatory affidavit by the third respondent.

² According to the second and third respondents, the first and third respondents were still recorded as directors on the CIPC database at the time that their answering affidavit was prepared. This was not disputed by the applicant in reply.

³ In the initial Notice of Motion, the applicant also relied on the provisions of s 77(3)(b)&(c) and s 22 (1) of the Companies Act, 2008 for the declaration of delinquency sought by him.

directing the sixth respondent to delete the names of the first to fourth respondents from the record of directors of the company; (iii) payment compensation in the sum of R3,000 000.00 as contemplated in section 162(10)(c) of the Act.; and (iv) costs as against the first to fourth respondents on the attorney and client scale, jointly and severally, the one paying the other to be absolved.

5. The first to fourth respondents seek the dismissal of the application with costs.⁴

Background

6. The background facts were largely uncontentious.
7. The fifth respondent was formed as a Venture Capital Company (hereinafter, the fifth respondent or 'the VCC'), as defined in s 12J(1) of the Income Tax Act, 58 of 1962, as amended. It was registered on 12 October 2017. The first to third respondents became directors on the same date, being 12 October 2017, whilst the fourth respondent became a director on 13 February 2018.
8. According to the answering affidavit of the second and third respondents, Section 12J incentivises taxpayers to invest in venture capital companies that fund small-and medium-sized enterprises that have long-term growth potential. The sole object of the VCC was to manage investments made by it in suitable qualifying companies, as defined in s 12J(1). The investment occurs through the investor purchasing shares in the VCC, which funds are in turn invested in identified qualifying companies. In terms of the Section 12J Investment, the VCC utilises the qualifying company as a vehicle

⁴ Only the fourth respondent seeks costs on the attorney and client scale.

through which it trades. As a start-up company that was in its early stages of growth, the VCC required a lot of capital. Section 12J investments are classed as medium to high-risk investments, particularly when compared to traditional investments such as bonds, listed equities or cash, because it entails investment in a start-up. The nature of the investment is such that it is embarked upon by the investor on a risk basis, there being no guarantee that the investor will recover the investment or derive dividends during the five year investment period.

9. Tax incentives provided by s 12J investments include a tax exemption/savings equivalent to 45% of the value of the investment in the VCC in the year in which the investor makes the investment.
10. According to the answering affidavit of the first respondent, the second respondent (Craig Swart) and his brother (Mike Swart) wanted to take advantage of certain business opportunities in the solar energy sector which entailed the sale of solar power generated by solar installations to customers (referred to as 'off-takers' in the papers), a type of business they sensed would have great growth and income generating potential, given the ongoing loadshedding problems that were being experienced in the country and Eskom's rising electricity tariffs. The second respondent's brother had experience in setting up, installing and operating such solar systems. The objective was to start a group of companies, including a VCC in line with SARS's 12J Regulations, with the aim of: (i) providing solar energy solutions to off-takers - who would benefit from a cheaper rate per kWh versus what they were paying Eskom or City Power - and (ii) enabling favourable returns on investment for investors in the long term. The Group of companies would be structured in a way that would enable potential investors to invest their monies into the VCC, which the VCC

would then deploy by investing in businesses (qualifying companies) that supplied solar installations for off-takers. The solar installations would be owned by certain companies (Cobalt Energy 1, Cobalt Energy 2 and Cobalt Energy 3) with whom the off-takers would enter into Power Purchasing Agreements (PPA's) for an agreed-upon tenor and at agreed-upon kWh/h rates. The proceeds from the sale of electricity via these PPA's would serve as income for these Cobalt Energy entities, which income, net of costs, would represent the return to the VCC and its investors. To this end, the 'Cobalt' group of companies were formed which included, amongst others, Cobalt Energy 1, 2 and 3 as well as the VCC (fifth respondent).⁵ The first, second and third respondents were directors in these companies, including the VCC, from inception.

11. The applicant became interested in purchasing shares in the VCC pursuant to a public offering of shares made in October 2018.⁶ He embarked on negotiations for the purchase of shares with the second respondent and his brother Mike Swart (Mike), aimed at gauging the soundness of the investment he sought to make in the VCC. To this end, during the ensuing months, he was furnished with the VCC's executive summary; a pro forma written subscription agreement; the fifth respondent's memorandum of incorporation (the MOI); and a signed power purchase agreement (PPA) concluded between Cobalt Energy 5 (Pty) Limited (Cobalt 5) and Pandoway (Pty) Ltd (Pandoway).
12. The executive summary of the fifth respondent recorded, amongst others, that *"the motivation for Persimmon Energy [the VCC] came about as an*

⁵ Other companies in the group allegedly included Persimmon Energy VCC Management and Persimmon Energy.

⁶ From a reading of the papers, this was the second public offering of shares, the first of which was made in February 2018, which had failed to attract investors.

alternative to bank finance that was relied on to install and market solar PV systems...Establishing Persimmon Energy allows us to enjoy the profit at installation as well as an ongoing management fee which allows us to 'build a book'" Highlights of investing in the VCC were referenced, amongst others, the fact that the investment was tax deductible; a 5 year exit strategy was in place; and returns for up to 25 years were envisaged. Reference was also made to potential risks such as bad economic conditions or client insolvency, which could be mitigated as *"The system always belongs to Persimmon Energy and should the Offtaker not be able to continue with the PPA agreement the system can simply be moved and income will continue at new site."* The key players in the VCC were said to be: Craig Swart (second respondent), Mike Swart (second respondent's brother) and one Jeff Millar, a start-up specialist and reportedly the CEO of the VCC. A brief synopsis of their individual background and experience was included.

13. In terms of the provisions of the Subscription Agreement:
 - 13.1. The VCC would invest the purchase price paid for the purchase of shares in *"Qualifying Companies that are involved in the development, owning and managing of renewable energy generation assets that demonstrate high yield annuity cashflows and meet the stringent criteria of the Investment Committee."* (clause 2.2.2);
 - 13.2. In terms of clause 2.3.2: *"The Company's policy is to build a diverse portfolio of companies in line with the investment strategy, which is to approach existing EPC's [energy producing companies] ... to fund future projects or buy existing projects from EPC's where the indicative returns to the Company will satisfy the fund mandate. The funds raised will be progressively invested in Qualifying Investments."*

- 13.3. In terms of clause 2.3.3: *"The amount of equity invested in any one Qualifying Company will be no more than 20% of the targeted gross capital raised. The Board, the Manager and the Investment Committee will review the Investment Portfolio on a regular basis to assess asset allocation and the need to realise investments to meet the Company's objectives or maintain its Section 12J status."*
- 13.4. In terms of clause 2.3.1: *"Initially, whilst suitable Qualifying Investments are being identified, the funds will be invested into interest deposits."*
- 13.5. In terms of clause 2.5: *"The Investor acknowledges the risks in investing in a Venture Capital Company and accepts that he will not have a claim against Persimmon Energy, its staff, agents and/or advisors. The value of the investments may rise as well as fall, and there is a risk that the Investor may suffer financial losses. The Investor does not have a claim against persimmon Energy VCC in the event of the realisation of this risk unless it can be proved that the losses were due to negligence, fraud, misconduct or dishonesty by Persimmon Energy VCC or its staff. The Investor is aware that the investment is of a medium to long term nature and adverse tax consequences may arise if the Investor disposes of his Ordinary Shares in the Company prior to the fifth anniversary of the date at which he acquired those Shares. An appropriate discount may also be applied to the disposal of an Ordinary Share prior to the aforementioned fifth anniversary.*
- 13.6. In terms of Clause 2.9.2: *"The Investor understands that the term of the investment is for a minimum of 5 (five) years from Closing Date, in order to enjoy the full benefit of the tax incentive granted by section 12I of the Income Tax Act."*
(emphasis added)
14. According to the applicant, the PPA concluded between Cobalt 5 and Pandoway provided him with the necessary comfort that the Fifth Respondent had indeed identified qualifying companies in which to invest, as envisaged in the subscription agreement. On 3 December 2018, the

applicant and the fifth respondent concluded a written Subscription Agreement in terms of which the applicant purchased 3000 ordinary shares in the fifth respondent for a total subscription price of R3 million. Share certificates were duly issued to the applicant thereafter.

15. In February 2019, the Applicant requested the Second Respondent to provide him with an update and details regarding the Section 12J investment which the Fifth Respondent was to make with the bulk of the subscription price paid. The second respondent failed to reply for a period of six months. Pursuant to follow up requests made by the applicant, on 21 August 2019, the second respondent replied and confirmed that the Fifth Respondent had not yet invested the subscription price, as agreed, due to an alleged delay in the initial project which the Fifth Respondent had identified for investment.
16. The applicant took the view that the fifth respondent had breached the terms of the Subscription Agreement, which was exacerbated by a lack of transparency, and hence decided to exit the investment. On 21 August 2019, he informed the second respondent in an email that he wished to exit the investment. On 26 August 2019, the second respondent replied by informing the applicant that it would not be possible for him to exit the investment, as his share certificates had already been issued.
17. On the 27th of August 2019, the Applicant wrote to the Second Respondent stating that the Fifth Respondent was in breach of the subscription agreement and as such, he wished to be refunded the subscription price for his shares. At the request of the second respondent, the applicant met with him on 26 September 2019 when a copy of the

Fifth Respondent's audited annual financial statements for the year ending 28 February 2019, were furnished to the applicant.

18. Thereafter, the applicant requested that various documents be provided to him.⁷ This was followed by formal demands made by the applicant's attorneys. As the documents were not provided, the applicant launched an application to compel and obtained an order in his favour on 13 February 2022.⁸ The fifth respondent's failure to comply with the order led to the applicant launching a contempt application, pursuant to which some but not all of the documents were furnished to the applicant.
19. In response to court order, on 29 April 2022 the 5th respondent's attorneys sent a letter to the applicant's attorneys in which they confirmed, amongst others, that:
 - The VCC's first management accounts were generated in 2019;
 - No Annual General meetings (AGM's) were ever held, accordingly no notices and minutes in respect of AGM's were in existence;
 - The fifth respondent did not possess a bank account from its inception - it maintained a current account during the period Nov 2018 until 17 March 2020 and an investment account during the period 17 Dec 2018 to 16 Dec 2019, however, such accounts were no longer active;

⁷ These included, amongst others: the fifth respondent's audited financial statements for the financial years ending February 2018, 2020 and 2021; reports presented at the 2018, 2019 and 2020 AGM's of the fifth respondent; management accounts of the fifth respondent for the financial years ending February 2018 to 2021; notices and minutes of all annual general meetings held; the fifth respondent's securities register, bank accounts and accounting records of the fifth respondent; documentation pertaining to all investments made by the Fifth Respondent in any qualifying company as defined in the Fifth Respondent's memorandum of incorporation from the date of inception of the Fifth Respondent; and documentation pertaining to all due diligences conducted by or on behalf of the Fifth Respondent in respect of any qualifying company in which the Fifth Respondent invested, from the date of inception of the Fifth Respondent, to the date of the order.

⁸ The application was initially opposed by the fifth respondent, though it failed to file an answering affidavit.

- no due diligence was conducted with regard to 'the qualifying company,' however, the identity of the qualifying company was not provided.

Applicant's case

20. The applicant argues that the documentation provided on behalf of the fifth respondent pursuant to the aforementioned court order 'demonstrates a complete breach of the First to Fourth Respondents governance and fiduciary obligations as directors of the Fifth Respondent.'
21. The applicant relies on four grounds for a declaration of delinquency, being the directors' failure to: (i) hold any Annual General Meetings; (ii) prepare audited financial statements for the 2018, 2020, 2021 and 2022 financial years; (iii) ensure a due diligence in respect of qualifying companies; and (iv) second respondent's failure to disclose his sole directorship in Cobalt 5, being the selected qualifying company.⁹
22. The applicant made no distinction in his papers between the first to fourth respondents in respect of the conduct complained of.
23. The applicant's case against the second respondent was premised on his control of the management and affairs of the fifth respondent. The second respondent was directly involved in and responsible for the day to day running of the fifth respondent and its financial affairs. It should be

⁹ In support of these grounds, the applicant relies on:

- contraventions of the Act;
- non-compliance by directors with the fifth respondent's MOI;
- breach by the fifth respondent of the terms of the Subscription Agreement and non-compliance by the directors of their duty to ensure compliance by the fifth respondent with the terms thereof;
- non-compliance by the directors of their duty to keep and maintain proper accounting records; and
- non-compliance by the second respondent of the duty to avoid a conflict of interest with the VCC and to make disclosure of personal financial interests.

noted that the third respondent unequivocally aligned himself with the second respondent's actions and decisions in their joint answering affidavit and is for all intents and purposes on the same footing as the second respondent.

24. Apropos the fourth respondent, the applicant's case was premised on the fact that the legal duties of all directors, whether executive or non-executive, are all the same, seeing that the board of directors has collective responsibility for the management of a company in terms of s 66(1) of the Act, which collective responsibility is operationalised by imposing individual responsibility and liability for each of the board members.

First respondent's version

25. Although the applicant is no longer seeking relief against the first respondent, certain facets of his version, aside from that referred to earlier in the judgment, bear mention.
26. According to the first respondent, he was not informed and thus did not know of the formation of Cobalt Energy 5 or that such entity was to serve as the qualifying company in which the VCC would invest, nor did he know that the applicant had made a significant investment in the fifth respondent through the acquisition of shares or that any PPA had been concluded with either Pandoway or other off-takers – he discovered this only upon receipt of the application. As at the time of his resignation as director, there was nothing to dispel his belief that the VCC was effectively dormant.

27. In September 2017, a solar VCC whatsapp group was established between the Second Respondent, Mike Swart and the first respondent to enable them to keep in touch and to ensure that everyone was informed about potential investors or meetings that needed to be attended, and the like. Whilst Mike (the brother of the Second Respondent) was not a director of the Cobalt group of companies, he was an integral part of the Group's offering to investors and off-takers alike, given his experience in setting up, installing and operating solar systems. The third respondent was added to the whatsapp group in January 2018. The last communication on the whatsapp group occurred in August 2018. The bank accounts of the VCC, as at September 2018, evidenced that no funds were raised into the account. The second respondent left the whatsapp group on 1 November 2018, which underscored the first respondent's belief that the VCC had lain dormant through inactivity.
28. He resigned as a director in April 2020. In response to his letter of resignation, the second respondent informed him that he (second respondent) was going to wind down the VCR that year. This led him to believe that, as no investors and investments had been secured, the VCC would be closed. He alleges that he therefore did not find it odd that no board meetings or AGM's were ever held, given the VCC's prolonged inactivity.¹⁰

Fourth respondent's version

29. The first respondent's version is to the effect that he had no involvement in or knowledge of the allegations made by the applicant against the directors of the fifth respondent. He did not either participate in or take

¹⁰ It is unclear from the papers whether the first respondent was provided with or had sight of the 2019 financial statements of the fifth respondent.

part in any action or decision described by the second and third respondents in their answering affidavit. He was never informed of the applicant's investment/shareholding in the fifth respondent and did not know of the applicant's existence until this application was served on him. Save for being asked by the second respondent to sign documents on three occasions, he did not participate in the management of the VCC and had no knowledge of its financial operations. He was never part of any decision taken by the fifth respondent's directors.

30. He holds a Master's degree in Analytic Chemistry from UCT. His experience and know-how are scientific in nature. As regards his background, he had previously run his own business for many years which involved the supply high-tech laboratory equipment. He had no experience or knowledge regarding venture capital companies, the provisions of the Income Tax Act 58 of 1962 or section 12J of the Income Tax Act.
31. He was persuaded by the Swart brothers to become a director in the fifth respondent in the following circumstances: He had been social friends with Mike Swart (Mike) for many years. During February 2018, Mike approached him socially and informed him that that he and the second respondent decided to start a capital venture business aimed specifically at the solar electricity supply industry. Mike owned a solar business at the time. Mike posited the fourth respondent becoming a director in the VCC. This led to a meeting with the Swart brothers when the fourth respondent was informed of their business objectives and furnished with the fifth respondent's prospectus.¹¹ They indicated that he merely had to agree to

¹¹ The VCC's prospectus constituted 'A general public offer to subscribe for 100 000 Ordinary Shares of no par value at an issue price of R1 000 per Ordinary share'. The opening date of the offer was 9

be a director in name, since the management of the venture capital company would be administered by a company called Venture Capital Management Services (Pty) Ltd ("VCMS") whilst the second respondent would take charge of the fifth respondent's business and its affairs. He was lulled into a sense of trust by the contents of the prospectus before agreeing to become a director. From his perusal of the fifth respondent's prospectus, an extract of which was attached as 'DGM1' to his answering affidavit,¹² he noted that the auditors and reporting accountants, tax advisor, attorney, and other advisors associated with the fifth respondent were reputable companies. He also noted that there were other directors who held professional qualifications, which further provided him with peace of mind.

32. Although he had no knowledge of or experience in the venture capital business field, he believed (at the time) that his technical knowledge could be of value in the solar electricity industry.
33. He was never involved in sourcing any investments, capital, loans, or securing shareholders in the fifth respondent.
34. The only interaction he had with the second respondent and the business of the fifth respondent during 2018 and 2019 was as follows: In May 2018, at the request of the second respondent, he signed a management agreement with Persimmon Energy Management Company (Pty) Ltd ("PEMC") on behalf of the fifth respondent. On 3 June 2019, at the

February 2018 and the closing date of the offer was 28 February 2018. The first, second and third respondents were listed as the VCC's directors. Members of the public were forewarned therein that "*Venture capital investments are speculative by their very nature and prospective subscribers should refer Annexure 1 of this Prospectus concerning the potential risks.*" Members of the public were also forewarned that "*the ordinary shares on offer are unlisted and are not readily marketable and should be considered to be a risk capital investment.*"

¹² Not all the pages constituting the prospectus were provided, including Annexure 1 thereto.

request of DBO auditors, he signed a form reflecting directors' remuneration as nil. On 29 July 2019, at the request of the second respondent, he signed a page headed "Director's Responsibilities and Approval". Only the page in question had been emailed to him by the second respondent. The page in question comprised a declaration that pertained to the 2019 financial statements of the fifth respondent. He was not furnished with the balance of the 2019 financial statements and accordingly did not have sight thereof. In signing the declaration, he relied on the accuracy of the financial statements which the auditors of the fifth respondent had prepared.

Statutory framework and Legal Principles

35. At the time of the institution of the application on 21 June 2022, section 162(2) provided, in relevant part, as follows:

“(2) A...shareholder...of a company may apply to a court for an order declaring a person delinquent ... if-

- (a) The person is a director of that company or, subject to (2A) within the 24 months immediately preceding the application, was a director of that company; and
- (b) Any of the circumstances contemplated in –
 - (i) Subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or
 - (ii)”

36. Accepting for present purposes that the third respondent resigned on 31 August 2020, he resigned less than 24 months before the launch of the application and thus fell within the purview of s 162(2)(a) for purposes of this application.

37. Section 162(5) provides, in relevant part, as follows:

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

(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);¹³
- (iii) ...
- (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

...”

38. Section 162(10)(c) provides, in relevant part, as follows:

“(10) Without limiting the powers of the court, a court may order, as conditions applicable or ancillary to a declaration of delinquency...that the person concerned –

...

...

- (c) pay compensation to any person adversely affected by the person’s conduct as a director, to the extent that such victim does not otherwise have a legal basis to claim compensation;...”

39. In *Gihwala*,¹⁴ Wallis JA explained that s 162 of the Act has a protective purpose as opposed to a penal purpose: “... its aim is to ensure that those who

¹³ In terms of section 76(2)(a) a director of a company must 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
- (ii) to knowingly cause harm to the company...” (emphasis added)

The word ‘person’ referred to in s 76(2)(a)(i) includes a juristic person in terms of the definition section of the Act.

¹⁴ *Gihwala and Others v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) (“*Gihwala*”), par 144 read with par 142. In par 142, Wallis JA stated that “... it is appropriate first to examine the purpose of section 162 (5). Contrary to the submissions on behalf of Mr Gihwala and Mr Manala, it is not a penal

invest in companies, big or small, are protected against directors who engage in serious misconduct of the type described in these sections. That is conduct that breaches the bond of trust that shareholders have in the people they appoint to the board of directors. Directors who show themselves unworthy of that trust are declared delinquent and excluded from the office of director. It protects those who deal with companies by seeking to ensure that the management of those companies is in fit hands..." (emphasis added)

40. The applicable provisions also seek to promote acceptable standards of corporate governance.¹⁵

41. In *Gihwala*, the Court described the type of conduct that would justify an order in terms of s 162(5)(c). The Court pointed out that the section is not concerned with some 'trivial misdemeanour or an unfortunate fall from grace'.¹⁶ In terms of s 162(5) (c):

"Only gross abuses of the position of director qualify. Next is taking personal advantage of information or opportunity available because of the person's position as a director. This hits two types of conduct. The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the company. Our law has deprecated that for over a century. The third case is where the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary. The fourth is where the director has been guilty of gross negligence, wilful misconduct or breach of trust

provision. Its purpose is to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against misconduct of delinquent directors.'

¹⁵ *Smuts v Kromelboog Conservation Services (Pty) Ltd and Another* (511/2023) 2024 ZASCA 156 (14 November 2024), par 29. ("*Smuts*")

¹⁶ *Gihwala*, fn 14 above, at par 143.

in relation to the performance of the functions of director or acted in breach of s 77(3)(a) to (c)”¹⁷ (emphasis added)

42. If any of the grounds set out in section 162 are established, a court is obliged to make an order declaring a person to be a delinquent director, thereby disqualifying him or her from office. This is made clear by the word ‘must’ in section 162(5).
43. A declaration of delinquency under s 162(5) carries the consequence that a person may not serve as a director of a company for a minimum of 7 years.¹⁸
44. In *Lewis*¹⁹ Binns-Ward J held that: “It follows that for a company or any of its shareholders to succeed in obtaining a declaration of delinquency in respect of any

¹⁷ Section 77(3) makes a director liable for loss or damage sustained by the company in consequence of the director having:

‘(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) acquiesced in the carrying on of the company’s business despite knowing that it was being conducted in a manner prohibited by section 22(1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose ...’

The section is not relevant in *casu* pursuant to the amended Notice of Motion filed by the applicant.

¹⁸ Section 162(6)(b) – subject to the court’s power to relax the order after three years and to place the director under probation in terms of section 162 (11)(a).

¹⁹ *Lewis Group Ltd v Woollam and others* 2017 (2) SA 547 (WCC), at par 18. (“*Lewis*”) In par 76 of the judgment, Binns-Ward J pointed out that:

“It bears emphasis in this connection that the 2008 Companies Act expressly contemplates that directors are entitled to rely in good faith on any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by qualified employees of the company and legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the directors reasonably believe are matters within the particular person’s professional or expert competence. Indeed, I would find it surprising if non-executive directors of a public company carrying on business

of the company's directors or former directors, they must demonstrate very serious misconduct by the person concerned. The relevant causes of delinquency entail either dishonesty, wilful misconduct, or gross negligence. Establishing so-called 'ordinary' negligence, poor business decision making or misguided reliance by a director on incorrect professional advice will not be enough." (emphasis added)

45. Section 66(1) of the Act provides that "The business and affairs of a company must be *managed by or under the direction of its board*, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise" (emphasis added).
46. The emphasised part of section 66(1) may provide wide enough power for the board to delegate the day-to-day management to the executive director/s, but the board as a whole has a supervisory role.
47. In the *Outa* case,²⁰ the court explained that "...*The fact that someone is a 'non-executive member' does not absolve her of any legal responsibility. The legal duties of all directors are the same...The implication of the aforesaid is that if a non-executive director and/or a chairperson involved himself or herself in the day-to-day operation, their duties do not change, but their conduct may be judged more stringently. This is re-enforced by Section 76(3)(c) of the Companies Act...*"
48. In terms of Section 76(3) of the Act:

"(3) Subject to sub-sections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of a director-

 - (a) In good faith and for a proper purpose;
 - (b) In the best interests of the company; and

on the scale that the applicant's subsidiary operating companies do would find it possible to discharge their duties other than with material reliance on such inputs and advice." (footnote excluded)

²⁰ *Organisation Undoing Tax Abuse and Another v Myeni and others* [2020] 3 ALL 578 (GP) ("*Outa*") at paras 32 & 33.

- (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 expertise of that director.

- 49. The position appears to be the same in English law. In *Equitable Life Assurance Society v Bowley*,²¹ the court confirmed that the duty of a non-executive director in expression does not differ from the duties of executive directors, however, the duties might differ in their application.

- 50. Our courts have recognised that although there is no difference between executive and non-executive directors with regard to their legal duties, the law allows for a differentiation to be made between them in that executive directors may carry out functions which are different from those of non-executive directors, so that those who took part in the conduct of the company's business may be distinguished from those who did not.

- 51. For example, in *Philotex*,²² the Supreme Court of Appeal considered the meaning of gross negligence as described in cases such as *S v Dhlamini* 1988 (2) SA 302 (A) at 308D-E and *S v Van As* 1976 (2) SA 921 (A) at 928C-E.²³ In concluding that recklessness connotes gross negligence, it held that

²¹ 2004 1 BCLC 180; 2003 EWHC 2263 (Comm)

²² *Philotex (Pty) Ltd and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998(2) SA 138 (SCA); [1998] JOL 1881 (A) at p 42 ("*Philotex*")

²³ In *S v Dhlamini* 1988 (2) SA 302 (A) at 308D-E **gross negligence** was described as including an attitude or state of mind characterised by "*an entire failure to give consideration to the consequences of one's actions, in other words, an attitude of reckless disregard of such consequences*". In *S v Van As* 1976 (2) SA 921 (A) at 928C-E ("*Van As*"), the court held that **the test for recklessness is objective** in so far as the defendant's actions are measured against the standard of conduct of the notional reasonable person **and** it is **subjective** in so far as one has to postulate that

'In the application of the recklessness test to the evidence before it a court should have regard inter alia to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery: Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v A W J Investments (Pty) Ltd and others 1980 (4) SA 156 (W) at 170B–C.' (emphasis added)

52. In the *Fisheries Development* judgment (at 165G–166F) the court explained as follows:

"The extent of a director's duty of care and skill depends to a considerable degree on the nature of the company's business and on any particular obligations assumed by or assigned to him. See In re City Equitable Fire Insurance Co 1925 Ch 407 at 427. Compare Wolpert v Uitzigt Properties (Pty) Ltd and others 1961 (2) SA 257 (W) at 267D–F. In that regard there is a difference between the so-called full-time or executive director, who participates in the day to day management of the company's affairs or of a portion thereof, and the non executive director who has not undertaken any special obligation. The latter is not bound to give continuous

notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge.'

As regards the objective and subjective components of the test (as described in *S v Van As*), in *Philotex*, at 143G–J to 144A–B, the court observed that *"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 it 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 spheres and having the same knowledge or means to knowledge: S v Van As 1976 (2) SA 921 (A) at 928C–E. One should add that there may also be a subjective element present if the defendant has the risk-consciousness mentioned in [S v Van Zyl 1969 (1) SA 553 (A) at 559D–G] 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 the above.*

It remains, as far as subjectivity is concerned, to warn that risk-consciousness in the realm of recklessness does not amount to or include that foresight of the consequences ('gevolgsbewustheid') which is necessary for dolus eventualis: Van Zyl at 558, 559E–F. Accordingly, the expression 'reckless disregard of the consequences' in Dhlamini must not be understood as pertaining to foreseen consequences but unforeseen consequences – culpably unforeseen – whatever they might be. In its ordinary meaning, therefore, 'recklessly' does not connote mere negligence but at the very least gross negligence..."

attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at any other meetings which may require his attention. He is not, however, bound to attend all such meetings, though he ought to whenever he is reasonably able to do so. City Equitable Fire case supra at 429. Of course if he has reasonable grounds for believing such to be necessary, he ought to call for further meetings. Nowhere are his duties and qualifications listed as being equal to those of an auditor or accountant. Nor is he required to have special business acumen or expertise, or singular ability or intelligence, or even experience in the business of the company. Ibid at 428; In re Brazilian Rubber Plantations and Estates Ltd (1911) 1 Ch 425 at 437. He is nevertheless expected to exercise the care which can reasonably be expected of a person with his knowledge and experience. City Equitable Fire case supra at 428–9; and Brazilian Rubber case supra at 427. A director is not liable for mere errors of judgment. City Equitable Fire case supra at 429; Brazilian Rubber case supra at 437; and Lagunas Nitrate Co v Lagunas Nitrate Syndicate (1899) 2 Ch 392 at 435. In respect of all duties that may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. He is entitled to accept and rely on the judgment, information and advice of the management, unless there are proper reasons for querying such. Similarly, he is not bound to examine entries in the company's books. Dovey v Cory 1901 AC 477 at 485, 492; the same case in the Court of Appeal, reported under In re National Bank of Wales Ltd (1899) 2 Ch 629 at 673; the City Equitable Fire case supra at 429–30; Huckerby v Elliot (1970) 1 All ER 189 at 193J–194D. Obviously, a director exercising reasonable care would not accept information and advice blindly. He would accept it, and he would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof. Gower [Modern Company Law, 4th ed] at 602 refers to the striking contrast between the directors' heavy duties of loyalty and good faith and their very light obligations of skill and diligence. Nevertheless, a director may not be indifferent or a mere dummy. Nor may he shelter behind culpable ignorance or failure to understand the company's affairs." (emphasis added)

53. The extent to which that summary was respectively approved and disapproved by the Court in *Howard v Herrigel* and Another NNO 1991 (2) SA 660 (A) at 678A–F, as noted in *Philotex*, is apparent from the following passage:

"In my opinion it is unhelpful and even misleading to classify company directors as 'executive' or 'non-executive' for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them. No such distinction is to be found in any statute. At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case. One of the circumstances may be whether he is engaged full-time in the affairs of the company: see the Fisheries Development case *supra* at 165G–166B. However, it is not helpful to say of a particular director that, because he was not an 'executive director', his duties were less onerous than they would have been if he were an executive director. Whether the inquiry be one in relation to negligence, reckless conduct or fraud, the legal rules are the same for all directors. In the application of those rules to the facts one must obviously take into account, for example, the factors referred to in the judgment of Margo J in the Fisheries Development case and any others which may be relevant in judging the conduct of the director. His access to the particular information and the justification for relying upon the reports he receives from others, for example, might be relevant factors to take into account, whether or not the person is to be classified as an 'executive' or 'non-executive' director." (emphasis added)

54. In *Gihwala*²⁴ the Supreme Court of Appeal held that s162 of the Act passed constitutional muster.

²⁴ *Gihwala*, fn 14 above, at paras 142-145 & par 150.

55. In relation to a quoted passage from *Gihwala*,²⁵ in *Maja*,²⁶ Tolmay J emphasized that:

“The following is important to note from the above. In a declaration of delinquency, the court is not a passive bystander that merely rubberstamps the order... It is the court that considers the evidence and determines whether the requirements are met. It is the court that makes the findings that lead to the declaration of delinquency. It is only when the court finds that all the requirements are met that the court must declare a director delinquent.” (emphasis added)

In other words, the court is to consider the relevant facts and circumstances that are applicable to each individual director in assessing any non-compliance by a director with section 162(5).

56. It is therefore clear that the court is only mandated to declare a director delinquent if the evidence establishes conduct that warrants such a finding. It also follows from the above discussion that the the court may take into account the individual director’s circumstances including but not limited to his role, functions, knowledge, access to information and participation in the company’s business in its assessment of that director’s conduct, the seriousness thereof and concomitant blameworthiness.

²⁵ The relevant passage appears in *Gihwala*, at par 147, where the court in considering the challenge to the constitutionality of s 162, held as follows:

“The challenge under s 34 was misconceived. The court is involved at every stage of an enquiry under s 162(5). It is the court that makes the findings on which a delinquency order rests. It is the court that decides whether the period of delinquency should be greater than seven years or should be limited to particular categories of company and whether conditions should be attached to a delinquency order and, if so, their terms. It is to the court that a delinquent director turns if they believe that the period of delinquency should be converted into one of probation. The fact that a delinquency order of a specific duration follows upon the factual finding by a court that the director is delinquent is no different from any other provision that provides for a statutory consequence to follow upon a finding in judicial proceedings. It is apparent therefore that before a declaration of delinquency is made the errant director has an entirely fair hearing before a court.” (emphasis added)

²⁶ *Companies and Intellectual Property Commission v Maja and Others* (62755/2018)) [2024] ZAGPPHC 354 (9 April 2024) at par 18.

57. Section 165(c) is premised on gross negligence, wilful misconduct or breach of trust.
58. Gross negligence and recklessness have been variously described as involving:
- 58.1. An extreme departure from the standard of a reasonable person. It must demonstrate “...where there is found to be conscious risk taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care...”²⁷
 - 58.2. an entire failure to give consideration to the consequences of one’s actions, in other words, an attitude of reckless disregard of such consequences,²⁸ with the court in *Philotex* adding that ‘reckless disregard of the consequences’ ... must not be understood as pertaining to foreseen consequences but unforeseen consequences – culpably unforeseen – whatever they might be’²⁹
 - 58.3. “...the carrying on of the business of a company recklessly means ‘carrying it on by conduct which evinces a lack of any genuine concern for its prosperity...’”³⁰
59. As noted earlier, an objective and a subjective standard must be applied in assessing gross negligence. This is made clear by section 76(3)(c) of the Act³¹ which codified the position as enunciated in *Van As*.³² In *Philotex*,³³ Howie JA explained how this is practically evaluated:

²⁷ *Transnet Ltd t/a Portnet v Owners of the MV ‘Stella Tingas’ and Another* 2003 (2) SA 473 (SCA) at par 7.

²⁸ *S v Dlamini*, above fn 23, at 308D-E

²⁹ *Philotex*, fn 22 above, at 144A-B.

³⁰ *Cheng-Li Tsung and Another v Industrial Development Corporation of South Africa Ltd and Another* 2013 (3) SA 468 (SCA) at par 31;.

³¹ Par 48 above.

³² *S v Van As*, fn 23 above.

³³ *Philotex*, fn 22 above.

"Finally as regards the law, although the standard by which a director's conduct must be measured is an objective one, the subjective consideration discussed in Van As, in the passage referred to earlier, requires that regard should also be had to any additional knowledge, experience or qualification that the evidence reveals that director to possess and which is relevant to the question whether recklessness has been proved. So if director A, being, say, a farmer, did not know certain relevant facts which, by justified inference, would have been within the knowledge of his co-director B by reason of the latter's professional qualifications or experience, say, as a chartered accountant, then A's ignorance will be blameworthy if he ought reasonably to have sought B's advice, that is to say, not advice qua accountant but advice qua director having additional relevant knowledge. And B's position will be assessed, not just as a director-businessman, but as one having that extra knowledge. The enquiry will therefore be: what would the reasonable businessman having that additional knowledge, or having ready access to that knowledge, have done in the circumstances? That is the question that must ordinarily be answered in the case of every individual defendant against whom recklessness is alleged under the section..."

60. As noted in *Msimang*,³⁴ the meaning of the concept 'wilful misconduct' was considered in *Rustenburg Platinum Mines*,³⁵ where the court stated that "... 'wilful misconduct' goes far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness maybe."³⁶

Discussion on the Merits

³⁴ *Msimang NO and Another v Katuliiba and Others* [2012] ZAGPJHC 240; [2013] 1 All SA 580 (GSJ) at par 38.

³⁵ *Rustenburg Platinum Mines Ltd v South African Airways and Pan American World Airways Inc* 1977 (1) Lloyds LR 19, (Q.B (Com.Ct.) 564, at 569

³⁶ This dictum was approved and adopted into our law in *KLM Royal Dutch Airlines v Hamman* 2002 (3) SA 818 (W), at para 17.

61. As to the approach to be followed in assessing the applicant's complaints, a holistic rather than a piecemeal approach is to be followed.³⁷
62. In *Outa*,³⁸ the court held that there is no such thing as collective responsibility in the absence of individual responsibility. Although the board of directors bear collective responsibility, this does not absolve each director from liability for his or her own actions, whether by commission or omission. It is axiomatic therefore that each director's action or inaction must be assessed individually against the standard of a reasonable person performing the same functions, whilst taking into account subjective factors such as that director's knowledge, skill and experience, functions and participation in relation to the conduct complained of.

Second and Third Respondents

63. Under this rubric, I will refer to the second and third respondents jointly as 'the respondents'. In their combined answering affidavit, they proffered generalized explanations as to why their conduct was not wrongful or serious enough to warrant a declaration of delinquency.
64. The papers suggest that the second respondent acted in the capacity of executive director of the VCC whilst the other directors were non-executive directors. The respondents were both aware of and involved in the goings-on in the fifth respondent.
65. No evidence was presented in the answering affidavit that board meetings were either called or ever held prior to the institution of the application. The version of the second and third respondents that decisions were

³⁷ *Smuts*, fn 15 above at par 33.

³⁸ *Outa*, fn 20 above, at par 9.

taken by 'the board' (for example, to conclude the Electrical Supply Agreement and Power Purchase Agreement with the applicant or other off-takers such as Irish Rock and Expand Meats) lacked factual substance. On the second respondent version, he at all material times conducted the management and day-to-day business affairs of the Fifth Respondent. The objective evidence shows that the applicant negotiated and communicated only with the second respondent or his brother in relation to his investment, and the version of the first and fourth respondents, *inter alia*, that they had no knowledge of the applicant's investment cannot be rejected as palpably false.

66. It is indisputable that at the time this application was launched in June 2022, no annual general meetings (AGM's) had ever been held by the fifth respondent, in contravention of sub-sections 61(7) and (8) of the Act and in breach of clauses 26.6 and 26.7 of the MOI. Only audited financial statements for the 2019 financial year were ever procured, in breach of the provisions of section 30 of the Act.
67. The respondents explained these contraventions on the basis that the statutory non-compliances did not occasion any prejudice to the applicant and were 'in the process' of being rectified. They state that the duty to convene AGM's had been delegated to an entity called Grovest, who assisted the Fifth Respondent with its structure since inception, and was also responsible for administration. Grovest would not perform unless and until it obtained payment its professional fees in full. However, due to a 'shortage of funding', its fees could not be paid.³⁹

³⁹ Suffice it to say that the preparation and presentation of the annual financial statements is the responsibility of the directors not the auditors. In that regard the directors act on behalf of the company. The auditors' function, on the other hand, is to report to members, not on behalf of the company but independently, concerning the reliability of the company's accounts and, consequently,

68. According to the respondents, the Fifth Respondent 'could not afford' to make payment of the professional fees associated with the finalization of the Annual Financial Statements of the Fifth Respondent for the 2020, 2021 and 2022 financial years, hence the submission of management accounts to the Applicant for those years.
69. Both s 61(8) Act and the MOI set out the business to be conducted at the annual AGM, which, *inter alia*, included presentation of the audited financial statements for the immediately preceding financial year and an audit report.⁴⁰ The AGM's and audited financial statements would allow holders of shares of the Fifth Respondent to be fully appraised of the business and financial standing of the Fifth Respondent, as well as the utilisation of shareholder investment monies. Moreover, an audit report would enable shareholders to be afforded an independent overview of the finances of the company. The explanation tendered by the respondents does not serve to excuse or justify the admitted non-compliance with statutory prescripts or the peremptory provisions of the fifth respondent's MOI. They were required to keep accounting records, as contemplated in s 24 of the Act, that fairly present the state of affairs of the company. The fact that they did not maintain bank accounts for the fifth respondent (save for a short period) serves only to exacerbate the

to report to members on their investment. See *Powertech Industries Ltd v Mayberry and another* 1996 (2) SA 742 (W) at 746B–H. The position has not changed under the purview of the new Companies Act.

⁴⁰ The duties of an audit committee are set out in section 94(7) of the Act. They include, amongst others, the duty to prepare a report in which the audit committee may comment on the financial statements, the accounting practices and the internal financial control of the company; and to receive and deal appropriately with any concerns or complaints, whether from within or outside the company, or on its own initiative, relating to, *inter alia*, the accounting practices and internal audit of the company, the content or auditing of the company's financial statements and the internal financial controls of the company. There is nothing in the papers to suggest that an audit committee was established, or that audit committee reports were ever prepared.

lack of proper records. They were also required to provide the applicant with access to company records, as contemplated in section 26 of the Act. They refused to do so. This resulted in the fifth respondent being involved in and incurring costs in unnecessary litigation, including two applications to court.

70. As was pointed out in *Cape Empowerment*,⁴¹ the preparation and publication of annual financial statements and the need to keep these on the records of the company in order that these be accessible to any person who has a beneficial interest in the company serves to round off the disclosure requirements contemplated in section 30 of the Companies Act.
71. The evidence reveals that the respondents failed to ensure that a due diligence was conducted in respect of any qualifying company/ies in which the VCC invested the subscription price paid for the applicant's shares, in breach of the provisions of clause 2.2.2 of the Subscription Agreement. The mechanism for the due diligence contemplated in clause 2.2.2 was via a committee whose members were tasked to assess whether the qualifying company met 'the stringent criteria' of the investment committee; and could demonstrate 'high yield annuity cash flows' and 'indicative returns' to the VCC. Moreover, on the admitted facts, it is clear that the bulk of the funds paid by the applicant, save for a nominal amount, were not invested in interest bearing cash deposits as provided in clause 2.3.1 of the subscription agreement.

⁴¹ *Cape Empowerment Trust Limited v. Druker and others* [2016] JOL 36987 (WCC) at par 10. In par 60 of the judgment, the court held that "...It is through the publication of the company's financial statements that the shareholders, investors and creditors of the company have an idea of the state of affairs of the company, more particularly its solvency and liquidity position. The directors will be aware that the compulsory disclosure of information concerning the company plays an important role in protecting the interests of shareholders, investors and creditors. (See *Cillier, Benadé et al Corporate Law (3ed)* at 189)"

72. The many respects in which the Subscription Agreement was breached, constituted breaches of fiduciary duty on their part as directors of the VCC, which was a party to the investment agreement and bound by it. The respondents owed a fiduciary duty to the VCC to ensure that it complied with its obligations under that agreement.⁴² This conduct falls squarely within s 162(5)(c) of the 2008 Act. It involved gross abuses of the position of a director.⁴³
73. According to the respondents, Cobalt 5 was the qualifying company in which the applicant's funds were to be invested. Ultimately the respondents failed to put up any evidence that the fifth respondent was satisfied that Cobalt 5 (or any other Cobalt entity) would constitute a viable qualifying company pursuant to an investment committee procedure. The significance of this is that if an investment was made in Cobalt 5, ostensibly to benefit Cobalt 5, this would have occurred without apparent concern for the viability of the investment.⁴⁴

⁴² *Giwhala*, fn _ above, at par 137.

⁴³ *Id*, par 138. These actions, in my view, also amount to wilful misconduct on the part of the respondents because it was intentional and done with knowledge of the obligations owed to the applicant under the Subscription Agreement. If not, at the very least it was gross negligence akin to recklessness. It also involved a breach of trust in relation to their performance of their duties as directors. It was entirely inexcusable and ongoing, as evidenced by their endeavours to avoid complying with their obligation to provide a proper accounting to the applicant in relation to his investment.

⁴⁴ The respondents, on their own version, sought to procure capital injection through equity shareholding from the VCC for the benefit of Cobalt 5 of which the second respondent was the sole director, which company was not a vetted qualifying company in respect of which a due diligence audit had been performed under the auspices of an investment committee charged with determining the viability of investing in a particular qualifying company. It was therefore not shown to be qualified as a qualifying company as envisaged in the subscription agreement. The fifth respondent is a venture capital company who relies on investment funding from investors. The integrity of the VCC is its agency to ensure that funds are invested in qualifying companies that are financially viable in order to fulfil the objectives and thereby safeguard the sustainability of the VCC and its investments.

74. It was demonstrated at the hearing by reference to the bank statements attached to the answering affidavit of the second third respondents that the bulk of the applicant's subscription price (R2.597 000.00) was paid by the fifth respondent to Cobalt 1 and *not* Cobalt 5, which, on the respondents' version was the qualifying company selected.⁴⁵ Given the assertion in their answering affidavit that the funds 'remain invested,' on the available documentary evidence, the sum appears to have been invested in a non-qualifying company (Cobalt 1) and not in the alleged qualifying company (Cobalt 5). One is left wondering how the funds remained invested, as the said respondents did not unambiguously or unequivocally state where the applicant's subscription price was in fact invested in a qualifying company, nor did they provide any substantiating documents to evidence where the investment went (other than to Cobalt 1).
75. The conduct described above, cumulatively considered, in my view, fell short of the standard expected of directors in the position of the second and third respondents, to such an extent that it amounted to wilful misconduct, breach of trust and a gross abuse of their position as directors. The third respondent was a party to the conduct of the 5th respondent's business in that he associated himself with the conduct of the second respondent, supported and concurred therein and was aware of what was being done in his name. He is therefore equally responsible together with the second respondent for the misconduct relied on in these proceedings. The conduct of the second and third respondents not only amounted to a serious breach of their fiduciary duties as directors of

⁴⁵ The said amount was transferred from the fifth respondent's bank account in seven tranches to Cobalt 1.

the VCC but also led to breach of trust between the respondents as directors, and the applicant as shareholder.

76. Section 76(2) of the Act stipulates that:

"A director of a company must –

(a) not use the position of a 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." .

77. As regards the alleged duty on the part of the second respondent to disclose his sole directorship in Cobalt 5, there is no real or substantiating evidence before me that the subscription price was in fact invested in Cobalt 5.⁴⁶ It is axiomatic therefore that there is no evidence that the second respondent took advantage of any investment to personally advance himself or his own business interests at the expense of the VCC, thereby grossly abusing his position as director of the fifth respondent. No facts were put up to sustain a conclusion that he is or was operating Cobalt 5 for his personal financial gain to the prejudice of the VCC or its investors.

78. The entire scheme of the VCC was such that it would to invest in qualifying companies (being qualifying companies as defined in s12J(1) of the Income Tax Act) through investing in qualifying companies in exchange for an equity stake in the qualifying company to enable such qualifying companies, over time, to generate sufficient profits through

⁴⁶ Neither the bank accounts nor any other accounting documents of Cobalt 5 were provided in the papers. All that is stated in the combined answering affidavit of the second and third respondents, is the ambiguous allegation, in par 32, that "*Turning then to the investments made, Cobalt Energy 5 (Pty) Ltd ("Cobalt"), it would be observed from the founding affidavit, is the Venture Capital Company.*"

contracts concluded with off-takers. The profits thereby generated, would, net of costs, be ploughed back into the VCC, thereby advancing the interests of the VCC and its investors. That much is evident from the contents of the VCC's executive summary provided in the papers. Whilst the second respondent was the sole director of Cobalt 5, it was not shown that he had any personal financial interest to gain if, for example, the VCC had, pursuant to a due diligence viability assessment, legitimately invested in such company, nor was there evidence to indicate whether or not the second respondent held securities in Cobalt 5. But in so far as no evidence was provided to confirm that funds were in fact invested in Cobalt 5, this complaint served merely to highlight material inconsistencies in the version of the second and third respondents.

Fourth Respondent

79. In *Smuts*,⁴⁷ the Supreme Court of Appeal held that a holistic approach had to be adopted in assessing the director's conduct and such had to be done by applying the principles applicable when determining facts in motion proceedings.
80. The question arises as to whether the facts support a finding that the fourth respondent was grossly negligent, wilful or reckless in the performance of his duties as director or that he grossly abused the position of director. Since the applicant seeks a final order on motion proceedings, the *Plascon-Evans* rule applies. Final relief may only be granted if those facts averred in the applicant's affidavits which have been

⁴⁷ *Smuts*, fn 37 above.

admitted by the respondent, together with the facts alleged by the respondent justify the order.⁴⁸

81. Applying Plascon–Evans in relation to the fourth respondent’s version, which cannot be said to be clearly untenable, and on a holistic consideration of all the affidavits filed, the fourth respondent was never informed and *a fortiori* had no knowledge of: the applicant’s investment; the VCC’s failure to comply with its statutory obligations or the nature or extent the second and third respondents’ malfeasance in the corporate governance of the company. The fourth respondent’s minimal interaction with the second respondent apropos the VCC or its business was referred to earlier in the judgment. The second respondent had stopped engaging with the first respondent prior to the applicant’s investment, notwithstanding that he (first respondent) had been more involved in the VCC than the fourth respondent had been.
82. The fourth respondent avers that he was unaware of the financial activities of the fifth respondent and did not know whether any financial statements were prepared for 2020, 2021 and 2022 financial year end. He averred that the financial management of the company was to the best of his belief managed by the second respondent and/or PEMC in terms of

⁴⁸ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 T at 634E-635C. There are recognised exceptions to the general rule that essentially favours acceptance of the respondent’s version in a factual dispute, where final relief is sought in motion proceedings. As an example of such exception, Corbett JA gave the following: (at 635C) ‘Where the allegations or denials of the respondent are so far-fetched and clearly untenable that the court is justified in rejecting them merely on the papers.’ In Thus, in seeking final relief the fourth respondent’s version must be accepted in so far as it is not far-fetched, inherently improbable, or capable of being dismissed on the papers alone.’

In *Uys N O and Others v National Credit Regulator and Another* (869/2023) [2025] ZASCA 34 (1 April 2025), Weiner JA put it thus: ‘in seeking final relief the Trust’s [respondent’s] version must be accepted and as it was not far-fetched, inherently improbable, or capable of being dismissed on the papers alone’

the management agreement, Annexure "DGM2" to his answering. He was also not involved in any transactions pertaining to the fifth respondent.⁴⁹

83. The fourth (and first) respondents did not know of the governance failures precisely because the second and third respondents had failed to inform them of critical information such as: (i) the investment made by the applicant of R3 million; (ii) the conclusion of a subscription agreement with the applicant, the terms thereof or the breach thereof by the fifth respondent; (iii) if and when the subscription funds were invested by the VCC or how they were deployed and for what purpose; (iv) the qualifying company that was selected to have applicant's subscription price invested in; (v) the verification of such qualifying company's financial viability; (vi) the formation of Cobalt 5 and 2nd Respondent's sole directorship therein; (vii) the 2nd respondent's failure to keep the applicant informed as to the movement of his investment (viii) the failure to ensure compliance by the fifth respondent of its statutory obligations; (ix) the fifth respondent's state of illiquidity both prior to and pursuant to the applicant's investment; and (x) the second respondent's expressed intention to wind down the affairs of the fifth respondent in 2020.⁵⁰ The cumulative effect of these non-disclosures is that the fourth respondent therefore could not have known what he had not been informed of. Simply put, he did not know what he did not know.

⁴⁹ The applicant does not dispute this in his replying affidavit. In paras 208 & 209, the applicant states that *"It is ...apparent...that Garside has scanty knowledge of the financial affairs and management of the Fifth Respondent. I accept that Garside was never involved in any of the transactions."*

⁵⁰ In terms of section 76(2)(b), the second respondent was duty bound to communicate critical information to the board of directors. The critical information described was not immaterial; was not generally known to the first and fourth directors and was not subject to any legal or ethical obligation of confidentiality.

84. The averments in the answering affidavit of the second and third respondents, namely, that ‘The Fifth Respondent, myself *and the co-directors* were at all material times transparent and forthright with the Applicant in having disclosed the nature of the business to be conducted by the Fifth Respondent...this is clearly evident from a plain reading of the Application and Mandate, as read with the Annual Financial Statements which were provided to the Applicants in 2019’ lacked factual substance. From the documentary evidence provided in the papers, it is indisputable that the fourth respondent was excluded from involvement, had no knowledge of and did not participate in the share subscription transaction. A perusal of the 2019 financial statements shows that the second respondent was depicted as shareholder (and not the applicant). Thus, even had the fourth respondent perused the entire 2019 financials, he would not have been informed of the applicant’s shareholding in the VCC.
85. The fourth respondent was also excluded from the whatsapp group to which the first, second and third respondents together with Mike Swart were members, as a means of being updated on the progress of any potential or actualized investments or decisions to be taken at meetings.
86. The collective evidence points to the conclusion that the second respondent kept his cards close to his hands.⁵¹ He failed to inform his co-directors (1st and 4th respondent) of the applicant’s investment in the VCC, a significant development, given that until December 2018 the company had failed to procure investors and concomitant investments, which were obviously needed to get the VCC’s business off the ground. He formed a company (Cobalt 5) in May 2018 of which he was the sole director, without informing the first or fourth respondents of the existence of such

⁵¹ The idiom suggests a person to be secretive and not reveal his/her plans or intentions to others.

company and without disclosing to them that this company was going to be the 'qualifying company' in which the VCC would invest. This becomes more significant when regard is had to the requirement in the subscription agreement that a due diligence into the viability of the qualifying company was to be conducted to ensure that only companies that 'demonstrate high yield annuity cashflows and meet the stringent criteria of the Investment Committee' were selected as qualifying companies.

87. The bank statements provided in the answering affidavit of the second and third respondents evidence that that the majority of the funds invested by the applicant were *not* invested in Cobalt 5, the alleged qualifying company. An amount of R2 597 000.00 was paid to Cobalt 1 without any due diligence having been conducted with regard to such company, whether through the auspices of an investment committee process or at all. The bank statements of the fifth respondent showed that by 2 May 2019, the VCC had a meagre balance of R3134.88 in its account and was in such a state of illiquidity that the second respondent eventually chose to close the bank accounts to save on bank charges.
88. In the first respondent's letter of resignation as director, dated 30 April 2020, he, *inter alia*, recorded that "*since inception...we have not managed to secure the requisite funding, conclude the deals and embark on the ventures we envisaged at the establishment of the group.*" In response thereto, the second respondent expressly represented to the first respondent that he (2nd respondent) would be winding-down the affairs of the VCC, this, in circumstances where he had already utilised the applicant's investment in the VCC's business to defray the VCC's start-up costs; had decided that Cobalt 5 would be the qualifying company for

investment of the applicant's funds, and had concluded, on behalf of Cobalt 5, a PPA with an off-taker (Pandoway), which PPA he had represented to the applicant would apply to the applicant's investment, when in truth, he knew that the majority of funds paid by the applicant to the VCC had in fact been deployed to Cobalt 1 (absent any proper due diligence) and as such, had *not* been invested in the earmarked qualifying company.

89. To compound matters, on his own version, a further PPA (headed 'Supply of electricity agreement' had been concluded between Cobalt 1 with an off-taker called Irish Pub on 18 October 2019, absent any demonstration by Cobalt 1 of high yield annuity cashflows that met 'the stringent criteria of the Investment Committee'. A purported audit checklist pertaining to this transaction formed part of the papers, however, all it served to evidence was that if any checklist tick box audit exercise occurred in relation to the off-taker with regard to any investment that was to be made by the VCC in a non-qualifying company (Cobalt 1), this not only breached the terms of the subscription agreement and the VCC's investment policy, but placed the VCC's investment of investors' funds at uncalled for and preventable risk. Although mention was made in the papers of another PPA that was to be concluded, whether this came to fruition was not disclosed.
90. This type of underhanded or devious and dishonest conduct in relation to the applicant's investment (in breach of the subscription agreement) and in the second and third respondents' management of the fifth respondent's affairs, amounts in my view to a gross abuse of the position of director and gross negligence, wilful misconduct and breach of trust in

relation to the performance of the director's functions within and duties to the company.

91. The same cannot be said of the fourth respondent. He relied on the *bona fides* of the Swart brothers,⁵² including their combined acquired business acumen in the field of solar installations as well as venture capital investment through advice they received from an entity called Grovest.⁵³ He had no reason to suspect that the second respondent (or third reespondent) would act dishonestly in managing the affairs of the VCC. He also relied on the expertise of the VCC's auditors, an acclaimed firm who had prepared the 2019 financial statements. The company prospectus led him to believe that the management of the VCC would be in safe hands and well managed, given that well known accounting firms and law firms would be involved. These factors speak to the subjective context of the fourth respondent's actions or inaction. The fact that the fourth respondent was excluded from a whatsapp group established to facilitate directors acquiring knowledge of the state of the business was likely deliberate on the part of the second respondent, given what has been stated in the preceding paragraphs.
92. To sum up: the fourth respondent's inaction - the failure to give sufficient importance to his supervisory duty (s 66(1) of the Act) by, for example, ensuring that the company acted in accordance with its MOI and fulfilled its statutory obligations – must be viewed in the light of the fact that he was not made aware that the VCC's business had started operating or was

⁵² The extent to which the second respondent's brother (Mike) was involved in the fifth respondent is unclear. That he had some ongoing involvement is evident from the contents of written communications that passed between the applicant and Mike, and the fact that he was included in the fifth respondent's executive summary and the public offering of shares to potential investors.

⁵³ In par 27 of the answering affidavit deposed to by the second respondent, Grovest was commissioned to '*assist with the formation of the VCC Structures in order to ensure strict compliance with the Act. Grovest are the largest and most renowned local administrator of small cap funds, including Section 12J investments and they have an unimpeached track record in the 12J industry.*'

actively functioning or moving forward. The VCC's business was dependant on investments being ploughed into it by members of the public. The suggestion on behalf of the applicant in oral argument that the fourth respondent ought to have seen from the 2019 financial statements that capital had flowed into the VCC though the issuing of 3112 ordinary shares of R1 each, is at best, speculative. The fourth respondent's version,⁵⁴ including that he only had sight of one page thereof, must be accepted.

93. In oral argument presented at the hearing, the applicant's counsel submitted that the fourth respondent deliberately did not participate in the VCC's business, allowed his name to be used as director *'in total disregard of the consequences thereof'* and therefore *'assumed the risk knowingly of things being done in his absence.'*⁵⁵ This was not, however, the applicant's pleaded case. The fourth respondent was also accused, during oral argument, of allowing the second respondent to do whatever he wanted, albeit that this was also not the applicant's pleaded case.
94. In *Msimang*,⁵⁶ the court found that the directors concerned had acted in contravention of their duties to the company as provided for in the company's MOI and under the old Companies Act by failing to cause the preparation of annual financial statements for the company and by failing

⁵⁴ The version in par 8.9.3 of the fourth respondent's answering affidavit was the following: "On 29 July 2019 I received an e-mail from the second respondent. Attached to the e-mail was only the page headed up as "Director's Responsibilities and Approval "regarding the 2019 financial statements. I did not receive the 2019 financial statements. I relied upon the accuracy of the financial statements... and signed the declaration without having seen or perused the 2019 financial statements. I only received one page referred to hereinabove. I believed that the fifth respondent was not conducting business and was a mere dormant entity." (emphasis added)

⁵⁵ It is one thing for a director to accept information and advice blindly. As the Fisheries Development case made clear, the director could accept it, and would be entitled to rely on it, but he would give it due consideration and exercise his own judgment in the light thereof. It is another thing entirely where information is deliberately withheld by the executive director from the non-executive director, thereby precluding the latter from knowing about it or considering it.

⁵⁶ *Msimang*, fFn 33 above, at paras 68 & 69.

to hold an AGM since the last held AGM in 2006. The court reasoned that as directors of the company, they ought to have been aware of their duties to the company, under the memorandum of incorporation and the Companies Act, but acted in reckless disregard of those duties, by failing to give consideration to the consequences of their actions for the company. This court held that this was not only grossly negligent but amounted to wilful misconduct as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act, *“as both Katuliiba and Mdwaba knew and appreciated that such conduct was wrong, but, nevertheless, omitted to carry out their statutory duties to the company, regardless of the consequences for the company, and not caring what the result of their carelessness may be.”*⁵⁷ (emphasis added)

95. In the present case, the facts do not sustain an inference that the fourth respondent knew of the misconduct attributed to the second and third respondents and knew and appreciated that it was wrong but nevertheless chose not to act, regardless of the consequences for the company, and not caring what the result of such carelessness may be.
96. Whether or not the fourth respondent's inaction amounted to 'a total failure to take care' as discussed in *Giwahla*, must be judged in the context of his subjective knowledge and functions. Whilst the management of the fifth respondent's business had to be managed under the direction of its board, the case made out in the founding affidavit was not that the fourth respondent failed to supervise the management of the business despite knowing that the business had become operational. On

⁵⁷ Katuliiba was the managing director whilst Mdwaba was a director, shareholder of the company and also the company secretary. They were not mere non-executive directors as in *casu* and were accused of having committed serious acts of misconduct in relation to the management of the company's affairs..

the contrary, on the fourth respondent's version, he believed that the business had not yet taken off, not ever having been informed of the applicant's investment or any other investments for that matter. He performed limited functions such as the signing of documents when required. He received no remuneration as director. Far from being aware of governance problems and/or any mismanagement or irresponsibility in the management of the VCC's affairs, by July 2019, he still believed that the VCC was dormant. He had no further communication with the second respondent after July 2019, with nothing to alert him that the business had taken off though investments made by investors in the VCC. Not the same amount of culpability can be attributed to the fourth respondent as that attributable to the second and third respondents in these circumstances.

97. In the circumstances, the applicant has not in my view succeeded in demonstrating that the fourth respondent's inaction amounted to indifference of such an extreme degree that it could properly be categorized as a total failure to take care. At worst his inaction might more appropriately be categorized as ordinary negligence (the failure to exercise the care that a reasonable director would exercise in similar circumstances negligent) or that he acted in a manner materially inconsistent with his duties as director, as contemplated in section 162(7)(a)(ii)⁵⁸ or at best, what Wallis JA described as a fall from grace. In either instance, it does not in my view warrant a finding of delinquency on any of the grounds relied on by the applicant.

Claim for compensation

⁵⁸ The applicant did not seek probationary relief and hedged his bets on all directors being equally liable to be declared delinquent.

98. The sum total of the applicant's pleaded case in the founding affidavit for an order in terms of section 162(10)(c), was the following;

"[125] In so far as ... the subscription price paid by me in the sum of R 3 000 000.00 was an investment and, as such is not repayable to me, I seek an order as envisaged in terms of Section 162 (10) (c), that:

125.1. I be recompensated the subscription price, insofar as I have been adversely affected by the conduct of the First to Fourth Respondents, in their conduct as directors."
99. The applicant submitted in his heads of argument that the mere fact that his investment cannot be properly accounted for, 'let alone a return on the investment, vindicates the compensatory relief' sought.
100. In his replying affidavit, the applicant confirmed that he was well aware of the risks associated with venture capital. He took a calculated risk, based on information provided by the second respondent and documents disclosed to him prior to the investment. He went on to state that 'it is not the nature of the risks associated with the investment model that is in issue in this application. Rather, it is the unsatisfactory manner in which the directors of the Fifth Respondent conducted the affairs of the Fifth Respondent, a public company, that is the driving issue.' He further stated that 'the monetary claim 'is not about a sale of shares. It is based on the fact that I have no confidence, taking into account the track record of the directors of the Fifth Respondent, that any part of my investment will be returned to me. Most of the investment cannot be properly accounted for, let alone a return on the investment.' (emphasis added)
101. The application was launched prior to the expiry of the five year investment period. No allegation was made in the applicant's papers that his investment is/was lost. Whilst the five year period had expired by the time the matter was heard, no supplementary papers were filed by the

applicant to indicate whether the whole or part of his investment had become lost, for example, because one or another director took the benefits for himself or for some other reason. The applicant was aware of the risk disclosure in the subscription agreement and that his investment entitled him to a tax benefit, and he chose to invest on such basis.

102. According to the fourth respondent, the applicant could have claimed a tax benefit of 45% of the amount invested in terms of Section J12. This would have amounted to a tax saving of R1,350,000.00 on an investment of R3,000,000.00. In reply, the applicant baldly alleged that '*a tax directive was issued, and SARS levied a tax liability*', without providing any substantiating evidence thereof. If SARS had indeed levied a tax liability, there ought to have been no difficulty in providing the requisite proof.
103. The fourth respondent alleged in his answering affidavit that "It is, ... not as simple as claiming that the applicant is entitled to compensation worth R3,000,000,00 without accounting for the usual costs associated with any investment, the tax benefits the applicant received, and any growth in the investment in five years as contended for by the second respondent. The applicant fails miserably in alleging or proving that he suffered a loss due to my reckless conduct. No allegation is made that the total investment is lost."
104. The applicant baldly denied these averments in reply, without engaging with the content thereof. The significance of such failure lies in the fact that if the investment was not lost and if the applicant obtained a tax benefit, then it begs the question as to why the whole amount would be refundable, without accounting for the usual costs associated with the investment or the tax benefit received?

105. In their answering affidavit, the second and third respondents alleged that “the Applicant, whilst on the one hand seeking payment of the sum of R3 000 000.00 (three million rand) from myself and the First, Third and Fourth Defendants, does not, on the other hand make mention of:-What is to become of the shares which he has subscribed for; The tax benefit which he has already received; A tender for the repayment of the tax benefit to the South African Revenue Services; or A tender for sale [of] the shares which he has subscribed for, at fair market value.

The effect therefore of the defective relief sought is that the Applicant seeks to be enriched to a greater extent than the invested sum, which is not what was/is envisaged in the Mandate and Application and the nature of the Section 12J Investment.”

106. These allegations were denied in reply without the applicant having seriously engaged with the content thereof. The applicant seeks a full refund without accounting for the shares which he owns or the value thereof. The applicant would not be ‘adversely affected’ as contemplated in s 162(10)(c) of the Act unless he could establish a loss (as opposed to a growth in the investment). It is not possible to make a finding as to the applicant’s loss without an evidentiary basis, even less so, the extent of any such loss.

107. In sum, without real evidence that the applicant’s investment has been adversely affected, a compensatory order cannot be granted. On the papers filed, the applicant has not, aside from expressing suspicion, established that the VCC is insolvent. The applicant expressed the suspicion that the VCC was trading in insolvent circumstances in his papers. The most he has said is that he lacks confidence in his prospects of recovery.

108. Section 162(10)(c) provides for compensation to be paid to any person adversely affected by the person's conduct as a director, *'to the extent that the victim does not otherwise have a legal basis to claim compensation.'*
109. At the very least, the applicant has a claim for breach of contract against the fifth respondent. Or, he may elect to institute winding-up proceedings against the fifth respondent and thereby avail himself of the statutory mechanisms provided for in the old Companies Act⁵⁹ to determine where and how his investment funds were deployed and whether any monies are due to the fifth respondent as a result of any PPA's concluded with off-takers.
110. Ultimately, any action (or application) is based on facts and law. The facts are those which, if proved, would sustain in law the cause of action relied upon.⁶⁰ A mere profession of a lack of confidence in one's prospects of recovery is insufficient for purposes of establishing a claim, meaning that within the context of this case, it is lacking in what is necessary or required to establish an entitlement to compensatory relief in terms of the section.

Costs

111. The applicant seeks an order for punitive costs against the respondents who are declared delinquent.

⁵⁹ Sections 414, 415, 417 and 418 of the 1973 Companies Act, which continue to apply in terms of the provisions of item 9 of Schedule 5 of the 2008 Act.

⁶⁰ *Alberts and Others v Minister of Justice and Correctional Services* (404/2021) [2022] ZASCA 25; 2022 (6) SA 59 (SCA) at par 13.

112. In *Public Protector v South African Reserve Bank*, the Constitutional Court summarised the principles that apply to the award of punitive costs, as follows:

“The punitive costs mechanism exists to counteract reprehensible behaviour on the part of a litigant. As explained by this Court in *Eskom*, the usual costs order on a scale as between party and party is theoretically meant to ensure that the successful party is not left “out of pocket” in respect of expenses incurred by them in the litigation. Almost invariably, however, a costs order on a party and party scale will be insufficient to cover all the expenses incurred by the successful party in the litigation. An award of punitive costs on an attorney and client scale may be warranted in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation.

The question whether a party should bear the full brunt of a costs order on an attorney and own client scale must be answered with reference to what would be just and equitable in the circumstances of a particular case. A court is bound to secure a just and fair outcome.

More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or *mala fides* (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court.”

113. I have already made findings of dishonesty and underhanded conduct on the part of the second and third respondents. The applicant was given the runaround in respect of information he required about his investment. In their answering affidavit, the second and third respondents were evasive, if not misleading, apropos the VCC’s investment of the applicant’s funds. Their abuse of their position as directors and misconduct in the performance of their duties as directors is deserving of censure. In my

view, it would be just and equitable to order that they pay the applicant's costs on a punitive scale.

114. The fourth respondent seeks the dismissal of the application with costs on a punitive scale on the basis that the application against him constitutes an abuse of the process in that the relief claimed against him was not justified. The fourth respondent indicated in his answering affidavit that no cost order would be sought by him if the applicant did not persist with the application against him. The applicant was invited to not persist with the application against the fourth respondent after receipt of the fourth respondent's answering affidavit.
115. The fourth respondent states that if he was approached earlier, he would have cooperated with the applicant and his attorney in resolving the matter as far as it may legally be possible for him to have done so. For reasons known to the applicant only, he elected to engage only with the second respondent.
116. The applicant elected not to proceed with the application against the first respondent, despite having replied to the first respondent's answering affidavit and having dealt with why the first respondent should be declared delinquent in his heads of argument.
117. The fourth respondent's counsel submitted in oral argument that serious accusations were made against the first respondent, yet no explanation was given for why the applicant elected not to proceed against the first respondent at the hearing of the matter. If the applicant no longer believed that he had made out a case against the first respondent, then even more so, he could not seriously have believed that he had made out

a case against the fourth respondent. Both were non-executive directors although the first respondent was more involved in the fifth respondent's operations than the fourth respondent was.

118. The applicant did not explain why the fourth respondent remained targeted whilst the first respondent did not. On its face, that is indicative of vexatiousness, but I do not find it fitting to make a determination in that regard.⁶¹ The term 'vexatious' was considered in the context of a punitive costs award in *Johannesburg City Council*,⁶² where the court expressed the view that proceedings may be regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear. The Constitutional Court affirmed this approach in *Public Protector v SARB*,⁶³ stating that a punitive costs order is appropriate 'in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by the litigation'.⁶⁴
119. The circumstances in the present matter are such that the fourth respondent would in any event have had to have incurred costs up to the filing of his answering affidavit in order for his version to be made known. There was nothing preventing his legal representatives from having without prejudice discussions with the applicant's legal representatives pursuant to service of the application. The applicant put up an arguable case but failed to establish the threshold of seriousness required for a finding of delinquency. As I understood the argument for the fourth

⁶¹ I cannot make a reasoned finding without knowing the real reason as to why the case against the first respondent was abandoned, particularly, whether it was for a reason other than a legal one. From a legal perspective, the answer may lie in the fact that the first respondent resigned on 30 April 2020, whilst the application was instituted on 21 June 2022, being more than 24 months later. *s 162(2) of the Act)

⁶² *Johannesburg City Council v Television & Electrical Distributors (pty) Ltd and Another* **1997 (1) SA 157** (A) at 177D-E.

⁶³ *Public Protector v SARB* [2019] ZACC 29; 2019 (9) BCLR 1113 (CC) at para 144.

⁶⁴ *Id*, par 221.

respondent at the hearing of the matter, the fourth respondent accepts that his version did not serve to absolve him from the failure to give sufficient importance to his duties as director.

120. In these circumstances, I do not think that it would be just and equitable to award punitive costs against the applicant.
121. Notwithstanding that the applicant only achieved partial success in the application, given that the claim for compensation occupied little space in the affidavits or time at the hearing, it would be appropriate for the second and third respondents to pay the costs of the application.
122. Accordingly, for all the reasons given, the following order is granted:

ORDER

As against the second and third respondents:

- 122.1. The second and third respondents are declared delinquent directors in terms of sections 162(2)(a) and (b)(i) read with Sections 162(5)(c)(i), (ii) and (iv)(aa) of the Companies Act No. 71 of 2008;
- 122.2. The sixth respondent is to delete the names of the second and third respondents from the record of directors of the fifth respondent;
- 122.3. The second and third respondents are to pay the costs of the application on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved;

As against the fourth respondent:

- 122.4. The application is dismissed with costs



AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 24 April 2025

Judgment delivered 24 July 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 24 July 2025.

APPEARANCES:

Counsel for Applicant: Adv T. Ohannessian SC together with Adv N. Lombard
Instructed by: Stephanie Aproskie Attorneys

Counsel for Fourth respondent: Adv JP Van den Bergh SC
Instructed by: Griesel Van Zanten Attorneys