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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 32482/2020

DOH: 29 APRIL 2025

DOJ: 08 SEPTEMBER 2025

1.	REPORTABLE: NO /YES
2.	OF INTEREST TO OTHER JUDGES: NO /YES
3.	REVISED.
..... SIGNATURE	08 September 2025 DATE

In the matter of:

ABEGAIL NTOMBIKHONA BOIKHUTSO

Applicant/ Second Defendant

And

PGC GROUP (PTY) LTD

First respondent / Plaintiff

**WORKERS LIFE MANAGEMENT
SERVICES (PTY) LTD**

Second Respondent / Plaintiff

**PGC INVESTMENT HOLDINGS (PTY)
LTD**

Third Respondent / Plaintiff

WORKERS LIFE DIRECT (PTY) LTD

Fourth Respondent/Plaintiff

In Re:

In the matter between

PGC GROUP (PTY) LTD

First Plaintiff

**WORKERS LIFE MANAGEMENT
SERVICES (PTY) LTD**

Second Plaintiff

**PGC INVESTMENT HOLDINGS (PTY)
LTD**

Third Plaintiff

WORKERS LIFE DIRECT (PTY) LTD

Fourth Plaintiff

This Judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on Caselines. The date of hand down shall be deemed to be 08 September 2025

ORDER

1. The application succeeds.

2. The respondents, jointly and severally, must furnish security to the applicant in the form of a bank guarantee, payable on demand, in the amount of R2 000 000.
3. The respondents must pay the applicant's costs, with counsel's fees on scale B.

JUDGMENT

Bam J

Introduction

1. This is an interlocutory application, brought by the applicant, for an order directing the respondents jointly and severally to furnish security for costs in the amount of R 2 000 000.00 (Two Million Rand). The applicant is the second defendant in an action brought by the respondents, (plaintiffs). The applicant's case for security is set out in her founding papers. She makes the point that the action instituted against her by the respondents is vexatious and or frivolous and amounts to abuse of the process of this court and is hopelessly flawed. This conclusion appears to be drawn primarily from two main grounds, namely, (a) the respondents' refusal to join interested and necessary parties to the litigation and (b) the respondents' failure to plead the common law fiduciary duties allegedly breached by the applicant. In this judgment, I use second defendant interchangeably with applicant. Likewise, I use respondents and plaintiffs to refer to the same persons. The full details of the parties are set out in the plaintiffs' particulars of claim, PoC.

Background

2. The background to the present application may be stated thus: On 27 July 2020, the respondents instituted an action against two defendants. The pleadings setting out the plaintiffs' case read in the relevant parts:

[10] The Second Defendant:

Was at all times a director of the first and fourth plaintiffs;

During the period 1 December 2016 until 31 March 2019, was the Deputy Group Finance Director of the first plaintiff, and, as such, performed the same functions in respect of the first plaintiff's subsidiaries, including the second to the fourth plaintiffs.

[11] The first and second defendants, in their capacity as directors, in the case of the first defendant, of the first, second, and third plaintiffs, and in the case of the second defendant, of the first and fourth plaintiffs, owed the plaintiff the fiduciary and other duties set out in Sections 76(2) and (3) of the Companies Act, 71 of 2008, (the Companies Act).

[12] The first defendant, in his capacity as Chief Executive Officer as aforesaid, and the second defendant, in her capacity as Deputy Group Finance Director as aforesaid, owed, in terms of the common law, a fiduciary duty to the first plaintiff and its subsidiaries, including the second to the fourth plaintiffs.

[13] At all material times, the first and second defendants, in their capacity as directors and employees, as aforesaid, each owed fiduciary duties to the plaintiffs, whether under common law and/or Sections 76(2) and (3) of the Companies Act, including:

13.1 To act in the best interests of the plaintiffs;

13.2 To act honestly, diligently and ethically in all their dealings in relation to the plaintiffs;

13.3 Not to use their position of director to gain advantage for themselves or for another person other than the plaintiffs;

13.4 Not to knowingly cause harm to the plaintiffs.

13.5 To exercise their powers and perform their functions in good faith, for a proper purpose and in the best interests of the plaintiffs; and

13.6 To act with a degree of care, skill and diligence that may reasonably be expected of a person-

- carrying out the same functions in relation to the plaintiffs as those carried out by that director;

- having the general knowledge, skill and experience in that director;

[14] The first and second defendants are liable for their dishonest acts, misconduct and breaches as set out under Claims 1 to 8 and the first defendant is further liable.....

[15] The first and second defendants are held liable jointly and severally in respect of Claims 1 to 8 below under the common law and/or Section 77(6) of the Companies Act.

Claim 1

[16] On or about 14 July 2017, the Board of the first plaintiff approved a loan of R7 million to Pan Africa Asset Management (PAAM).

[17] By 26 March 2019. It appeared that the loan amount exceeded the authorised amount of R7 million by the amount of R 3 071 053, 70.

[18] The first and second defendants, absent any authority, purported to authorise further payments to be paid to PAAM, thereby causing the authorised amount to be exceeded.

[19] The first and second defendants' actions in regard to the excessive loan were intentional, [wrongful], unlawful, and amounted to a breach of their aforesaid fiduciary duties.

[20] The first and second defendants' actions in respect of the excessive loan caused the first plaintiff to suffer damages in the amount of R 3 071 053,70.

[21] In the premises, the first and second defendants are jointly and severally liable to the first plaintiff for payment of R 3 071 053,70, in terms of the common law, breach of common law fiduciary duties and/or

Claim 2:

22. The first and second defendants permitted and/or authorised non-executive directors of PAAM to invoice the second plaintiff for so-called 'consulting fees'. Same comprises of four payments in the total amount of R 80 000,00, as set out in the table below. It [the table below] reflects the amount of each payment, the name of the non-executive PAAM director, the date on which payment was made, and the name of the person or entity who invoiced the second plaintiff.

R 20 000,00: Mr Makhubalo Ndaba: 4/01/2019: Invoiced by Diamond Holdings

R 20 000,00 Ms Tembakazi Z Mnyaka: 4/01/2019: Invoiced by Obagystix (Pty) Ltd

R 20 000, 00 Ms Ntshekiwa Molefe: 1/03/2019: Ms Ntshekiwa Molefe

R 20 000,00 Mr Calvin Hanford Maseko: 13/03/2019: Seraph Investments (Pty) Ltd

[23] The actions of first and second defendants, by authorising the issuing of the above invoices and by allowing the various payments to be made by the second plaintiff to to the respective recipients, were intentional, wrongful, unlawful, and amounted to a breach of their aforesaid fiduciary duties.

[24] As a result of the first and second defendants' actions, the second plaintiff suffered damages in the amount of R 80 000,00.

[25] In the premises, the first and second defendants are jointly and severally liable to the second plaintiff for payment of the amount of R 80 000,00, in terms of the common law, breach of common law fiduciary duties and /or breach of their statutory duties under Sections 76(2) and (3) of the Companies Act.

Claim 3:

[26] The first and second defendants authorised and permitted payment in the total amount of R 20 000 to be made by the third plaintiff for the so called 'Board fees' to persons who were not directors of the third plaintiff as set out in the table below. It reflects the amount of each payment, the name of the recipient, the date on which the payment was made, and the party who invoiced the third plaintiff.

R 10 000,00: Philani Godfrey Mavundla: 4/03/2019: Invoiced by Mr Mavundla to PGC Inv Holdings;

R 10 000,00: AFrozulu Ventura (Pty) Ltd: 29/03/2019: Mr B Zulu to PGC Inv Holding

[27] The actions of first and second defendants, by authorising the issuing of the above invoices and by allowing the various payments to be made by the third plaintiff to to the respective recipients, were intentional, wrongful, unlawful, and amounted to a breach of their aforesaid fiduciary duties.

[28] As a result of the first and second defendants' actions, the second plaintiff suffered damages in the amount of R 20 000,00.

[29] In the premises, the first and second defendants are jointly and severally liable to the third plaintiff for payment of the amount of R 20 000,00, in terms of the common law, breach of common law fiduciary duties and /or breach of their statutory duties under Sections 76(2) and (3) of the Companies Act.

Claim 4:

[30] On or about 5 November 2018, the first and second defendants approved the lease of a BMW X5 motor vehicle, Registration No. HS6[...] (BMW X5), at a monthly cost of R 25 227,45, and a company fuel card (which was approved on 7 November 2018) for use by one Mr Abel Mphile Sibande (Mr Sibande), at the expense of the fourth plaintiff. Mr Sibande was the Chief Executive Officer of PAAM, and was not employed by the Fourth Plaintiff at the time.

[31] The costs incurred at the expense of the fourth plaintiff during the period 30 November 2018 to 18 May 2019, in respect of the BMW X5, was R 213 953,47, which costs included the lease of the vehicle, insurance, fuel, oil, toll fees, Tracker, repairs, maintenance and other related costs.

[32] The approval of the lease and the fuel card, and the purported authorisation given by the first and the second defendants for the aforesaid expenses to be incurred, were not authorised.

[33] The aforesaid actions of the first and second defendants in respect of the BMW X5 were intentional, wrongful, unlawful and in breach of the aforesaid fiduciary duties.

[34] As a result of the first and second defendants' actions, the fourth plaintiff suffered damages in the amount of R 213 953,47.

[29] In the premises, the first and second defendants are jointly and severally liable to the fourth plaintiff for payment of the amount of R 213 953,47, in terms of the common law, breach of common law fiduciary duties and /or breach of their statutory duties under Sections 76(2) and (3) of the Companies Act.

Claim 5:

[36] On or about 14 November 2018, the first and second defendants purported to authorise the purchase by the fourth plaintiff of a BMW X3 motor vehicle, registration No. HT 3[....] (BMW M3) for an amount of R 1 360 000,00, which amount was invoiced to and paid by the fourth plaintiff for use by one Mr Muziwabafana, Aaron Masina (Mr Masina). Mr Masina was, at the time, the Chief Investment Officer of PAAM, and was not employed by the fourth plaintiff.

[37] The acquisition of the BMW M3 for the use by Mr Masina was unauthorised.

[38] Mr Masina used the BMW M3 from 13 December 2018 to 8 May 2019, at a total cost to the fourth plaintiff in the amount of R 189 245,74, which amount includes the value of the use of the BMW M3 and insurance.

[39] The aforesaid actions of the first and second defendants were intentional, wrongful, unlawful and in breach of the aforesaid fiduciary duties.

[40] As a result of the first and second defendants' aforesaid actions, the fourth plaintiff suffered damages in the amount of R 189 245,74

[41] In the premises, the first and second defendants are jointly and severally liable to the fourth plaintiff for payment of the amount of R 189 245,74 in terms of the common law, breach of common law fiduciary duties and /or breach of their statutory duties under Sections 76(2) and (3) of the Companies Act.

Claim 6

[42] By virtue of her position as director of the first plaintiff and as Deputy Group Finance Director, the second defendant was entitled to the use of a company vehicle. Such vehicle would be available for a period of 36 months or up to the date when it reaches mileage of 140, 000 kilometres, whichever is earlier.

[43] The second defendant would, in terms of her conditions of employment, become entitled to purchase the vehicle at a full settlement cost to the company at the end of the three year period, or when the mileage of 140 000 kilometres is reached.

[44] The second defendant, in terms of the above conditions, was given the use of a Land Rover Discovery 4, SD V6 3.0 litre motor vehicle, Registration No. FP 0[...] (the Discovery), when she commenced her employment as Deputy Group Finance Director on 1 December 2016.

[45] On 23 November 2018, before the expiry of the three year period, and when the mileage of the Discovery was only 58,300 kilometres, the Discovery was replaced by a BMW X5 Facelift M5.OD Sport Steptronic, Registration No. HT 0[...] (the BMW).

[46] The first and second defendants purported to authorise the premature replacement of the Discovery with the BMW, and the second defendant accepted the replacement vehicle. Notwithstanding the replacement of the Discovery with the BMW, the second defendant retained both vehicles for her own benefit and use, with the knowledge and consent of the first defendant.

[47] On 19 March 2019, the second defendant entered into a written agreement with the second plaintiff, purportedly represented by the first defendant, in terms of which the Discovery was sold to the second defendant at a purchase price of R639 376,10. (A copy of the agreement is attached hereto marked Annexure A)

[48] The Discovery was financed by Absa Bank. On 20 March 2019, first defendant purported to authorise the second defendant to settle the amount of R 735 282,52, which was owing to Absa Bank in respect of the Discovery.

[49] In terms of the conditions applicable to company vehicles, the second defendant would be entitled to purchase the Discovery at an amount equal to the settlement amount payable to the finance house. However, in terms of the aforesaid written agreement, the second defendant purchased the Discovery in the amount of R 95 906, 42 less than the settlement amount.

[50] On March 2019, the second defendant, with the knowledge and consent of the first defendant, caused the second plaintiff to extend the maintenance plan in respect of the Discovery at the second plaintiff's cost for an amount of R 118, 869, 59. The extension was for a period of two years, or for a further R 60 000 kilometre.

[51] To the knowledge of the first and second defendants, the second defendant was not entitled to have the Discovery replaced with the BMW on 23 November 2018, and was supposed to use the Discovery as her company vehicle until 30 November 2019.

[52] As a result of the premature and irregular replacement of the Discovery with the BMW, the second plaintiff incurred expenses in relation to the BMW over the period of 23 November 2018 to 26 November 2019, when the BMW was returned to the second plaintiff. The expenses amounted to a total of R 441 761,41 over the period, which expenses include lease costs, insurance fuel, oil, toll fees, Tracker, and related costs.

[53] The aforesaid actions of the first and second defendants, in relation to the premature replacement of the Discovery with the BMW, the sale of the Discovery to the second defendant at a reduced amount, the extension of the Discovery's maintenance plan, and the costs associated with the BMW were intentional, wrongful, unlawful and in breach of their fiduciary duties as aforesaid.

[54] As a result of the first and second defendant's aforesaid actions, the second plaintiff has suffered damages in the total amount of R 656 537,42, made up as follows:

54.1 R 95 906,42; 54.2 R 118 869,59; and 54.3 R 441 761, 41.

[55] In the premises, the first and second defendants are liable, jointly and severally, to the second plaintiff for payment of the amount of R 657 537, 42, in terms of the common law, breach of common law fiduciary duties and/breach of their statutory duties under Sections 76(2) and (3) of the Companies Act.

[56-64] **Claim 7** is premised the allegation that the second defendant made available a company mobile phone to her husband, which was meant for her use personally, and for her work and official duties, in breach of the company conditions under which the mobile phone was provided to her. It is said that the phone was used by the second defendant's husband from 1 December 2016 to 30 November 2019, which cost the second plaintiff an amount of R 2 199,00 monthly. The phone was made available to the husband with the knowledge of the first defendant. The actions of the first and second defendant are said to have been intentional, wrongful, unlawful, and/or in breach of the aforesaid fiduciary duties. In the premises, the first and second defendant are held liable, jointly and severally, to the second plaintiff for payment of the sum of R 79 164,00, in terms of the common law, breach of common law fiduciary duties and/or breach of their statutory duties under Section 76(2) and (3) of the Companies Act.

Claim 8

[65] On or about 31 October 2018, the first and second defendants, absent any authority, purported to authorise a payment to be made for purported 'professional fees' to an entity, Phakama Investment Holding Proprietary Limited.

[66] The first and second defendants' actions aforesaid, caused the second plaintiff to make payment of the sum of R 1 500 000,00 to Phakama Investment Holdings Proprietary Limited.

[67] Phakama Investment is an unknown entity and no professional services were rendered by it to the second plaintiff.

[68] The first and second defendants' actions in regard to the unauthorised payment in aforesaid were intentional, wrongful, unlawful, and amounted to a breach of their fiduciary duties.

[69] The first and second defendants' actions caused the second plaintiff to suffer damages in the amount of R 1 500 000.

[70] In the premises, the first and second defendants are jointly and severally liable to the second plaintiff for payment of the amount of R 1 500 000,00, in terms of the common law, breach of common law fiduciary duties and/or breach of their statutory duties under Sections 76(2) and (3) of the Companies Act.

Second Defendant's Plea

3. In her plea of 28 September 2020, the second defendant raised six special pleas and further pleaded over. In terms of the special pleas, the applicant pleaded that a number of parties whom are mentioned in the plaintiff's PoC ought to be joined as co-defendants along with her as second defendant. The plaintiffs replicated alleging that none of the parties the applicant seeks to have joined have any direct and substantial interest in the action and that there is no legal interest which may be affected prejudicially by any judgment granted in the action.
4. On 23 March, the applicant filed a notice to amend, as provided for in Rule 28 of the Uniform Rules, to introduce three further special pleas, bringing the number of special pleas to nine. She further amended her plea stating, *inter alia*, that the plaintiffs' particulars do not disclose the fiduciary duties she allegedly breached. The notice to amend was met with an objection to the effect that the parties named in the

special pleas have no direct and substantial interest and they have no legal interest that may be affected prejudicially by any judgment this court may make. The following parties according to the applicant ought to be joined as co-defendants in the action with her as second defendant:

- (i) Pan African Asset Management, PAAM, the entity referred to in claim 1 and 2 of the plaintiff's PoC;
- (ii) Mr Philani Godfrey Mavundla, referred to in claim 3;
- (iii) AfroZulu, referred to in claim 3;
- (iv) Mr Abel Sibande, referred to in claim 4;
- (v) Makhubalo Ndaba, referred to in claim 2;
- (vi) Thembakazi Mnyaka, referred to in claim 2;
- (vii) Ms Ntshekwa Molefe, referred to in claim 2;
- (viii) Mr Calvin Hanford Maseko, referred to in claim 2;
- (ix) Diamond Holdings (Pty) Ltd, referred to in claim 2;
- (x) Obagystix (Pty) Ltd, referred to in claim 2;
- (xi) Seraph Investments Investments (Pty) Ltd, an entity referred to in claim 2;
- (xii) Legacy Auto (Pty) Ltd t/a Zambezi Auto, referred to in claim 4;

(xiii) Mpho Dipela, who was, at the time of concluding the aforesaid lease, the respondents' Group Director for Finance and a shareholder of Legacy Auto (Pty) Ltd t/a Zambezi Auto.

(xiv) Mr Makhubalo Ndaba, the respondents' Group Legal and Company Secretary, who approved payment of the amounts claimed from the applicant in claims 2 and 3.

5. In addition to the respondents' refusal to join the individuals mentioned in paragraph 4(i) to (xiv), the applicant submits that in paragraph 13.5 of the particulars of claim the respondents alleged that she owed them a fiduciary duty '*to exercise ...powers and perform...functions in good faith, for a proper purpose and in the best interests of the plaintiffs*'. The allegation in paragraph 13.5, according to the applicant, mirror what is stated in 76(3) (a) and (b) of the Companies Act, Act 71 of 2008. However, the particulars of claim do not mention the powers and functions of a director that the applicant exercised or performed in bad faith, for an improper purpose and not in the best interests of the respondents.

6. In paragraph 13.6 of the PoC, the respondents allege that the applicant owed them a fiduciary duty to 'act with a degree of care, skill and diligence that may be reasonably expected of a director in such position. The allegation mirrors what is stated in section 76 (3) (c) of the Companies Act. The applicant submits that the standard in section 76 (3) (c) arises when 'acting in the capacity of a director and exercising the 'powers' and performing the functions of a director'.

Applicable legal principles

7. Rule 47 of the Uniform Rules reads, in the relevant parts:

‘(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.’

8. It is trite that, a court entertaining an application for security for costs is not required to attempt to resolve the dispute between the parties. In *Boost Sports Africa (Pty) Ltd v The South Africa Breweries (Pty) Ltd*¹, it was said:

‘It is not envisaged, it seems to us, that a detailed investigation of the merits of the case should be undertaken. Nor, is it contemplated that there should be a close investigation of the facts in issue in the action.

9. The focus when evaluating applications for security is no longer centred on the question whether an *incola* company may be able to satisfy a costs order. As suggested in *Boost*:

‘[I]n terms of the common law mere inability by an *incola* to satisfy a potential costs order is insufficient to justify an order for security, something more is required (Ramsamy NO v Maarman NO 2002 (6) SA 159 (C) 172I-J). As Thring J put it (Ramsamy NO at 172J-173A):

‘[w]hat this something is has been variously described in a number of decisions. Thus in *Ecker v Dean* . . . it was said that the basis of granting an order for security was that the

¹ (20156/2014) [2015] ZASCA 93 (1 June 2015), paragraph 19

action was 'reckless and vexatious'.' In *Ecker v Dean* 1937 AD 254 at 259, Curlewis CJ stated:

'In *Western Assurance Co. v Caldwell's Trustee* (1918, A.D. 262) this Court laid down that a Court of law had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the Court; one of the ways of doing so is by ordering the vexatious litigant to give security for the costs of the other side, and I know of no reason why the Court below should not have [exercised] such an inherent jurisdiction.'

10. Courts are alive to the significant damage that may be caused to others were measures such as ordering security to be forgone, as noted in this passage in *Boost*

'[27] In the language of Lombard (at 877), when a company has everything to gain and nothing to lose, it would be putting a premium upon vexatious and speculative actions if such practice (namely, compelling security) were not adopted.'

Standards of directors as provided for in the Companies Act [2008 Act]

11. Section 76 (2) and (3) of the Companies reads:

'A director of a company must:-

- (a) not use the position of director, or any information obtained while acting in the capacity of a director-
- (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
- (ii) to knowingly cause harm to the company or a subsidiary of the company; and
- (b) communicate to the board at the earliest practicable opportunity any information

that comes to the director's attention, unless the director-

(i) reasonably believes that the information is-

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

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

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

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

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

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

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

12. Section 77(6) provides:

(6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.

Discussion

13. As I see it, the complaint raised by the applicant against the respondents' reliance on the broad claim of 'breach of fiduciary duties' means that the applicant cannot effectively respond or defend herself against these allegations. There are many examples one can raise but for purposes of this judgment, bearing in mind that this court is not called upon to resolve the dispute between the parties, few but striking examples will suffice to make the point. In paragraph 13 of the PoC, the applicants set out conclusions of law about what constitutes fiduciary duties. But what is pleaded in claims 1 to 8 bears no relationship with the conclusions of law. Consider for example what is pleaded in claim 1, that the Board had approved a loan of R7 million to PAAM, a subsidiary of one of the plaintiffs, in 2017. Two years later, the plaintiffs find that the loan payments made to the subsidiary were in excess of the amount approved by the Board. The question raised by the applicant is whether this is a breach of a statutory or common law fiduciary duty? More importantly, does the payment to a subsidiary of amounts more than that approved by the board constitute a breach of the duty to act in the best interests of the plaintiffs, or a breach of the duty to act honestly, or a breach of the duty to act diligently, or a breach of the duty to act ethically or that the applicant used the payment to take advantage for herself?

14. On this very claim, there is a follow up question based on the manner the respondents have chosen to plead their case. That question is, what are the circumstances that led to the subsidiary not repaying the loan, given the claim for

damages. Further questions relate to the joinder. I save them for now until I get to the joinder point.

15. A further question arises from the respondents' reliance on the statutory fiduciary duties premised on Section 76(2) for their claims for damages. Save for claim 1 virtually all the claims rely on this section for liability, including Section 76(3). Broadly stated, the section proscribes the use of a director's position or information obtained while acting in the capacity of a director, to gain advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company. For example, conduct such as insider trading would fall squarely within the parameters of section 76(2). However, nothing resembling insider trading or the use of company information to make gain for herself or another person is pleaded in any of the claims. Given the respondents' reliance on the section, the question remains, what information as envisaged in Section 76(2) came to the attention of the applicant as director that she is said to have used in breach of the section.

16. There is more. Section 77 deals with liability of directors and prescribed officers and it reads:

(1) In this section, "director" includes an alternate director, and-

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.

17. In terms of Section 77(6) liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act. In the majority of the charges, several entities and or individuals supposedly benefitted from the applicant's alleged breach of her fiduciary duties. When the applicant pleaded non-joinder alleging that the individuals mentioned in the claims ought to have been joined as co-defendants, the plaintiffs replicated stating that none of these individuals have any direct and substantial interest in the matters raised. This reasoning goes contrary to the established legal position. In *Breetzke and Others NNO v Alexander NO and Others*), Mr Alexander, a trustee, cited as the first respondent, was alleged to have made a secret profit in disposing of the trust's property by selling it to a company he had nominated and which he owned and controlled, Ziningi Properties (Pty) Ltd, the second respondent. The question arose,

'[I]f an independent third party knows of a trustee's breach of the fiduciary duty owed to a trust and acts in a manner that aids the trustee's wrongful conduct, or enables or facilitates the breach of trust to occur, is it liable to either the trust or the beneficiaries of a trust for the losses they have suffered arising from the breach of trust?

18. The first and second respondents, defending themselves argued, *inter alia*, that Ziningi was not a trustee of the Trust; that it owed no fiduciary duty to the Trust, its trustees or its beneficiaries; that mere knowledge on Ziningi's part that Mr Alexander was engaged in breaching the fiduciary duties that he owed to the Trust and the

beneficiaries of the Trust, did not impose upon Ziningi the same or similar fiduciary duties. The court pointed to the established principle that,

‘[17]A person assisting a trustee in the perpetration of a breach of trust is jointly liable with him or her.’

19. The court went on to hold:

‘[37] Where the execution of a breach of fiduciary duty involves or requires the involvement or participation of a third party, and that third party has knowledge that the transaction in question involves a breach of a fiduciary duty, it seems to me clear that the legal convictions of the community demand that the third party share the liability of the person breaching the fiduciary duty. That is not because they owe a similar duty to the injured party, but because by aiding, enabling or facilitating the breach they are themselves equally responsible for the injury caused to, or the loss suffered by, the injured party. I can think of no good reason why the principal perpetrator would be liable, but the enabler should escape liability,..’

The proposed amendment

20. I mention in passing that there is currently an impasse between the parties pertaining to an amendment proposed by the applicant. The respondents, as mentioned early on in this judgment objected to the amendment, forcing the applicant to come to court for leave to amend. The principles pertaining to the amendment of pleadings are set out in *Affordable Medicines Trust and Others v Minister of Health and Another*. Here the court stated:

‘The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles

in *Commercial Union Assurance Co Ltd v Waymark NO*. The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.” These principles apply equally to a Notice of Motion. The question in each case, therefore, is what do the interests of justice demand.’²

21. The extract I have set out in paragraph 19 demonstrates that a party seeking to successfully oppose a proposed amendment must demonstrate that allowing the amendment would be detrimental to the interests of justice. I need not answer whether the respondents have or are likely to overcome that requirement because the application for leave to amend is not before me. Having said, the matters canvassed in this judgment appear point to one conclusion, and that is, there may well be substance to the applicant’s complaints. The plaintiffs’ refusal or neglect to properly plead their claims against the applicant and their refusal to join individuals who must by law be joined serve to bolster the applicant’s conclusion that the litigation is vexatious and frivolous, while the applicant is being put through the unnecessary burden of funding such litigation in the High Court. The respondents must be called upon to furnish security to the applicant.

Conclusion on costs

² (CCT27/04) [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) (11 March 2005), paragraph 9

22. The applicant seeks costs on a punitive scale. I have no basis to grant costs on a punitive scale and so costs will be paid at ordinary scale.

Order

1. The application succeeds.
2. The respondents, jointly and severally, must furnish security to the applicant in the form of a bank guarantee, payable on demand, in the amount of R2 000 000.
3. The respondents must pay the applicant's costs, with counsel's fees on scale B.

N.N BAM
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION,
PRETORIA

Date of Hearing:

29 April 2025

Date of Judgment:

08 September 2025

Appearances:

Counsel for Applicant / Second Defendant

Instructed by:

Adv P Mbana

Fenyane & Associates Inc

c/o TIDK Attorneys Inc

Centurion, Pretoria

Counsel for Respondents / Plaintiffs:

Instructed by:

Adv L Hollander

LDA Attorneys

% Hills Incorporated Attorneys,

Brooklyn, Pretoria