

REPUBLIC OF SOUTH AFRICA



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

Case Number: **2024/056253**

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED: No

06/11/2025

DATE

SIGNATURE

In the matter between:

MATSHIKWE SIMPIWE

Applicant

and

MATSHIKWE PUMELELA

First Respondent

LAURIE, WIID N.O.

Second Respondent

KHULULEKANI LABORATORY SERVICES

Third Respondent

**THE COMPANIES AND INTELLECTUAL
PROPERTY COMMISSION**

Fourth Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

MANOIM J:

- [1] This is an application for leave to appeal a judgment which I gave *ex tempore* on 4 June 2024. The text version was supplied and signed by me only on 27 January 2025.
- [2] The application is brought by the first respondent in the court a quo and for reasons of convenience I will continue to refer to him as the first respondent.
- [3] In that decision, I found that the first respondent was disqualified to act as a director in terms of section 69(8)(b)(iv) of the Companies Act, 71 of 2008, (the Act) and declared him to be a delinquent director in terms of section 162(5)(a) of the Act.
- [4] The essential facts in this case are common cause. On the 10th of June 2022, the first respondent was convicted and sentenced for an offence under Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004. He was sentenced to six years in imprisonment. However, the sentence was suspended for a period of five years. On 11 December 2023 (thus after his sentence) the first respondent accepted his appointment as a director of the third respondent on 10 May 2024. He then continued to act as a director of the third respondent since that date. The application for his disqualification was brought by his brother, also a director of the third respondent. I will refer to him as he was in the court a quo as the applicant.
- [5] The relevant section of the Act relied on by the applicant is section 69(8)(b)(iv), which in the relevant parts states:

“A person is disqualified to be a director of a company if-

(a) ... ; or

(b) *subject to subsections (9) to (12), the person-*

(ii) ... (iii) ...

(iv) *has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence-*

(aa) ... (bb) ...

(cc) *under this Act, the Insolvency Act, 1936, (Act 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001, the Financial Markets Act, 2012, Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act 33 of 2004) or the Tax Administration Act, 2011 (Act 28 of 2011); or...*

[6] For ease of reference I have underlined the statute in terms of which he was convicted.

[7] The argument before me when I heard the matter as an urgent application is that the disqualification did not apply to the first respondent as he had only received a suspended sentence and not a custodial sentence. The argument was that the phrase “convicted ...*and imprisoned without the option of a fine*” did not contemplate a person who receives suspended prison sentence. I did not agree. The first point of appeal then was that I erred in this interpretation.

[8] In this regard I followed an earlier case on precisely the same point in the case of *Entrepreneurial Business School (Pty) Ltd and Others v African Creek Investments (Pty) Ltd and Others*, in which Binns Ward J held that:

“It is of no consequence for the purposes of the Companies Act whether all or part of the sentence was conditionally suspended or not. The provision in the Companies Act is concerned with the nature of the sentence imposed, not with its operation... This is entirely consistent with the attainment of the evident object of the provision, which is to disqualify any person who has been convicted of committing any of listed offences from being a director except in those matters in which the punishment is so light as to suggest that only a very minor instance of the offence had been involved.”¹

[9] It was argued before me on appeal that because the criminal court imposed a fully suspended sentence, this suggests that in the sentencing court’s mind, that this was a less serious offence. Hence it imposed a suspended sentence rather than a purely custodial one. This distinction must be applied to the interpretation of section 69(8)(b)(iv) and that this is consistent with the language used in the text. Moreover, it was argued that the harsh consequences for the individual should be similarly ameliorated by interpreting the text in this way given that it restricts a person’s economic rights, namely, to serve as a company director.

[10] But this argument was dealt with and rejected by Binns Ward J, who stated:

¹Case Number 3232/2016 - 2016 ZAWCHC 53 (12 May 2016), paragraph 31.

“The court’s direction that part, or the whole of the sentence be conditionally suspended is intended merely to conditionally ameliorate the effect of the imposed sentence on the convicted person. It does not affect the character of the sentence component of the order as the measure of the court’s assessment of the appropriate punishment for the offence”.²

- [11] I agreed with this approach. The distinction between what mischief the Act seeks to remedy by the disqualification, and the approach of the sentencing court when it suspends a sentence of imprisonment must be borne in mind. The Act is concerned with public consequences. It seeks to secure the integrity of corporate governance by disqualifying a person convicted of any of the enumerated crimes from occupying the office of director.
- [12] Not all crimes or contraventions are listed. Those that are, have in common that they involve a crime of dishonesty, insolvency, a threat to national security or contraventions of the Act itself in relation to the governance of a company. By contrast the sentencing court, whilst it may be concerned with public consequences of a crime, is also concerned with private consequences for the individual concerned. Hence in a given case, it might decide because of its impact on that individual a suspended sentence of imprisonment is more appropriate than a custodial sentence. Where the text permits of two possible interpretations one must look at the purpose of the provision. Private consequences for the individual concerned are not the concern of section 69(8).
- [13] It was then argued that although the decision of Binns Ward J is the only one directly in point, another court on appeal might prefer to follow the approach of

² Supra, paragraph 33.

Mthiyane JA in the Electoral Court which dealt with section 47(1)(e) of the Constitution in the matter of *Freedom Front Plus v African National Congress and another*, where the learned judge had to interpret a provision which referred to the eligibility of a person to be a member of the assembly.³ That section refers as well to a person being “ ... sentenced to more than 12 months imprisonment without the option of fine” being ineligible for a period of five years after the sentence has been completed. Mthiyane JA pointed out that this might mean that a person sentenced to a custodial sentence might be eligible before someone who has had a suspended sentence imposed which might be at a later date. Thus, the more serious offender is better off than the less serious one. This was described as an absurdity by Mthiyane JA. The first respondent’s argument before me on leave to appeal is that this argument might find favour with a court of appeal.

- [14] But this decision was considered by Binns Ward and distinguished by him as is evident from the following passage:

“The basis for absurdity identified in the judgment in Freedom Front Plus does not arise. It is excluded by the effect of the phrase ‘at the later of’. The effect is that in the case of a suspended sentence that is not put into operation (five years is the outer limit of the period for which a sentence may be suspended), the disqualification ends five years after the date of the imposition of the sentence (which by virtue of s 70(1)(b)(v) of the Act corresponds with the date upon a which an incumbent director is removed from office if he becomes disqualified in terms of s 69(8)(b)(iv)), and, in the case where the sentence is

³ [2009] ZAEC 4 (31 March 2009), 2011 JDR 0054 (EC)

brought into operation, five years from the date upon which the period of imprisonment is completed or the fine paid, as the case may be. The fact that the period of disqualification might in certain circumstances be longer if a suspended sentence is brought into operation than it would be had an effective sentence been imposed does not give rise to the irrational inequalities identified by the Electoral Court in the construction of s 47(1)(e) of the Constitution contended for by the appellant in that case. This is so because if the suspended sentence is brought into operation it will in most cases be indicative that the offender has committed a further offence of the type identified in s 69(8)(b)(iv) and would only afford further confirmation of his unfitness to hold office as a director.”⁴

[15] More recently in *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* the question before the Constitutional Court was the legal effect on Mr Zuma of the remission of the sentence imposed on him. He received a sentence of 15 months. The effect of the remission was that he would serve a sentence of imprisonment that was less than the twelve month period laid down in section 47(1) of the Constitution.

[16] Theron J writing for a unanimous bench held that:

“In my view, section 47(1)(e) focuses on the length of the sentence imposed, not the length of the sentence served. It uses the words: “convicted of an offence and sentenced”. If the focus of the section were time served, the text would have said, for example, “convicted of an offence and served a sentence”.

⁴ *Entrepreneurial Business School*, supra, paragraph 35.

“The purpose of the section confirms the text. Section 47(1)(e) recognises that not every offence should disqualify someone from being a member of the National Assembly. Only offences that warrant a sentence of more than 12 months’ imprisonment are sufficiently serious to warrant disqualification. The sentence component in section 47(1)(e) is there to indicate the severity of the offence. That signal of seriousness applies – and gives effect to the purpose of section 47(1)(e) – no matter how long the offender ultimately serves (in prison).⁵

[17] Although the facts of that case differ from those of the present, the policy adopted towards the interpretation of the text viz. that the ‘purpose of the provision confirms the text’ applies equally to section 69 of the Act. I am thus not persuaded that any other court would come to a different finding on this point.

[18] The second argument on appeal was that I erred in declaring the first respondent delinquent as a director in terms of section 162(5)(a) read with section 162(6)(a) of the Companies Act. The argument was that the facts had not been fully ventilated and I ought to have deferred such a decision to a hearing in due course. I find this ground of appeal hard to comprehend. If it is meant to suggest that further facts would have come to light in due course there is no basis in the record for this. Nor is anything contended for on appeal. The relevant facts in this matter were all common cause. Moreover the operation of relief contemplated in section 162 is mandatory for a court once the court has

⁵ *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* (CCT 97/24) [2024] ZACC 6; 2024 (7) BCLR 869 (CC); 2025 (5) SA 1 (CC) (20 May 2024), paragraphs 68-69.

determined that a person is disqualified in terms of section 69. This is evident from the way in which this provision is crafted. Section 162(5)(a) states:

“A court must make an order declaring a person to be a delinquent director if the person –

(a) consented to serve as a director, or acted in the capacity of a director of prescribed officer, while ineligible or disqualified in terms of section 69, unless the person was acting –

(i) under the protection of a court order contemplated in section 69(11); or (ii) as a director as contemplated in section 69(12).”

[19] There is no suggestion that either of the provisos set out in subparagraphs (i) and (ii) applied, hence the disqualification followed upon the conclusion that the director was delinquent.

[20] Finally, the notice of appeal asserted that there were compelling reasons for leave to appeal to be granted as there was no authority on this point. That of course is incorrect and Mr Boonzaier who appeared for the first respondent in the leave to appeal, but who had not drafted the notice of appeal, correctly conceded this. There is authority directly in point namely the *Entrepreneurial Business School* decision.

[21] I agree then with counsel for the applicant that the application for leave to appeal has no prospects of success and there are no compelling reasons why leave ought to be granted.

Costs

[22] Applicant's counsel sought a punitive costs order on the basis that the leave to appeal had been prosecuted in a dilatory manner given that the original order had been granted on 4 June 2024 and the leave was only argued on 3 November 2025. There are indications that the first respondent has been dilatory including a possibility that he might seek a postponement for today on the grounds that new counsel had been brought into the matter late in the day. Nevertheless Mr Boonzaier was willing to get on with the matter today and did not seek a postponement. I also take into account that my judgment was only transcribed by January of this year and hence this contributed to the delay. I am thus not persuaded to give punitive costs. A cost order of party and party costs with counsel's fees on Scale B will suffice.

Order

1. The application for leave to appeal is dismissed.
2. The first respondent is liable for the applicants' party and party costs with counsel's fees on Scale B.

MANOIM J
JUDGE OF THE HIGH COURT
JOHANNESBURG

APPEARANCES:

For the Applicant:	W C Carstens
Instructed by:	Pottas Attorneys
For the First Respondent:	W Boonzaier
Instructed by:	Mashabane and Associates Inc.
Date of hearing:	04 November 2025
Date of Judgement:	06 November 2025