IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
(JOHANNESBURG)

SGHC Case No: 38587/2011
SCA Case No: 389/2012
Appeal Case No: A5055/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED

31/5/2013
DATE

SIGNATURE

In the matter between:

LOBELO, KAGISHO LAMBERT	First Appellant
PEOLWANE PROPERTIES (PTY) LTD	Second Appellant
DIPHUKA CONSTRUCTION (PTY) LTD	Third Appellant
And	
KUKAMA, AOBAKWE REGINALD KOKETSO	First Respondent
THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Second Respondent

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JUDGMENT

THE COURT

THE PARTIES

[1] In order to avoid confusion, it is necessary to set out the *dramatis personae* in this appeal. The first appellant, Kagisho Lambert Lobelo ("Lobelo") was the first respondent in the court *a quo*. The second appellant, Peolwane Properties (Pty) Ltd ("Peolwane") was the second respondent. The third appellant, Diphuka Construction (Pty) Ltd ("Diphuka") was the third respondent. The fourth respondent in the court *a quo* was the Companies and Intellectual Property Commission that has also been cited on appeal as the second respondent, but plays no part in the present proceedings. The first respondent in this appeal, Aobakwe Reginald Koketso Kukama ("Kukama") was the applicant in the motion proceedings before the court *a quo*.

INTRODUCTION

[2] This is an appeal against an order granted by Tshabalala J on 12 April 2012 which was the first order of delinquency issued by a High Court against a director of a company under section 162 of the new Companies Act 71 of 2008 ("the Act").[1] The appeal is with leave of the Supreme Court of Appeal after such leave had been refused by the court *a quo*.

[3] In the court *a quo* Kukama sought and succeeded in obtaining an order declaring Lobelo a delinquent director in terms of section 162(5)(c) of the Act. This section provides:

> "(5) A court **must** make an order declaring a person to be a delinquent director if the person –
> (a) ...
> (b) ...
> (c) while a director –

[1] See R. Cassim in *De Rebus* January/February 2013 page 26

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a);

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)(a);

(iv) acted in a manner –

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77(3)(a), (b) or (c);..."
(Emphasis added)

[4] This section refers to sections 76(2)(a) and 77(3)(a)(b) and (c) of the Act which deal, *inter alia* with the standards of conduct and liabilities of directors. These subsections provide:

"76(2) 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 ...

77(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect 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 it was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose; .."

[5] The reference to section 22(1) refers to the provision prohibiting the carrying on of a company's business "recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose."

[6] In terms of the above provisions of the Act, Kukama applied to the Court *a quo* on a semi-urgent basis for the following relief:

> "1. The first respondent, Mr Kagisho Lambert Lobelo, is declared a delinquent director in terms of the provisions of the Companies Act, Act 71 of 2008 (the Companies Act) and is forthwith removed as a director of the second and third respondents;
>
> 2. The first respondent shall file with this Honourable Court and serve on the applicant within 5 (five) days of the granting of this order, the following:
>
> 2.1 an affidavit deposed to by himself in which he states the dates, the amounts, the names of the recipients of payments and the reasons for such payments that were made from the bank account/s of the third respondent during the period 1 December 2010 to the date of this order including copies of invoices in respect of which the payments were made and copies of receipts reflecting payment thereof and copies of all the third respondent's bank statements for the abovementioned period.
>
> 3. In the event that payment of R22 715 909.22 is not made by the third respondent to the second respondent at the time of the hearing hereof, then leave is granted to the applicant to bring proceedings in the name and on behalf of the second respondent against the third respondent for payment of R22 715 909.22 or such other amount together with interest and costs, without making the demand contemplated in section 165 of the Companies Act.
>
> 4. The first respondent shall pay the costs of this application on the scale as between attorney and own client.
>
> 5. The applicant is granted such further and/or alternative relief as this Honourable Court deems appropriate, including any order permissible in terms of the relevant provisions of the Companies Act.
>
> 6. The Registrar of this Court is requested to furnish a copy of this order to the National Director of Public Prosecutions."

[7] The court *a quo* ultimately granted an order to the following effect:

1. Lobelo is declared a delinquent director.
2. Kukama is granted leave to institute legal proceedings against Diphuka for payment R22 715 909.22 or such other amount together with interest and costs without making the demand contemplated in section 165 of Act 71 of 2008 in the name and on behalf of Peolwane.
3. Kukama is granted leave to institute legal proceedings in the name and on behalf of Peolwane against Lobelo for the payment of R22 715 909.22 or such other amount together with interest and costs in terms of section 77(2) and (3) of Act 71 of 2008.
4. Lobelo is ordered to pay the costs on the party and party scale.

[8] It will be noticed that the Court a quo did not grant any order pursuant to prayers 2, 5 and 6 mentioned in the Notice of Motion. Also, costs were only granted on a party and party scale contrary to what was applied for in prayer 4.

[9] Against this order Lobelo, Peolwane and Diphuka have lodged this appeal.

THE FACTS

[10] The material facts are not in dispute. The common cause facts can conveniently be summarised as follows:

1. Lobelo and Kukama are each 50% shareholders of the issued shares in Peolwane and Diphuka.
2. Lobelo and Kukama are both directors of Peolwane. However, Lobelo is the sole director of Diphuka.
3. During December 2010 and May 2011 the South African Revenue Services ("SARS") made two payments of R22 715 909.22 and R39 023 656.00 respectively into the bank account of Diphuka.

4. These payments were for refunds of VAT from SARS allegedly incurred by and due to Peolwane and not Diphuka.
5. The amount of R22 715 909.22 was not utilised by Lobelo for the sole benefit and expenses of Peolwane. Instead, it was applied for the benefit of other entities as well as for his own personal benefit.
6. The refund of R39 023 656.00 was not due by SARS to either Peolwane or Diphuka. At the time when this matter was argued, it had not been repaid to SARS, despite Diphuka having received the amount in its bank account.
7. The R39 023 656.00 claimed from SARS was made up of fictitious tax invoices submitted by a tax consultant, Royal Alliance Consulting (Pty) Ltd ("Royal Alliance"), to SARS. Lobelo acted unilaterally in appointing Royal Alliance to act on behalf of Peolwane. In effect, this meant that Peolwane had spent approximately R278 740 400.00 more than it actually spent on items that attracted VAT.
8. Both the amounts received from SARS were paid into the bank account of Diphuka at the instance of Lobelo instead of in the bank account of Peolwane. Lobelo acted as the sole director of Peolwane in affecting these transactions since approximately 25 November 2010, being the day upon which Kukama resigned as a director of Peolwane.

[11] In the founding affidavit Kukama alleged that Lobelo engaged the services of Royal Alliance without his consent either as a shareholder and/or a director of Peolwane. He was also not advised by Lobelo that the latter had directed the payment of the two amounts received from SARS into the account of Diphuka. His main complaint against Lobelo was that the funds were utilised for the benefit of entities other than Peolwane for whom it was destined. These allegations were not seriously disputed.

[12] On the other hand, Lobelo originally in the answering affidavit disputed any wrongdoing on his part or on the part of Peolwane and Diphuka. He alleged that Peolwane was part of a group of subsidiary companies and other entities and that he so acted in the interest of Peolwane and the entire group of companies. He also denied having defrauded the SARS. He placed the blame on Royal Alliance who was responsible for submitting the invoices to SARS.

[13] However, in the heads of argument submitted on behalf of Lobelo, it was conceded that Lobelo acted in a manner materially inconsistent with the duties of a director.[2] It was also conceded that the payments to the various other entities authorised by Lobelo were affected in the absence of any director's resolution and/or consent of Kukama.[3]

[14] Despite these concessions, it was argued on behalf of Lobelo that he should have been placed on probation as contemplated in section 162(7) (a)(ii) of the Companies Act rather than to be declared a delinquent director in terms of section 162(5). Nowhere in the papers filed on behalf of Lebelo is any mention made of this relief as an alternative to the delinquency order applied for, still less is any case made out for such alternative relief if, indeed, it was open to the court *a quo* to grant it. We shall return to these arguments later in the judgment.

KUKAMA'S APPLICATION TO LEAD FURTHER EVIDENCE ON APPEAL

[15] Despite having been successful in his application in the court *a quo*, Kukama brought on notice of motion dated 15 March 2013, a substantial application running to no less than 190 pages for the admission into evidence of further evidence contained in various affidavits and annexures attached thereto.

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[2] See par 30.1.3.11 of the Heads of Argument filed on behalf of the Appellants
[3] See par 30.1.3.3 of the Heads of Argument filed on behalf of the Appellants

Lobelo and the other appellants were duty bound to respond thereto and the answering affidavit and annexures thereto encompassed another 297 pages. Thereafter Kukama filed a replying affidavit of some 126 pages making the application comprise no less than 513 pages, i.e. more than the record of the appeal which consisted of 437 pages.

[16] The substance of the additional evidence sought to be introduced by Kukama are set out as follows in the heads of argument filed on his behalf:[4]

> "30.1 An affidavit deposed to by Lobelo, in which he claims that all the money transferred by SARS to Diphuka was used to settle Peolwane's debts.
>
> 30.2 An affidavit deposed to by Kukama in response to the disclosure of Diphuka's bank statements, in which he shows that more than R6 million of Peolwane's money was paid directly to Lobelo, or was used to settle his personal debts (payments were made into Lobelo's personal ABSA account and in respect of the property bought in Waterfall Estate on behalf of the Lobelo family trust).
>
> 30.3 A supporting affidavit deposed to by Mr Hamilton Otto Rampa, in which he discloses that R160 000 was paid to him by Diphuka, pursuant to an agreement that he had reached with Lobelo to pay Lobelo R150 000 of that amount, in cash."

[17] The powers of a court of appeal to receive additional evidence are set out in section 22 of the Supreme Court Act 59 of 1959. This section reads as follows:

> "The Appellate Division or a provincial division, or a local division having appeal jurisdiction, shall have power –
>
> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary, and
>
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

[4] See par 30 of the Heads of Argument filed on behalf of Kukama

[18] Counsel for Kukama was unable to refer us to any reported decisions as precedent for the proposition that a successful respondent may apply to adduce further evidence on appeal to bolster the decision of the court *a quo* which had already found in his/her favour. In our research, we could find no such authority in support of this novel contention which appears to be offensive to common sense and good practice. On the contrary, it would seem to us that there is authority supporting a contrary view. In **Stock v Stock** 1981(3) SA 1280 (AD) the Court of Appeal was faced with an application by a successful respondent who sought to introduce on appeal additional documentary evidence which bolstered her case for a variation order granting her the right to remove the children to a foreign country after the parties' divorce. At p 1291F – H, Diemont JA said the following:

> "I do not accept that the document could properly be used to fortify the conclusions reached by the trial Judge in his judgment; more particularly it could not be used 'to demonstrate that the Court *a quo* was correct in holding that Respondent would not place obstacles in Applicant's way' when he visited his children in France. Although, as was pointed out in *Shawzin v Laufer* (supra),[5] the Court may, on appeal 'in an exceptional case, take cognisance of facts, which are by consent admitted or which are unquestionable,' it would in my view be **manifestly wrong for the respondent to adduce new facts after judgment in any attempt to bolster up her case on a disputed issue. The sole question is whether the trial Judge came to the right conclusion on the evidence which was before him.**" (Emphasis added)

[19] It is trite law that any fresh evidence to be allowed on appeal is required to be of such a nature that it would probably have caused the trial court to come to a different conclusion.[6] The additional evidence sought to be introduced in the present instance is not intended to alter the judgment of the court *a quo*, but rather to bolster it. We can, therefore, see no legal basis for admitting any of the proposed additional evidence referred to in Kukama's application.

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[5] 1968 (4) SA 657 (AD)
[6] See **R v Dladla** 1962 (1) SA 307 (AD) at 308E – F

[20] Furthermore, an appeal court should exercise the powers conferred by section 22 sparingly and only in exceptional circumstances.[7] The existence of substantial disputes of fact in relation to such new evidence will militate against it being admitted.[8] In the present instance the facts relied upon by Kukama in his application are strongly disputed in the answering affidavit of Lobelo. Also, in none of the cases referred to by counsel for Kukama, was it the successful respondent who brought the application to adduce further evidence on appeal. It was always the appellant who lost in the court *a quo* that sought leave to introduce new evidence on appeal. Kukama seeks to uphold the judgment issued by the court *a quo*. No cross-appeal was lodged on behalf of Kukama which, notionally, might have justified an application to lead further evidence in order to set aside any adverse order made by the court *a quo* against Kukama. In the absence of any cross-appeal by Kukama, there is no basis in law or in fact which could have justified the application for further evidence to have been lodged. It constituted a substantial wastage of expense, time and energy and an abuse of court processes.

[21] What is the appropriate order for costs to be granted in this instance? It was submitted by counsel for Kukama that they had brought the application to lead further evidence in response to the heads of argument filed on behalf of Lobelo. This submission cannot be correct. When it was pointed out that the application was launched approximately 2 months prior to the filing of the heads of argument on behalf of Lobelo, counsel switched lanes and submitted that the application was brought "in anticipation of Lobelo's heads

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[7] See **Knox D'Arcy Ltd and Others v Jamieson and Others** 1996 (4) SA 348 (AD) at 450J – 451A; **Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others** 2005 (2) SA 359 (CC) at par [43] on p 389. It should be remembered that the discretion of the Constitutional Court to admit new evidence on appeal t is rendered wider than other appeal courts by virtue of Rules 19(3)(c), 30 and 31 of the Constitutional Court Rules which do not apply to this court. See **Rail Commuters** supra at paras [34] to [43]

[8] See S v **Shaik** 2008 (2) SA 208 (CC) at par [21] and [22]; **Prophet v National Director of Public Prosecutions** 2006 (2) SACR 525 (CC) at par [33]

of argument". Counsel's argument established a deplorable lack of candidness which constituted a breach of their duty to make trustworthy submissions to the court. We are duty bound to show this court's displeasure by making an appropriate punitive costs order.

[22] A punitive costs order is also called for arising from the untoward voluminous size of the application. Again, counsel for Kukama sought to blame the size of the application on the length of Lobelo's answering affidavit. This argument puts the cart before the horse. If Kukama had not brought the application there would have been no need for Lobelo to answer it! Furthermore, the absence of any legal precedent supporting such an application by a successful respondent read with Supreme Court of Appeal authority directly in point disallowing such procedure, should have placed Kukama and his legal representatives on guard before embarking on this wasteful course of action. We were further asked on behalf of Lebelo to find that the application was brought with a sinister motive. We think it unnecessary to make any such finding.

[23] Therefore, the application for the admission of additional evidence on appeal should be dismissed with costs including the costs occasioned by the appointment of two counsel and payable on the attorney and own client scale.

THE MERITS OF THE APPEAL

[24] The reasoning of the court *a quo* coming to its final conclusion is set out in paragraph [19] of the judgment. After dealing with the evidence, arguments and counter-arguments the court *a quo* was satisfied that:

"19.1 (Lobelo's) conduct fell short of the standard expected of a director of (Peolwane) to such an extent that it amounted to wilful misconduct, breach of trust and a gross abuse of his position as a director.

19.2 He was grossly negligent in failing to detect the fraud and in not suspecting foul play given the substantial refunds paid by SARS and the remuneration package it (sic, "he") had concluded with Royal Alliance regard also being had to the fact that the letter of engagement of Royal Alliance was only signed on the 22nd February 2011. This, in my view, creates the impression that the package covered future recoveries of refunds from SARS and not recoveries already made.

19.3 (Lobelo's) gross negligence inflicted harm upon (Peolwane) and exposed it to unnecessary litigation and to criminal liability especially having regard to the liability it accepted in its agreement with Royal Alliance to safeguard against fraud, its detection and prevention...

19.4 (Lobelo) should not have paid to the various entities that he had paid to from (Diphuka's) account, but should have transferred the amount of R22 715 909.22 into (Peolwane's) account and dealt with the same in consultation with his co-director and shareholder from that account.

19.5 (Lobelo) should...have dealt with the expenses of at least Tau Pride Projects and (Diphuka) and the income of Tau Pride Projects to demonstrate that Peolwane was settling its liabilities to these entities and not merely taking over their burdens.

19.6 (Lobelo) did not explain why the following disbursements were made ... (to) Tau Pride Projects and Diphuka and their contributions to: donations, salaries, legal fees, including Werksmans Attorneys' account, petty cash, transport costs, withdrawals, payments to Tau Pride Projects costs and to (Lobelo), Tau Pride Transfers, petty cash, withdrawals and payments to Royal Alliance to mention but a few...

19.7 Payment to Royal Alliance also included payment of the account due by Tau Pride Projects of R1 200 230.00, as it is clear from the letter of engagement that Royal Alliance also did consultancy work for it and that only R923 145.00 was paid to Royal Alliance for the account of Peolwane.

19.8 The payment from the tax refund proceeds due by SARS to (Peolwane) of certain invoices, such as the Eskom and Royal Alliance invoices should not have been paid from such proceeds particularly when no reason for so doing has been given or justified.

19.9 There is no reason why the amount of R3 995 232.17 (Annexure 'LKC10A' p 235) should be borne by (Peolwane) when the invoice specifically stipulate that it is for the account of Tau Pride Projects."

[25] In our view no fault can be found with the reasoning of the court *a quo* set out above. The conduct of Lobelo is particularly inexplicable considering the fact that he is a well-qualified and experienced director. He holds more than one degree among which is a Master's degree in business administration.[9] He

[9] See E-mail Annexure "C" Volume 1 p. 42

owns significant business interests, holds directorships in various companies and has been active in the corporate world for more than a decade.[10] Lobelo was quite able to familiarise himself with the obligations of a director of a company insofar as these relate to the conduct of the business of the companies in question and he was certainly obliged to do so.

[26] We shall now deal with some of the items of misconduct levelled against Lobelo.

THE APPOINTMENT OF ROYAL ALLIANCE AND ITS CONDUCT

[27] As early as 24 November 2008, Sizwe Ntsaluba was appointed as Peolwane's auditors by a resolution of the board of directors.[11] Despite this *status quo*, Lobelo unilaterally appointed Royal Alliance late in 2010 as tax consultants to Peolwane although he concluded a formal agreement with them only some time later.[12] The appointment of Royal Alliance was not approved at either a shareholder's meeting or a meeting of the directors of Peolwane. Kukama only became aware of this appointment much later,[13] and he stated that had he been aware of this proposed appointment, he would have opposed it.

[28] The letter of appointment makes clear that Royal Alliance was retained to:

> "a. Review the current tax status;
> b. Evaluation of the appropriateness of the current tax structure;
> c. Computation and submission of amended tax returns to minimise liability; and

[10] See Answering Affidavit Volume 2 p. 104 par 19 and pp. 106 – 109 par 23
[11] See Founding Affidavit Volume 1 p. 12 par 10 as read with the Answering Affidavit Volume 2 p. 110 par 30 and p. 121 par 69
[12] See Founding Affidavit Volume 1 p. 13 par 16 and 17 as read with the Answering Affidavit Volume 2 pp. 112 to 113 par 36 – 39 and p. 122 par 73 – 75; See the Letter of Appointment dated 22 February 2011 Annexure "D" Volume 1 p. 49
[13] See Founding Affidavit Volume 1 p. 12 par 12

d. Timing and scheduling of tax liabilities in line with cash flow management."

[29] Lobelo admitted that Royal Alliance prepared and submitted tax returns to SARS on Peolwane's behalf.[14] Royal Alliance also made certain submissions to SARS and thereby recovered from SARS, purportedly as VAT refunds owing to Peolwane, an amount of R22 715 909.22 in December 2010 and a further R39 023 656.00 in May 2011.[15] Royal Alliance charged Peolwane approximately R3.6 million for these services. Royal Alliance submitted fictitious tax invoices to SARS in support for its claim for a VAT refund in the amount of R38 826 630.20.[16] It is therefore common cause that Royal Alliance perpetrated a fraud on the *fiscus* by claiming this amount as a VAT refund from SARS. In addition, Lobelo's failure to exercise oversight over Royal Alliance's conduct in submitting fictitious VAT invoices constituted gross negligence on his part which inflicted harm on Peolwane.

[30] Despite its fraudulent conduct Royal Alliance instituted proceedings against Peolwane to claim payment of certain fees that Peolwane has to date not paid.[17] Lobelo unilaterally appointed Werksmans Attorneys to act as Peolwane's attorneys in those proceedings and he deposed to opposing papers on its behalf. Yet, no resolution was passed authorising him or Werksmans Attorneys to represent Peolwane in such proceedings. In so doing Lobelo acted on a frolic of his own to the detriment of Peolwane.

[31] In our view this conduct fell within the four corners of section 77(3), thus making Lobelo liable for the loss suffered by Kukama and Peolwane.

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[14] See Answering Affidavit Volume 2 p. 113 par 42
[15] See Answering Affidavit Volume 2 p. 116 par 51 and p 117 par 55
[16] See Founding Affidavit Volume 1 p. 25 par 64.4 as read with the Answering Affidavit Volume 2 p. 118 par 59 and p. 119 par 62
[17] See Founding Affidavit Volume 1 p. 19 par 44 as read with Answering Affidavit Volume 2 p. 126 par 87

DIVERTING PEOLWANE'S REFUNDS

[32] As stated earlier it is common cause that the VAT refunds were paid into Diphuka's bank account. This occurred on the instructions of Lobelo who authorised the payment of Peolwane's VAT refunds into Diphuka's bank account.[18] It cannot be gainsaid that Diphuka had no right or interest to the VAT refunds. On discovering this payment of Peolwane's money to Diphuka, Kukama requested Lobelo to cause such monies to be repaid to Peolwane. This has not, however, occurred to date.

[33] Lobelo's conduct in this regard is a clear contravention of section 76(2)(a). He used his position as a director to gain an advantage for himself and for Diphuka to the detriment of Peolwane.

THE MISUSE OF PEOLWANE'S MONEY

[34] Initially Lobelo claimed that Peolwane's money was utilised to pay for activities related to the business of Peolwane.[19] However, in his answering affidavit he admits that certain portions of the VAT refunds belonging to Peolwane was diverted into Diphuka's account and used to settle the debts of other companies such as debts owed to Tau Pride Projects (Pty) Ltd to an extent in excess of R22 million.[20] Despite Kukama's repeated requests for copies of Diphuka's bank statements,[21] these have not been forthcoming thus precluding an objective assessment of the veracity of Lobelo's conflicting explanations in regard to the use of the funds. Lobelo further stated that a

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[18] See SARS forms signed by Lobelo and nominating the Diphuka bank account for payment Annexures "RA3" to "RA5" Volume 4 pp. 370 to 390 as read with the Answering Affidavit Volume 2 p. 117 par 55–6
[19] See Letter of 12 September 2011 Annexure "Q" Volume 1 p. 75 par 2.2. Lobelo appears to stand by the contents of that letter: See Answering Affidavit Volume 2 p. 127 par 92
[20] See Payment Schedule Annexure "LKL19" Volume 3 p. 249
[21] See Letter of 5 September 2011 Annexure "N" Volume 1 p. 68 par 6.3 and 6.4; Letter of 19 September 2011 Annexure "R" Volume 1 pp. 77 – 78

certain amount was used to settle Tau Pride Projects and Diphuka's accounts with Eskom despite the fact that the payment schedule relied upon does not reflect any payment to Eskom at all.

[35] The payment schedule does reflect a payment to Lobelo himself in the amount of R498 044.00.[22] The payment is listed as a separate line item from the amount allocated to "Salaries and Wages". Lobelo has failed to disclose or explain the significance of this payment.

[36] On 12 February 2010 Peolwane entered into a loan contract with Firstrand Bank Ltd in terms whereof the latter loaned Peolwane certain amounts for purposes of meeting its VAT obligations to SARS. It was an express term of such a loan contract that the VAT refunds from SARS will be paid into a VAT facility account which Peolwane was obliged to open and maintain with Rand Merchant Bank ("RMB") for this specific purpose of affecting payment of such VAT obligations. On Lobelo's version only R4 million of the amounts diverted to Diphuka was paid into this VAT facility account.[23] Despite these allegations, Lobelo failed to mention the VAT facility agreement and account in his answering affidavit. Not only did he sign that agreement, unauthorised, on behalf of Peolwane, but his conduct had also caused Peolwane to be in breach of its terms which is obviously harmful to Peolwane.

[37] He also misappropriated the refunds by SARS.[24] The explanation that Lobelo acted in the interest of the group of companies does not pass muster. He acted in bad faith by unilaterally registering Diphuka's bank account with

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[22] See Payment Schedule Annexure "LKL19" Volume 3 p. 250 line 9

[23] See Answering Affidavit Volume 2 p. 116 par 52.1. Contrary to this allegation the payment schedule, Annexure "LKL19" Volume 3 p. 249 suggests that an amount of approximately R12 million was paid into the VAT facility account in contradiction to Lobelo's version.

[24] See Payment Schedule Annexure "LKL19" Volume 3 pp. 249 – 250

SARS and in so doing caused Peolwane's refund to be paid into such bank account. This he did without informing Kukama of his actions in this regard. His explanation for doing this in order to avoid any delay in the payment of the VAT refunds is without justification. If he really regarded himself entitled to such conduct, it would mean that Diphuka was to be regarded as a mere conduit and that such money would have had to be transferred from Diphuka to Peolwane who was the rightful owner. This, however, never occurred. By diverting those funds to Diphuka and not returning it to Peolwane, Lobelo in fact stole Peolwane's money which should have been placed in the facility account for VAT created with the RMB. In our view this constitutes a gross abuse of his position as director which inflicted harm to Peolwane and thus it amounted to wilful misconduct and a breach of trust on his part entitling a delinquency order to be issued.

[38] Lobelo's use of Peolwane's money to settle his own personal debts also constitutes theft of Peolwane's money and an egregious breach of his fiduciary position as director of Peolwane. We agree with counsel for Kukama that the provisions of section 162 were expressly included in the new Companies Act to guard against the very type of abuse of company funds by directors as perpetrated by Lobelo in the present instance. It was held in **Cohen NO v Segal** 1970 (3) SA 702 (W) at 706F as follows:

> "An application of the company's money *ultra vires* the company is in fact in breach of trust on the part of the directors. In the case of such misapplication the directors are not only liable for what they have put into their own pockets but also what they, in breach of trust, paid to others. They have to account to the company for such monies and their liability need not necessarily be based on fraud or delict."

[39] It was held in **Msimang NO and Another v Katuliba and Others** [2013] 1 All SA 580 (GSJ) at par 29 as to the purpose of section 162 of the new Companies Act as follows:

> "This provision is directed at protecting companies and corporate stakeholders against company directors who have proven themselves unable to manage the business of the company or have failed in, or are in neglect of, their duties and obligations as directors of the company."

[40] In the circumstances of this case and in consideration of the common cause facts referred to above, the court *a quo* did not have a discretion but was obliged to issue a delinquency order. Section 162(5) states that in such circumstances the court "must" grant a delinquency order. The conduct complained of in the present matter makes this case an *a fortiori* case in comparison to the facts in the **Msimang** case where the court held that the directors' failure to cause annual financial statements to be prepared for a number of years amounted to such a reckless disregard of their duties as directors as to require the court to declare them delinquent in terms of section 162(5) of the Companies Act.

[41] The above conduct of Lobelo in unilaterally siphoning off funds belonging to Peolwane for his own benefit and that of another company, also constitutes a breach of the standards of conduct of directors prescribed in section 76(2)(a). In our view the aforesaid facts are more than sufficient to justify the order declaring Lobelo a delinquent director as found by the court *a quo*. In these circumstances the argument by Lobelo's counsel that the order should have been one of placing Lobelo on probation is without substance.

ORDERS 2 AND 3 OF THE COURT *A QUO*

[42] In terms of orders 2 and 3, the court *a quo* granted Kukama leave to institute legal proceedings on behalf of Peolwane against Diphuka and Lobelo for the recovery of the amount of R22 715 909-22 in terms of section 165(6) of the Act. In argument the appropriateness of these orders was challenged by

counsel for Lobelo on the basis that they were "superfluous", "unnecessary" and inhibited access to court because, by implication, they require a party that is entitled to pursue a derivative action, to first seek the leave of the court to do so.

[43] Some argument was also advanced to us in regard to the inter-relationship between section 162 and 165 of the Act. However, the notice of appeal failed to mention any basis for overturning these orders. As such, these issues were merely incidental to the main appeal and we are not satisfied that they were properly before us. Moreover, in view of the conclusion we have come to, it is unnecessary to embark upon an analysis of these sections and we decline to do so.

CONCLUSION

[44] For the reasons aforesaid we are of the view that the appeal should be dismissed. The following order is issued:

1. The application to lead further evidence on appeal is dismissed with costs which include the costs occasioned by the employment of two counsel and payable on attorney and own client scale.
2. The appeal is dismissed with costs including the costs occasioned by the employment of two counsel.

DATED THE 31st DAY OF May 2013 AT JOHANNESBURG

P. BLIEDEN
JUDGE OF THE HIGH COURT

C. J. CLAASSEN
JUDGE OF THE HIGH COURT

C. JORDAAN
ACTING JUDGE OF THE HIGH COURT

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The appeal was argued on 27 May 2013