

In the matter between:

**LOBELO, KAGISHO LAMBERT
PEOLWANE PROPERTIES (PTY) LTD
DIPHUKA CONSTRUCTION (PTY) LTD**

**1st Appellant
2nd Appellant
3rd Appellant**

and

**KUKAMA, AOBAKWE REGINALD KOKETSO
CIPC**

**1st Respondent
2nd Respondent**

SUMMARY

THE COURT:

This is an appeal against an order granted by this court, amongst others, declaring the 1st appellant (“Lobelo”) a delinquent director in terms of section 162 of the new Companies Act 71 of 2008 (“the Act”) and for leave to institute legal proceedings against Lobelo for the recovery of VAT refunds in the amount of R 22 715 909.22, which was paid erroneously by the SARS to 3rd appellant instead of the 2nd appellant.

Lobelo and the 1st respondent (“Kukama”) are both directors of the 2nd appellant but Lobelo is the sole director of the 3rd appellant.

The court *a quo* refused leave to appeal which was later granted by the SCA.

On appeal and in limine, Kukama, the successful party in the court a quo, brought a substantial application for the admission into evidence of further evidence. The powers of a court of appeal to receive additional evidence are contained in section 22 of the Supreme Court Act 59 of 1959. Relying on the authority of *Stock v Stock 1981 (3) SA 1280 (AD)* the court was of the view that the additional evidence sought to be introduced was intended merely to bolster the decision of the court a quo and not to alter it. The court further pointed out that an appeal court should exercise the powers conferred by section 22 sparingly and only in exceptional circumstances. The existence of substantial disputes of fact in relation to such new evidence will also militate against its admission. The application to introduce new evidence on appeal by a respondent who was successful in the court a quo, was then dismissed.

Turning to the merits of the appeal, the court found no fault with the finding of the court *a quo*, where it held that Lobelo's conduct was inexplicable considering he is a well-qualified and experienced director. Furthermore, Lobelo was able to familiarise himself with the obligations of a director of a company insofar as these related to the conduct of the business of the companies in question.

The court found his dealings with Royal Alliance (the company that claimed the VAT refunds on behalf of the 2nd appellant) were fraudulent; and that Lobelo's conduct fell within the four corners of section 77(3) of the Act. He misappropriated the refunds by diverting some of it to pay the debts of his other companies and to himself. This constituted a breach of the standards of conduct of directors prescribed in section 76(2)(a) of the Act.

The appeal was dismissed with costs.