IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/29559

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

20 May 2025

Date

[redacted]

T ENGELBRECHT

In the matter between:

REGINALD PHINDILE MAKASI N.O **FIRST APPLICANT**

(as trustee of the Moabi-Makasi Family Trust)

SELENA JOSEPHIONE MOABI-MAKASI N.O **SECOND APPLICANT**

(As Trustee of the Moabi-Makasi Family Trust)

REGINALD PHONDILE MAKASI **THIRD APPLICANT**

(in his capacity as an ex-director of Amazwe Capital (Pty) Ltd

in liquidation)

SELENA JOSEPHINE MOABI MAKASI

(in his capacity as an ex-director of Amazwe Capital (Pty) Ltd

in liquidation) **FOURTH APPLICANT**

and

SETH MALEFETSANE RADEBE FIRST RESPONDENT

JACKIE LANDIWE MAHLANGU SECOND RESPONDENT

In Re

REGINALD PHINDILE MAKASI N.O **FIRST PLAINTIFF**

SELENA JOSEPHINE MOABI-MAKASI N.O **SECOND PLAINTIFF'**

AND

SETH MALEFETSANA RADEBE **FIRST RESPONDENT**

JACKIE LANDIWE MAHLANGU **SECOND RESPONDENT**

This order is made an Order of Court by the Judge whose name is reflected herein, duly stamped by the Registrar of the Court and is submitted electronically to the Parties/their legal representatives by email. The Order is further uploaded to the electronic file of this matter on Caselines by the Judge his/her secretary. The date of this Order is deemed to be 20 May 2025..

JUDGMENT

ENGELBRECHT, AJ

Introduction

[1] This is an application to declare the Second Respondent as a delinquent director in terms of section 162(5)(c)(i) and (iv) of the Companies Act 71 of 2008 and grant an order for the contraventions of sections 22 and 214(1)(c) and (d) (ii) in the Companies Act, No. 71 of 2008.

[1.1] This matter was brought against two Respondents, but an order was already granted against the First Respondent by Judge Yacoob on 3 April 2024. The Applicant requests the following relief in terms of the Notice of Motion :

1. *Declaring that the First and Second Respondents have contravened section 22 of the Companies Act, Act 71 of 2008.*
2. *Declaring that the First and Second Respondents are guilty of an offence as envisaged in section 214(1)(c) and d(ii) of the Companies Act, Act 71 of 2008.*
3. *Declaring the First and Second Respondents to be delinquent directors pursuant to section 162(5)(c)(i) and (iv) of the Companies Act, Act 71 of 2008.*
4. *That the First and Second Respondents pay the costs of this Applicant on an attorney and client scale.*

[1.2] In terms of the court order granted by Judge Yacoob, the matter against the Second Respondent was postponed sine die, and he was ordered to file his Answering Affidavit on 19 April 2024. In terms of this order, the costs of the postponement of the relief against the Second Respondent were reserved.

[1.3] An Answering Affidavit and Counter Application was filed by the Second Respondent on 23 April 2024, in which the Second Respondent requested that the Application be dismissed and that the following relief be granted:

1. *That the settlement agreement made an order of court on 31 January 2023 under Case Number 2019/29559 in the High Court, Gauteng Division is set aside.*
2. *That the matter under Case Number 2019/29558 in the High Court , Gauteng Division is hereby referred back to trial.*
3. *That the Second Respondent is hereby granted permission to supplement any underlying documents & to discover any additional documentation within 30 (thirty days) of the order being granted for the matter filed under Case Number 2019/29559 in the Hugh Court, Gauteng Division.*
4. *That the costs of the counter application be paid by the Applicant.*

[1.4] In the Replying Affidavit by the Second Respondent on his Counter Application, he stated a *point in limine* based on the alleged dispute of fact

[2] The Second Respondent did not apply for condonation for the late filing of their Answering Affidavit in their answer or Counter Application, but addressed the same in their Replying Affidavit to the Answering Affidavit to the Counter Application.

[2.1] Condonation is therefore clearly not to be had for the mere asking. In ***Grootboom v National Prosecuting Authority and Another*** [1] the Constitutional Court held that:

> *"A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient casu. This requires that party to give a full explanation for the non-compliance with*

[1] 201492) SA 68 (CC) at 76D.

the rule or Court's directions. Of great importance, the explanation must be reasonable enough to excuse the default.

[2.2] On behalf of the Second Respondent, it was argued that the non-compliance is not substantial as it was filed three court days late, and therefore, there is no prejudice. The reasoning for the late filing was stated as logistical, as the legal representatives only received the instructions late, and that there was no intention to be in contempt.

[2.3] In the interest of justice, I agree that the non-compliance was not substantial, I was not referred to any prejudice suffered by the Applicant in the three-day late filing of the affidavits and grant condonation for the filing of the answering affidavit and the counter application.

[3] The issues to determine are:

[3.1] Whether the Applicant is entitled to the declaratory orders in terms of sections 22, 214 and 162 of the Companies Act, 71 of 2008.

[3.2 Whether the relief in terms of the Second Respondent's counter-application must be granted.

[3.3] Whether there are issues in dispute that necessitate the matter being referred to trial, as per paragraph 35 of the Answering Affidavit, as stated in the practice note of the Second Respondent.

FACTUAL MATRIX

[4] The facts about the factual matrix are mostly common cause. In March 2015, the Applicants, in their capacity as trustees of the Trust, met the First and Second Respondents, who were seeking investment partners to participate in

the expansion of their business, Amazwe. On 24 April 2015 the Respondents presented the "*New Equity Partner Prospectus*" which stipulates "*for discussion*" on the front page.

[4.1] In this prospectus, it was indicated that Amazwe adopted a specified strategy to:

[4.1] Invest in companies demonstrating potential growth in niche markets, acquire a controlling interest in a sector active in the public sector business, strategic investment in knowledge economy sectors involving innovation, advisory and business process, enhancing the investment and enterprise value amongst other things, optimising synergies, vertical integration and generating local and global value chains, maximise returns and exits to investors and shareholders through primary listings, initial public offerings and exists by primary listings, IPO and other innovative and strategic disposal, mergers and acquisitions.

[4.2] In this prospectus, the Respondents also introduce various companies which they allege were in their "*current pipeline*" with a reference to the stage of transaction applicable to each company and a specific date for completion, Mercantile Bank: At advanced stage of bidding, 31 October 2015, Efficient Group: At advanced stage of bidding, 31 June 2015, Open Water: Due Dilligence, 1 May 2015, The Gaffney group, Concluded,1 May 2015, Interwaste: NDA stage, July 2015, W2E Solutions: NDA Stage, 31 July 2015, Voltex: NDA stage, 30 September 2015, Mining

Petroleum and Resources: NDA stage, 31 July 2015, Petronas: NDA Stage, 31 July 2015.

[4.3] On 12 May 2015, the Applicants as trustees of the Trust entered into a written shareholders' agreement and a subscription of shares agreement in respect of Amazwe, where the Trust acquired 100 shares in Amazwe.

[4.4] On 25 May 2015 the Applicants were then appointed as Directors of Amazwe with the First and Second Respondents. On 20 August 2015, the Applicants resigned as directors of Amazwe.

[4.5] On 24 March 2016, the Trust applied for an order declaring that these agreements between the Trust and Amazwe had lapsed and requested the repayment of the amount of R 4 187 639,55 from Amazwe and Judge Masipa granted an order on 24 March 2016. To execute on this order, a *nulla bona* return of service was received, and the Trust applied for the winding up of Amazwe on 20 February 2018, which was granted by Judge Wepener. An enquiry was conducted in September 2018 and in August 2019, the Trust instituted action against the First and Second Respondents in their personal capacities to hold them liable for the repayment of R 4 187 693.55 in their personal capacities.

[4.6] On 31 January 2023 the First and Second Respondents, who were both legally represented, entered into a settlement agreement with the Applicants, made an order of court by Acting Judge Ford. In this agreement, they both acknowledged their

indebtedness to the Trust of R 4 187 693,55 and undertook to pay a settlement amount of R 3 047 718.82 plus interest in full and final settlement as well as costs of the action to be paid on or before 30 June 2023. The further conditions of this settlement agreement stated that:

[4.6.1] *In the event that Mr Radebe and Mr Mahlangu (First and Second Respondents) breach the settlement agreement, the full amount of R 4 187 693,55 would become due and payable.*

*[4.6.2] In the event that Mr Radebe and Mr Mahnlagu breach the settlement agreement, they consent to an order declaring them delinq*uent directors.

[4.7] As a result of no payment received from the Respondents by the Trust, the Applicants issued this application, and the Second Respondent delivered his Notice to Oppose on 28 February 2024.

[4.8] On 3 April 2024 Judge Yacoob granted an order against the First Respondents on an unopposed basis for the relief so claimed by the Applicants.

APPLICANT'S CASE

[5] It is the Applicant's case that the Respondents induced the Applicant to enter into the agreements for the purchase and subscription of shares on behalf of the Trust.

[5.1] At the first meeting with the Respondents in 2015 the prospectus was provided and the Respondents represented to the Applicant and the trustees that Amazwe (Pty) Ltd had reached advance stages of negotiation regarding the acquisition of stakes and or shareholdings in various entities 50% Mercantile Bank, 51% in Efficient Group, 100% in Open Water Advanced Risk Solutions,100% in the Gaffney group, 26% in Interwaste Environmental Solutions, 100% in W2E solutions, 20% stake in Invorohub a subsidiary of Voltex, 30% in Inventia Holdings and 80% in Petronas.

[5.2] It was further presented that the acquisitions would be finalised between May 2015 and October 2015, that the Respondent has done due diligence on all the entities, that Amazwe were financially sound, that an investment in Amazwe would give sustainable returns to stakeholders and investors, that the Respondents had the necessary skill and knowledge and experience to deal with financial investments, banking, infrastructure development, local government, utilities, construction, housing and tourism. It was further indicated that the Respondents had secured key personnel as employees, that in their personal capacities had credit loan accounts in Amazwe as a result of their own investments therein and that they have complied with all statutory requirements.

[5.3] As a result of these representations, the Applicants entered into a subscription share agreement and a shareholders agreement, they were appointed as directors between 25 May 2014 and 24 July 2015 and made the payment to Amazwe of R 4 187 639,55.

[5.4] The Applicants allege that the representations were substantial and induced the trustees to act on behalf of the Trust to enter into these agreements with Amazwe.

[5.5] During 2015, the trustees became concerned about the financial viability of Amazwe and that the representations made by the Respondents were not materialising. Together with that, the board meetings to discuss the company's finances were cancelled without explanation, and a further amount loaned to the First Respondent was not repaid as agreed. Further concerns were a lack of information provided about the status of various acquisitions and negotiations presented by the Respondent in the prospectus.

[5.6] On 20 August 2015, the trustees resigned as Directors of Amazwe.

[5.7] Suspensive conditions of these agreements were also not fulfilled and therefore the agreements lapsed. The Applicants applied for the repayment of the amount so invested in Amazwe, and the order was granted on 24 March 2016.

[5.8] Upon the receipt of a *nulla bona* return against Amazwe, the Trust launched an application to place Amazwe under final winding up, which order was granted on 20 February 2018.

[5.9] At the Insolvency enquiry, in September 2018, it was established that the Respondents made false representations about the affairs of Amazwe, which representations induced the Trust to enter into the agreements and invest in Amazwe. At the enquiry, it was also

established that there were no other interactions, acquisitions or investments by Amazwe save for the acquisition of the Gaffney Group and no due diligence or interactions were done by the Respondents of the companies so listed in the prospectus.

[5.9.1] It was further determined that no business dealings with Amazwe and or the Respondents were done around the time of the negotiations and the conclusions of the agreements.

[5.9.2] It was further ascertained that most of the corporate entites were unaware that they had been included in the Prospectus.

[5.9.3] The Respondents also did not invest in Amazon contrary to their representations and no credit loan accounts existed at Amazwe.

[5.10] A summons was then issued in which the relief in this application against the Second Respondent was requested against both Respondents set down for 31 January 2023. On this day the Respondents entered into a settlement agreement which was made an order of court by Judge Ford in which they accepted personal liability to repay an amount of R 3 047 718,82 plus costs payable on or before 30 June 2023 and agreed that in breach of this order that they would be liable for the full amount of R4 187 639,55 and they consented to an order declaring them delinquent in terms of section 162(5(c)(i) and (iv).

SECOND RESPONDENT'S CASE

[6] The Second Respondent filed an Answering Affidavit in which he place his version of the background before court and denied all allegations by the Applicant and also brought a Counter Application to have the settlement agreement made an order of court on 31 January 2023 set aside, refer the matter back to trial and be granted permission to supplement his papers.

[6.1] The Second Respondent alleges that the document named "*New Equity Partner Prospectus*" was only a business plan to achieve their goals to seek potential business partners to acquire controlling stakes in various companies. Second Respondent alleges that the prospectus for this purpose does not have the same meaning as contemplated in the Companies Act, as it was for private investors and was not registered.

[6.2] According to the Second Respondent, the sole purpose of this document was to outline the experience of both Respondents, outline potential investment opportunities, outline the benefits of being an equity partner, outline the expected equity contributions needed from each equity partner.

[6.3] The Second Respondent then sets out details about each company referred to in the prospectus, which are contradictory to what is stated in the prospectus.

[6.4] The Second Respondent then vehemently deny that any of these transactions would be concluded within three months, that there were

never any timelines discussed and that no due diligence was conducted on all the entities except for the Gaffney transaction.

[6.5] Second Respondent alleges different amounts that are owed by Amazwe as well as the removal of funds from Amazwe's account which is not before me, as the same would be dealt with in the liquidation proceedings..

[6.6] The Second Respondent denies that board meetings were cancelled and refers to three board meetings, during which discussions were held about target companies with special focus on Gaffney and Interwaste and that all information was readily available to the Applicant.

[6.7] Then the Second Respondent alleges that he received bad advice from his legal representative during the filing of the plea and entering into the settlement agreements, which were made an order of court in 2023.

[6.8] The Second Respondent also alleges that he lodged a complaint with the Legal Practise Council, which has to date not completed.

[6.9] On 26 June 2023, the Second Respondent made a proposal for settlement, which the Applicant rejected, and the Applicant then issued a writ of execution. A further attempt to settle was apparently made to which no response was received.

[6.10] The Second Respondent then alleged that he was not served with these papers as it was allegedly served on his daughter who was not at home.

[6.11] The Second Respondent alleges that to have him declared delinquent would do immeasurable harm to him as a professional and in his personal life.

DISPUTE OF FACT

[7] Declaratory relief can only be granted if the facts as stated by the Respondent, together with the facts alleged by the Applicant, are admitted by the Respondent to justify such an order. The Second Respondent argued that there is a dispute of fact and therefore the matter is to be referred to trial.

[7.1] The Second Respondent alleged that the Applicant admitted to such dispute of facts in their Answering Affidavit to the Second Respondent's Counter Application. The peculiar manner in which the Second Respondent has answered this matter needs to be mentioned. The Second Respondent stated his version in motivation of this Counter Applicant and then elected not to admit or deny the specific allegations of the Applicants in their Founding Affidavit but rather pleaded a bare denial, referring to specific paragraphs which lacked particularity.

[7.2] In the matter of ***Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)***, Corbett JA set out the test to be considered when determining applications on papers where there could be a material dispute of fact.

"It is correct that where in proceedings on notice of motion disputes of fact arose on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such relief on the papers before it is, however, not confined

to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. .....If the court is satisfied as to the inherent credibility of the applicant 's actual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[7.3 In ***Bester NO and others v Mirror Trading International (Pty) Ltd t/a MTI(In Liquidation) and others 2024 (1) SA 112 (WCC)*** it is stated in par [71] that " *A real and bona fide dispute of fact can exists only where the court is satisfied that the party who purports to raise the dispute has, in his or her affidavit, seriously and unambiguously addressed the fact said to be disputed. .....*[73] *A respondent, in addition cannot merely allege conclusions as facts, a respondent must produce admissible evidence in support of such facts, In motion proceedings, the affidavits constitute not only the evidence, but also the pleadings. A party, in motion proceedings, is consequently expected to allege the required facts and in addition, to support such facts by adducing admissible evidence.*

[7.4] In **Sofianti v Mould 1956(4) SA 150 (E)**, Price JP took a robust approach to such disputes of fact.

"A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases; Respondent must state enough to enable the Court to conduct a preliminary examination and to ascertain whether the denials are fictitious, intended merely to delay the hearing..... If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised on affidavits."

[7.5 The Second Respondent alleges that the issues in dispute are what was the purpose of the prospectus, what did the Respondents tell the Applicants, what was discussed at board meetings, what amount in losses had the Applicants suffered and who has the liability to settle same are the disputes of fact which must force this matter to trial.

CONTRAVENTION OF SECTION 22 OF THE COMPANIES ACT

[8] The Applicant argued that the Second Respondent contravened section 22 of the Companies Act which reads as follows: "22(1)_ *A company must not carry on its business recklessly, with intent to defraud any person or for any fraudulent purpose".(My emphasis)*

[8.1] The Applicant then referred to ***Rabinowitz v Van Graan and others 2013(5) SA 315 (GJ)*** at paragraph 21, where Du Plessis AJ held that the conduct so prohibited against the company also prohibits the directors of the company from acting in any manner contemplated therein

[8.2] In **Venator Africa (Pty) Ltd v Watts and another 2024 (4) SA 539 (SCA)** at paragraph [28] it was held that *this section of the Companies Act imposes a duty on the company and not its directors and therefore to "construe s22(1) as being capable of infringement by the directors is to read into the section a prohibition that is not there. [29] Section 22(2) and 22(3) create remedies for the Commission when reckless trading is suspected. These provisions as well, are directed at the company. The section that deals specifically with director's liability is s 77(3)(b) which states "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 (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).

[8.1.1] In paragraph [3], it was also held that *"Section 76(3) imposes duties upon the directors to inter alia act in common good faith and in the best interests of the company. These are legal principles which have now been entrenched in the Act. These duties are owed to the company. In the event of a wrong done to the company in terms of the provisions of this section, the company can sue to recover damages. The company would be the proper plaintiff. "*

[8.1.2] In para 34, it was then held that *"Rabinowitz and the other High Court cases were wrongly decided".*

[8.2] Therefore, I cannot find that the Second Respondent contravened section 22.

GUILTY OF AN OFFENCE IN TERMS OF SECTION 214

[9] Section 214 (1)(c) states that *a person is guilty of an offence if the person was knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company or a holder of the company's securities or with another fraudulent purpose.*

[9.1] The Applicant refers to Section 214 (1)(d)(ii) in its Notice of Motion where there is only a Section 214(1)(d) which read as follows *is a party to the preparation, approval and dissemination or publication of a prospectus, or a written statement contemplated in section 101, that contains an untrue statement as defined and described in section 95.*

[9.2] The Applicant alleged that the Second Respondent on his own version was a party in the preparation of the prospectus and knowingly proposed and confirmed the content thereof and provided this document to the

Applicant. According to the Second Respondent, this prospectus should not be accepted as one in terms of the Companies Act. In terms of the definitions in section 95 of the Companies Act, *"a registered prospectus means a prospectus that complies with this Act and (i) in the case of listed securities has been approved by the relevant exchange or otherwise has been filed"*.

[9.3] I find that the purpose of this document, whether it complies with the Act or is registered, had one purpose only, with a list of nine companies, dates and status of investment, to provide information on status and dates for completion to prospective investors. Investors would use that information to determine whether or not they wanted to invest in this business. This document was prepared and used to meet with the Applicants as prospective investors. I was also not referred to any other manner which the First and Second Respondents used to discuss or convince the Applicants to invest, regardless of what was discussed at Board meetings for which no minutes were provided.

[9.4] The Second Respondent explains in the Answering Affidavit the status of the various companies. However, this is in direct contradiction to what is stated in the prospectus document on page 2 thereof, where it is stated that "*A number of transactions that are past the due diligence stage will be closed in a short while*". Each of the transactions states a date for completion from June to October 2015.

[9.5] I agree with the Applicants that whether the amount of R 3 million paid towards the Gaffney transaction forms part of the R 4 187 639,55 is not

before me as there is a court order granted on 31 January 2023 by Judge Ford ordering the Respondents to pay the amount of R 4 187 639,85 if they failed to comply with the court order.

[9.6] Furthermore, the allegation that the Applicants removed funds from the account of Amazwe is also not before me as Amazwe has been liquidated and in those proceedings the alleged debt of the Applicants to Amazwe will be dealt with.

[9.7] The Second Respondent was a party to the preparation of the document whether it is called a prospectus or a business plan, the facts are clear from the document what was proposed. None of these proposals or projections came to light, and during the liquidation enquiry, it was confirmed that various aspects so presented by the Respondent did not occur.

[9.8] Section 76 of the Companies Act imposes a duty of skill, care and diligence on directors and emphasises that Directors of a company must act reasonably and in good faith. Regardless of whether the prospectus was for a public offering or not or called a business plan, it was used to convince the Applicants to invest in Amazwe. The companies so noted in this document was not even aware that they were mentioned in this document.

[9.9] I find, based on the facts provided here and the findings at the liquidation hearing, which are all just denied by the Second Respondent in a bare denial in his Answering Affidavit, that the Second Respondent contravened section 214 (1)(c) and (d).

DECLARATION OF THE SECOND RESPONDENT AS A DELINQUENT

[10]. The Applicants requests an order to declare the Second Respondent as a delinquent in terms of Section 162 (5)()(c)(i) and (iv)

[10.1] In the matter of ***Gihwala and Others v Grancy Property Ltd and Others 2017 (2) SA 337 (SCA),*** it was held in paragraph 142 that

"*.....the purpose of section 162(5) is not that it is a penal provision but it is to protect the investing public, whether sophisticated or unsophisticated against the type of conduct that lead to an order of delinquency and to protect those who deal with companies against the misconduct of delinquent directors. What is that conduct? It is helpful to examine some of the other provisions of the section. Under subsection* 5(a), serving as a director, or acting in that capacity or in a prescribed office, while ineligible or disqualified from doing so, attracts delinquency. Under subsection 5(b), acting as a director while under a probation order in terms of s 162, or the corresponding provision dealing with close corporations, results in delinquency as both orders are directed at preventing that very conduct.

[143] *Turning to subsection 5(c), one starts with a person who grossly abuses the position of director, conduct of which I have found Mr Giwala and Mr Manala guilty. We are not talking about a trivial misdemeanour or an unfortunate fall from grace. 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 os 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 in relation to the performance of the functions of a director or acted in breach of s 77(3)(a) to (c). That section 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 any fraudulent purpose.

[144] All of these involve serious misconduct on the part of a director. .....Its aim is to ensure that those who 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 companies is in fit hands. And it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position."

[10.2] In terms of Subsection 162(6), (a) a declaration of delinquency in terms of *subsection 5(a) or (b) is unconditional and subsists for the lifetime of the person declared delinquent and (b) subsection 9(5)(c) to (f) which read as follows:*

> *(i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and (ii) subsists for seven years from the date of the order, or such longer period as determined by the court making the declaration, subject to subsections (11) and (12).*

[10.3] In terms of subsections (11) and (12), the delinquent director may approach the court to suspend the order after three years, and if so suspended, then to set it aside after two years. This applies to an order granted in terms of section 162(5)(c) as requested by the Applicants.

[10.4] As stated above, I find that the Second Respondent had a duty in terms of section 76 to act with skill, care and diligence which he did not do in convincing the Applicant to invest in a company based on apparent dealings with eight companies who did not even know that they were noted in this document and has never been in contact with the Respondents.

[10.6] The funds were invested by the Applicants, not used as indicated, and when the Applicants tried to claim the funds back, it was clearly not available anymore, except for the amount the Applicant indicates they owe Amazwe. The Respondents promoted themselves to the Applicants as competent, experienced and seasoned businessmen who should have known that what they presented was untrue and fraudulent. I also find that the new facts provided in the Answering Affidavit pertaining to each transaction are provided to argue against the granting of this order. These facts are in contradiction with the prospectus and what transpired from the enquiry in the liquidation of Amazwe.

[10.7] I accept that the declaratory order of delinquency might be a drastic measure, but as stated in the Gihwala matter, it is not a penal provision, but it is to protect the investing public from certain conduct by the Directors who were the Applicants when they invested in Amazwe.

[10.8] The Second Respondent then argues that he cannot be held personally responsible as Amazwe is a separate entity. Section 165 (5)(c) refers to Section 76(2)(a) and section 77 (3)(a) (b) and (c) which sets out when a director can be held liable for any loss, damage or costs sustained by

a company as a result of direct or indirect consequences of the directors conduct.

[10.9] In ***Lewis Group LTD v Woollam and others 2017 (2) SA 547 (WCC)*** Binns ward J stated in paragraph [14] that ...

> *"The adjective gross used in the context of gross abuse denotes obvious and egregious conduct. The conduct in question must relate to the use of the position as director; it does not relate to the performance by the person concerned of his or her duties and functions as director because that is a matter dealt with discretely in terms of subparagraph (iv).*

[10.9.1] In paragraph 16, Judge Binns-Ward address the concept of gross negligence as stated in Section 162(5)(c)(iv) with reference to Scott JA in ***MV Stella Tingas: Transnet LTD t/a Portnet v Owners of the MV Stella Tingas and Another 2003(2) SA 473 (SCA)*** in para 7 who stated that

> *" to qualify as gross negligence the conduct in question, although falling short of dolus eventualis, must involve a departure from the standard of the reasonable person to such an extent that it may property be categorised as extreme, it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or where there is conscious risk taking, a total failure to take care, if something less were required, the distinction between ordinary and gross negligence would lose validity".*

[10.10] The conduct by the Second Respondent falls squarely within section 162(5) (c)(i) and (iv). It is in my view wilful misconduct on the part of the Second Respondent because it was with the full knowledge that no due diligence had been done, and if that is disputed, none of these companies were even aware of the fact that

they were included in a document for investment. At the very least, it was gross negligence akin to recklessness, which involved a risk of breaching the trust concerning their performance and duties as directors. A declaration of delinquency is justified.

COUNTER APPLICATION

[11] The Counter application is brought to have an order granted in January 2023 set aside. In granting an order, the court becomes *functus officii* and therefore cannot, just for the mere asking, set aside an order. In order to have an order set aside, an Applicant may issue an appeal, review, rescission in terms of either Rule 32 or 42 or bring such application in terms of the common law.

[11.1] Judge Ford's order on 31 January 2023 is a final order, but there is no appeal or review application before me. During argument I was referred to the Constitutional case of ***Zondi v Member of the Executive Council for Traditional and Local Government Affairs and others, (Case CCT 73/03) [2004] ZACC 19: 2005(3) SA 589 (CC) 2005(4) BCKR 347 (CC)(15 October 2004).*** The Applicant argued that this matter is distinguishable from the present matter as the Zondi matter was about the confirmation of the constitutionality of certain provisions in the Ordinance. Application was then brought about the validity of certain sections of the Ordinance to the Constitutional Court. Therefore, I agree with the Applicant that there was no finality in the urgent court order granted in the High Court in the Zondi matter, as the High Court made a Constitutional invalidity

order which was then referred to the Constitutional Court for confirmation.

[11.2] In the matter of **Zweni v Minister of Law and order 1993(1) SA 523 (A)** the different rationales between what orders are appealable and what orders are not Harms JA noted that in determining in which category a judicial determination falls one must look not merely at the form of the judicial pronouncement but also and predominantly at its effect:

> *"First, the decision must be final in effect and not susceptible to alteration by the Court of first instance, second, it must be definitive if the rights of the parties and third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.""*

[11.3] In **Eke v Parsons 2016(3) SA 37 (CC)** it was confirmed that a settlement agreement can only be made an order of court when it is *proper and competent*, the settlement agreement must *relate directly or indirectly to an issue between the parties* and the agreement must not be objectionable both from a legal and a practical point of view.

[11.4] This settlement agreement complies with the principles so stated in Eke v Parsons and the order so granted was final in its effect. I also agree with the Applicant that the Second Respondent is not placing before this court on what basis and in terms of what rules he believes I have the discretion to set aside a competent order granted in 2023, as the application fails to comply with the requirements of any of the available rules of court.

[11.5] The main argument in the counter application with regard to the signing of the settlement agreement revolves around the bad legal advice he received. In **Rose and another v Alpha Secretaries (Pty) Ltd 1947 (4) SA 511 AD 519** ...."*It seems to me undesirable to attempt to frame a comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief under rule (12) or to lay down that a certain degree of negligence will debar the client and another degree will not. It is preferable to say that the court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the court holding, in the exercise of its wide discretion that sufficient cause for granting the relief has been shown.*"

[11.6] In this matter, an order was granted on 31 January 2023, where the settlement agreement that the Second Respondent now wishes to be set aside was made an order of court. No appeal, no review or rescission applications were brought by the Second Respondent since 2023 until this application is placed before me, which does not comply with any of the requirements of any of the applicable rules of court. Since the order was granted, the Second Respondent tried twice to settle the matter with a reduced amount, showing that he accepts that he owes the funds to the Trust. Even if the Second Respondent's allegation that he received bad advice is accepted, then it would have been expected of the Second Respondent to bring some form of application within the last 28 months to have this order set aside, but nothing was done.

[11.7] Therefore, I cannot find any justification in this counter-application to have the court order and, thus, the settlement agreement signed by both the First and Second Respondents set aside.

CONCLUSION

12. I am satisfied after due consideration of all the relevant principles applicable to the dispute of fact and the granting of the declaratory relief in terms of the relevant sections of the Companies Act, that the Applicant has shown on a balance of probabilities, that they are entitled to the relief claimed in paragraphs 2 - 3 of the notice of motion

COSTS

[13] What remains for me to consider is whether the Applicant is entitled to costs and, if so, whether it is entitled to costs on an attorney and client scale. Because of the success of the majority of the relief so claimed, there is no reason not to award costs to the Applicant.

[13.1] The Applicant argues that the Counter-application was baseless and the opposition is solely to delay the matter even further.

[13.3] The Second Respondent argued that this matter is ongoing for some time and when considering costs, some mercy must be shown. It is trite that the matter of costs remains in the discretion of the court. In exercising such discretion, the court has to weigh carefully the issues, the conduct of the parties and the unique circumstances of this matter, which may have a bearing on the issue of costs to ultimately make an order that would be fair, and reasonable.

[13.4] The resources of the litigants must also be taken into consideration. After considering the argument of the parties. I am of the view that

imposing a punitive costs order on the Second Respondent would not be fair and reasonable.

ORDER

[14] Therefore, the following order is made.

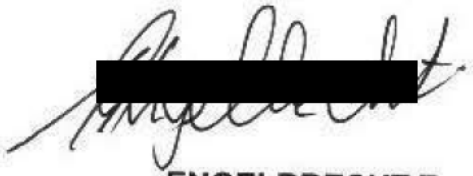
[14.1] Condonation is granted for the late filing of the Answering Affidavit incorporating the Counter Application by the Second Respondent.

[14.2] The Counter Application of the Second Respondent is dismissed.

[14.3] Declaring that the Second Respondent are guilty of an offence as envisaged by section 214(1)C) and (d) of the Companies Act, Act 71 of 2008.

[14.4] Declaring the Second Respondent to be a delinquent director in terms of section 162(5)(c)(i) and (iv) of the Companies Act, Act 71 of 2008.

[14.5] The Second Respondent is ordered to pay costs of the Application from 3 April 2024 on Party and Party Scale C, including the costs of Counsel.



ENGELBRECHT T

ACTING JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 20 May 2025.

Appearances:

For the Applicant:	Advocate Malatji MC
For the Respondent:	Mr S Ngcingwana
Date of Hearing:	03 March 2025
Date of Judgment:	12 May 2025