


IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

CASE NO: 73548/2018

In the matter between:

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
<u>08/08/19</u> DATE		 SIGNATURE

PHUMULANI ZWELITHINI RAPHAEL ZWANE

Respondent

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JUDGMENT

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Tuchten J:

- 1 The applicant (CIPC) applies to have the respondent disqualified from serving as a director under s 69(8) of the Companies Act, and/or declared delinquent or under probation under s 162(3) of the Companies Act.<sup>1</sup> For this purpose, counsel for CIPC offered three draft orders, marked A, B and C respectively, depending on the conclusions to which I come.

- 2 It is not in dispute that CIPC has standing to seek these orders and I shall not extend this judgment with a recitation of why this is so.
- 3 The respondent is an experienced chartered accountant. He used to be employed by the National Development Agency (the NDA). From 2010 to 2015, he was the chief financial officer of the NDA. On 6 November 2011, the respondent was appointed by the Minister of Energy to the board of directors of the South African Nuclear Energy Corporation SOC Limited (NECSA).
- 4 In the letter of that date appointing the respondent to the board of NECSA, the Minister referred the respondent to the Nuclear Energy Act<sup>2</sup> and the Public Finance Management Act<sup>3</sup> and "other applicable governance prescripts" to which the Minister said the appointment was subject. The Minister wrote in the letter:

The [Nuclear Energy] Act provides that a director who is in the full-time service of the State shall not be paid any remuneration for the services rendered by him as a director of NECSA, nor shall any such director be paid any travel and subsistence allowances at a rate other than that applicable to him by virtue of such service.

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<sup>2</sup> 46 of 1999

<sup>3</sup> 1 of 1999

- 5 In fact, the respondent did claim and accept director's fees for his services as a board member of NECSA. He even declared in his declarations of interests which he rendered annually to the NDA that he was doing so. The Minister took the view that in receiving and retaining the remuneration from NECSA, the respondent had acted "in direct breach of the instructions of the National Treasury" and decided to remove the respondent from office as a director of NECSA. The Minister informed the respondent of her decision on 6 November 2014.
- 6 The respondent tried through a number of avenues to reverse the Minister's dismissal decision. He first laid a complaint with CIPC itself. An inquiry was instituted. Then, before CIPC reached any conclusion, the respondent brought an application to this court under case no. 21254/2015 (the respondent's application). The respondent cited the Minister of Energy, NECSA and the CIPC as first, second and third respondents respectively.
- 7 In the respondent's application, the respondent sought orders declaring his termination as board member of NECSA unlawful and setting it aside, reinstating him and reimbursing him for board meetings he had not been allowed to attend and costs.

- 8 Several of the issues which arose before me were also in issue in the respondent's application, which came before Molopa-Sethosa J. It is part of CIPC's case before me that I should decline to revisit those findings on the basis of issue estoppel.
- 9 Molopa-Sethosa J dismissed the respondent's application. He tried to appeal the judgment, all the way up to the Constitutional Court but was never granted leave to appeal.
- 10 Using the findings in the judgment on the respondent's application, CIPC has brought the present application. This is an appropriate point to explain the three draft orders which counsel for CIPC presented.
- 11 Draft A seeks a declaration that the respondent is disqualified under s 69(8)(b)(iii) read with s 69(9)(a) of the Companies Act from serving as a director of any company for a period of five years calculated from 1 November 2014.
- 12 Subsections 69(8) and (9), as far as they are relevant for present purposes read:

**Ineligibility and disqualification of persons to be director  
or prescribed officer**

- (1) ...
- (2) A person who is ineligible or disqualified, as set out in this section, must not-
  - (a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director; or
  - (b) act as a director of a company.
- (3) A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.
- (4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to section 70 (2).
- (5) ....
- (6) ...
- (7) ...
- (8) A person is disqualified to be a director of a company if-
  - (a) ...
  - (b) subject to subsections (9) to (12), the person-
    - (i) ...
    - (ii) ...
    - (iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or
    - (iv) ...
  - (aa) ...
  - (bb) ...
  - (cc) ...
- (9) A disqualification in terms of subsection (8) (b) (iii) or (iv) ends at the later of-

- (a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or
- (b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).

- 13 Draft B asks that the respondent be prohibited and permanently disqualified under s 69(8)(a) of the Companies Act from serving as a director of any company. Section 69(8)(a) may be engaged if a court has prohibited a person from being a director or declared the person to be delinquent under s 162 of the Companies Act.
- 14 Draft C seeks to have the respondent declared delinquent under s 162(3) read with s 162(5)(c) of the Companies Act and disqualified under s 69(8) read with s 165(6)(b) from serving as a director for a period of seven years calculated from the date on which the order is made.
- 15 Subsections 162(4), (5) and (6), upon which CIPC relies, read in relevant part:
- (4) Any organ of state responsible for the administration of any legislation may apply to a court for an order declaring a person delinquent if-

- (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
- (b) any of the circumstances contemplated in subsection (5) (d) to (f) apply with respect to any legislation administered by that organ of state.
- (5) 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 or 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);
  - (b) while under an order of probation in terms of this section or section 47 of the Close Corporations Act, 1984 (Act 69 of 1984), acted as a director in a manner that contravened that order;
  - (c) while a director-
    - (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);
  - (d) ...
  - (e) ...

- (f) ...
- (6) A declaration of delinquency in terms of-
  - (a) subsection (5) (a) or (b) is unconditional, and subsists for the lifetime of the person declared delinquent; or
  - (b) subsection (5) (c) to (f)-
    - (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 at the time of making the declaration, subject to subsections (11) and (12);

16 Although, as I shall show, CIPC's case is that the respondent is indeed a person disqualified under s 69 and that while so disqualified, the respondent acted as a director, it is not CIPC's case in the present application that the court should act under s 162(5)(a). I shall therefore say no more about this aspect. CIPC's case at this level is that the respondent intentionally or by gross negligence inflicted harm on NECSA by soliciting and accepting director's emoluments. That situation is contemplated by s 162(5)(c)(iii). Counsel for CIPC submitted that relief should be granted in terms of in terms of Draft A together with either Draft B or Draft C.



- 17 Before I consider the central factual issue in the case, I must deal with one more legal aspect: whether the respondent was an employee of the state. In the respondent's application, he argued that he was, as an employee of a state owned entity, not an employee of the state. The argument was repeated before me, on the analogy with companies, where each has a separate legal personality; so that at common law an employee of a subsidiary is not an employee of the holding company.
- 18 The argument was dealt with by Molopa-Sethosa J in her judgment. She pointed out that the NDA was a public entity as contemplated by s 1 of the PFMA (which meant that the NDA as such was subject to its provisions) and held in paragraph 35 that (I paraphrase) the distinction which the respondent sought to draw between the state and the entities it created to achieve its governmental purposes was not one of substance. The learned judge rejected the argument of the respondent and held that, as a matter of law, as an employee of the NDA, the respondent was indeed an employee of the state.
- 19 This is an aspect of the case where I think issue estoppel should be applied. Issue estoppel is a recognised part of our law. Where an issue of fact or law has been decided in an earlier court case between the same parties and it is unlikely that inequitable or unfair

consequences will arise, a party will be precluded from rearguing the issue. Each case will depend on its own facts. A court asked to invoke issue estoppel must consider, amongst others, questions of equity of fairness not only to the parties themselves but to others. See *Smith v Porrit and Others*.<sup>4</sup>

- 20 I can think of no considerations, whether of fairness and equity or otherwise, that might preclude the application of issue estoppel on this issue. The determination of the issue was central to the determination of the respondent's application. It must therefore have been considered by all the other courts to which the respondent sought to appeal the order in the respondent's application. Those other courts included the Constitutional Court. To the extent that the finding constitutes precedent, it settles the law for many public servants in a similar position to the respondent. I hold that the respondent is indeed estopped from seeking the reconsideration of the finding.
- 21 If I am wrong and I ought to reconsider the position afresh, then I would hold that the finding is clearly correct. Interpretation of documents requires a unitary consideration of text, context and purpose.<sup>5</sup> In the present case, the purpose of the measure guides the

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<sup>4</sup> 2008 6 SA 303 SCA paras 10-11

<sup>5</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 SCA and the cases which followed it.

correct interpretation. The purpose of the measure is to ensure that public servants in the full time service of the state receive their remuneration from one source only, thereby reducing the risk of conflicts of interest and preferential treatment of some public servants over others. And, I might add, preventing public servants from being paid from the public purse twice for their time. There can be no rational distinction in this regard between the two categories of public servants under discussion.

- 22 Although counsel for the respondent did not address the point in oral argument, in his heads of argument counsel submitted *in limine* that the present application was incompetent because, so the argument ran, under s 162(3) of the Companies Act, CIPC was required to bring the present application within 24 months of the date on which the respondent was removed as a director of NECSA.

- 23 This is not correct. Section 162(3) reads in relevant part:

The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if-

- (a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and
- (b) any of the circumstances contemplated in-
- (i) subsection (5) apply, in the case of an application for a declaration of delinquency; or

(ii) ...

- 24 On CIPC's case, the circumstances in s 162(5)(c)(iii) apply. Whether they have been established is of course the question I must decide. But the essence of a point *in limine* such as this is that the case of the opponent is, as it were, excipiable. I think the argument proceeded on the misconception that s 162(3)(a) required CIPC to establish in the present case that the respondent was a director of *NECSA* in the preceding 24 months. But that is to misread the measure. It requires an applicant in the position of CIPC merely to allege and prove that the respondent was a director of a company, not any specific company.
- 25 To recapitulate, it is established that the respondent received director's emoluments while he was a full time employee of the state. It is common cause that the respondent was removed from the office of director of *NECSA* on the grounds of misconduct involving dishonesty. Section 69(8)(b)(iii) of the Companies Act provides in terms that a person who has so been removed from office is disqualified to be a director of a company.

- 26 I am of course well aware that the respondent denies misconduct. But he was held by the Minister to have so misconducted himself and the Minister's opinion was upheld by all the courts in which the respondent sought to challenge and overturn it. Unless and until the decision to remove the respondent as a director of NECSA for misconduct is overturned, it has legal consequences, one of which is that the respondent is disqualified to be a director of a company.
- 27 A disqualification under s 69(8)(a)(iii) ends, under s 69(9), five years after the removal from office. It then follows, inevitably, that the declaration in Draft A must issue.
- 28 Counsel for the respondent, commendably in my view, conceded this point forthrightly in oral argument. Counsel further accepted that the respondent was indeed presently a director of certain companies. Counsel said that the directorships flowed from the respondent's current position as chief financial officer of the University of South Africa.
- 29 Counsel's concession prompted me to invite the respondent whether he should not reconsider his position as to Draft A, apologise for acting as a director while disqualified from doing so and seek an accommodation with CIPC in relation to the balance of the relief