sought. I adjourned the proceedings for this purpose but no apology or change of stance was forthcoming from the respondent.

30 The way is now clear to determine the central factual issue in the case.

31 One of the important factual findings in the respondent's application related to the date on which the respondent sought approval from the NDA's executive authority, its chief executive officer Dr Nhlapo. It will be recalled that the Minister offered to appoint the respondent to the NECSA board by letter dated 6 November 2012.

32 The respondent's case is that he wrote a letter dated 13 November 2012 to the CEO of the NDA asking for approval so to act and that such approval was promptly granted in writing on a copy of the letter dated 13 November 2012. I shall call the copy of the letter dated 13 November 2012 conveying the alleged approval "the 2012 approval letter". The respondent says that he lost the 2012 approval letter but in 2014 found that he needed it. He then, in 2014, sent a fresh copy of the letter dated 13 November 2012 to the CEO and a copy of the letter of 13 November 2012 was once again returned to him by the CEO signifying approval for him to act as a director of NECSA but dated 10 October 2014.

33 In the papers in the respondent's application, the CEO disputed this version and said that the first time that she, the CEO, was approached for approval for the respondent to act as a director of NECSA was in 2014 and that no such letter dated 13 November 2012 had been sent to her in 2012.

34 Molopa-Sethosa J found that the respondent's version in this regard fell to be rejected on the papers as untrue. CIPC submitted before me that issue estoppel ought to be applied to this finding.

35 But in the present case, the respondent submitted credible evidence, which had not been before the court in the respondent's application, ie that a letter relating to an "appointment to serve on NECSA Board" had indeed been received by the CEO's assistant on 13 November 2012. I think that on this evidence, the version of the respondent that he wrote to the CEO in November 2012 asking for approval to sit on the NECSA board and that such approval was granted ought not to be rejected on the papers as false.

36 I of course intend no criticism of the judge in the respondent's application or any of the other judges who considered that case. But on the evidence now before me, I think it would be unfair to estop the respondent from asserting that he indeed sent the letter of 13

November 2013 to the CEO on that date. Having regard to the *Plascon-Evans* principle, I must decide this case on the footing that the respondent did send the letter as he alleges and that he received the CEO's approval to act as a director of NECSA.

37 Justice therefore requires that I assess, independently of the findings in the respondent's application, whether he, as contemplated by s 162(5)(c)(iii) of the Companies Act, acted in a manner that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of his functions within and duties to NECSA.

38 By soliciting and receiving director's emoluments from NECSA in circumstances in which he was not entitled to do so, the respondent misconducted himself and breached his trust to NECSA. The crucial question is whether he did so wilfully (ie in the knowledge that he was not entitled to receive such emoluments and NECSA was not obliged to pay them to him) or was grossly negligent in doing so. I shall now address that question.

39 One ought then to ask this question: why, at the time that the Minister appointed the respondent a director of NECSA, or indeed at any time thereafter, did the respondent not directly seek a ruling on his own specific individual situation?

40 In his founding affidavit in the respondent's application, the respondent contended that as a matter of law he was not an employee of the state and for that reason did not regard the Minister's warning in his appointment letter dated 5 November 2011 as applicable to him. In his answering affidavit in the present application, the respondent makes the case that as at that date his "understanding at the time" was that the Minister was referring only to people who were directly employed by the state and not those employed by state owned entities or institutions, such as the NDA.

41 Why would the respondent conceivably have thought that a distinction in this regard was being drawn between employees of the state and employees of its entities and institutions? He said in his answering affidavit that the Minister's appointment letter was sent to him under cover of an email dated 9 November 2012 from the company secretary of NECSA. He points out that this email called on him to provide his banking details for "purposes of payment of Board fees".

42 This request for banking details, the respondent asserted, grounded his belief that he was entitled to receive directors' emoluments. He demonstrated that NECSA drew the same distinction and paid all its other directors in the respondent's position director's emoluments. Although CIPC seeks to cast doubt on this allegation, it is not contradicted. Additionally, the respondent annually completed and submitted returns to the NDA declaring that he received director's emoluments from NECSA. The Auditor General reported on these disclosures and reported, apparently with approval, that the management of NECSA had commended the respondent for having made these disclosures.

43 A factor which weighs against the respondent's general credibility on this issue is that he did not take unpaid leave from the NDA for the time that he spent attending to the affairs of NECSA. The respondent admits that he began in 2014 to have doubts about the correct interpretation of the categorisation of those employees of the state who were not allowed to receive director's emoluments from NECSA.

44 Nevertheless, I cannot reject on the papers the respondent's version that for some time he believed that he was entitled to receive director's emoluments. There appears to have been a prevalent belief in the NDA and NECSA that, arbitrary as it may have been, a

distinction existed between persons employed directly by the state and persons employed by the state through its agencies for purposes of director's emoluments.

45 But at a later stage, the respondent began, on his version, to have doubts. These arose from directives put out by the Treasury. The directive in force in 2012 provided that:

> Employees of National, Provincial and Local Government, Agencies and Entities of Government serving on Public Entities are not entitled to additional remuneration.

46 The 2012 directive, the respondent says did not cause him to doubt that he was entitled to director's emoluments. But in 2014, the language of the directive changed. It read:

> Employees of National, Provincial and Local Government ***Institutions***, Agencies and Entities of Government serving **as *office-bearers*** on Public Entities are not entitled to additional remuneration.[6]

47 The respondent says that the change in language between the two directives gave rise to his doubts and that these doubts caused him to seek clarification from the Treasury. The clarification sought by the

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[6] My emphasis

respondent was first done over the telephone and then formalised in emails. The respondent did not ask for a ruling specific to himself. But the respondent, speaking as a director of NECSA, sought in general terms clarification of the directive which might cover his own situation. The answer that he got, in an email dated 13 October 2014 from a Mr Chris Kruger was this:

> Any person working for a public entity can technically serve on another public entity's board. The question which needs to be clarified beforehand may be the one on "conflicting interests". I do not think that an executive manager of the same entity can serve on its board as an independent (private) member, besides being there in an ex officio capacity.
>
> Should a person from another entity want to serve on your board, he/she should obtain the necessary approval from the executive authority to take up remunerative work outside his/her official duties (the principle is established for public servants appointed in terms of the Public Service Act, 1994 (Proc. No. 103 of 1994((see section 30 of the said Act), and there should be a similar provision for each entity.

48 The respondent says in his answering affidavit in the present case that he understood Mr Kruger's clarification to mean that he had to get the necessary approval from his executive authority, in this case the CEO of the NDA, to "take up remunerative work outside" his duties.[7]

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[7] Para 4.20.2 of the respondent's answering affidavit

49 It was this understanding that prompted the respondent to re-send his initial request for permission to serve on the NECSA board to his CEO in 2014. So far, so good.

50 But as the respondent must have known, the position (on the respondent's version) had changed; and not so subtly, either. The respondent believed (again on his version) in 2012 that once he had been given permission to act as a director of NECSA, it followed as a matter of law (because of the interpretation he gave to the phrase "employee of the state") that he was entitled to director's emoluments. But in 2014, the respondent knew that he had to ask his executive authority for permission to be remunerated. Yet he did not do so.

51 The respondent says that it was the very Treasury clarification that he received which prompted him to obtain confirmation of the approval he had received from the CEO of the NDA to take up his NECSA position. But he did not need it for confirmation that he was authorised to act as a NECSA director. At that stage nobody disputed that he was entitled to act as a director. What had changed was that the Treasury had emphasised the need to obtain permission *to receive remuneration* for acting as a director.

52 Why did the respondent not ask his executive authority for permission to be remunerated as a director of NECSA? There can be only one answer. He knew that such permission would be refused. I cannot think of any reason why an honest CEO would agree to the respondent's being paid twice for his time. And that explains the true reason why the respondent in 2014 sought confirmation of the permission to act as director which he had received in 2012. Not because he thought that he needed to show he had permission to act as director. Because he wanted to use the letter as cover after the event of the 2014 Treasury directive, even though he knew it was not cover, for his double remuneration.

53 The respondent is thus in the position of a person who sedulously avoids taking the very action that would lead to perfect clarity on his position.[8] He must have known, and therefore did know, that he required permission to receive director's emoluments. In fact, he says that he knew so. He must have known that if he drew attention to his position by asking for permission *to be paid*, permission would be refused.

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[8] Compare *R v Myers*, 1948 1 SA 375 AD 382, where it was said that a belief is not honest which, though in fact entertained by the representor was itself the outcome of fraudulent diligence in ignorance - that is, of a wilful abstention from all sources of information which might lead to suspicion, and a sedulous avoidance of all possible avenues to the truth, for the express purpose of not having any doubt thrown on what he desires and is determined to, and afterwards does (in a sense) believe.

54 Counsel for the respondent referred in argument to the situation around the necessity to ask for permission to be paid as a grey area. But it was not a grey area as far as the respondent was concerned. He knew what the correct position was. He thought that if he was ever called to account for his conduct, he could profit from the doubt that had, or still, existed amongst his colleagues in similar positions.

55 The conclusion, then, is that from the date the respondent received the email dated 13 October 2014 from Mr Kruger of the Treasury. He knew he was not entitled to receive director's emoluments from NECSA unless he had permission from the CEO of the NDA to do so. He did not seek such permission. He continued to receive emoluments. He has kept all the emoluments he received. He has not apologised at all for his conduct but has tried, without justification, to claim that he behaved honestly and correctly.

56 CIPC has thus established that the respondent, in soliciting and accepting director's emoluments from NECSA, at least from 13 October 2014, acted in a manner that amounts to wilful misconduct and breach of trust in relation to the performance of the respondent's duties to NECSA. CIPC has thus brought the respondent within the scope of s 162(3) of the Companies Act and is thus entitled to an order declaring the respondent delinquent.

57 I turn to the question of sanction. I am mindful, although I use the term sanction, that s 162(5) of the Companies Act is not a penal provision. Its purpose is to protect the investing public against the type of conduct which leads to an order of delinquency and to protect those who deal with companies against the misconduct of delinquent directors. The measure aims to protect those who deal with companies by ensuring that the management of companies is in fit hands.[9]

58 I bear in mind that the misconduct which I have found proved against the respondent was, on the respondent's version, prevalent amongst his colleagues in full time employ of the state who served as directors of entities such as and similar to NECSA. As the respondent's counsel submitted, too, the respondent must not be made a scapegoat for the misconduct of others.

59 Against that, the respondent has persisted in his untenable attempts to portray himself as a victim and escape all the consequences both of his own conduct and of law, as it was found to be in the judgment on the respondent's application and its subsequent conformation by appellate bodies. Even after being given a chance to reflect on his conduct by this court, he has remained intransigent.

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9 *Gihwala and Others v Grancy Property Ltd and Others* 2017 2 SA 337 SCA paras 142 and 144

60 Under s 162(6)(b), the declaration of delinquency, which under s 162(5) I must make, 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. In Draft C, CIPC asks for an order for disqualification for seven years. I shall therefore not consider whether a more severe sanction would be warranted.

61 Relief must therefore issue under Drafts A and C. Costs will follow the result.

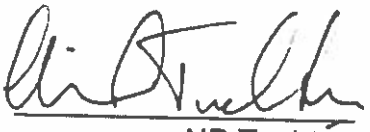
62 I make the following order:

1 The respondent is declared to be disqualified in terms of s 69(8)(b)(ii) read with s 69(9)(a) of the Companies Act, 71 of 2008 (the Companies Act) from serving as a director of any company for a period of five years calculated from 1 November 2014.

2 The respondent is declared delinquent in terms of s 162(3) read with s 162(5)(c) of the Companies Act.

3 The respondent is declared disqualified in terms of s 69(8)(a) read with s 162(6)(b) of the Companies Act from serving as a director of any company for a period of seven years calculated from the date upon which this order is handed down.

4 The respondent must pay the applicant's costs in this application, including the costs of two counsel.



NB Tuchten
Judge of the High Court
8 August 2019