REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 11/23050

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

27 November 2012 .....
DATE SIGNATURE

In the matter between

FAITH NTOMBIKAYSIE MSIMANG N.O	**First Applicant**
MAVUSO MSIMANG N.O **(In their representative capacities as the trustees for the time being of the THABIZOLO FAMILY TRUST)**	**Second Applicant**

and

PETER JOHN KATULIIBA	**First Respondent**
PERRY- MASON MNTUNZI MDWABA	**Second Respondent**
MALONEY BEHAN	**Third Respondent**
MEMEZA-QRX (PTY) LTD	**Fourth Respondent**
IWIN (PTY) LTD	**Fifth Respondent**
INVESTAGE 13 (PTY) LTD	**Sixth Respondent**
MZWANELE JIMMY MANYI	**Seventh Respondent**
TEBOGO REG-BASTA MAKGATHO	**Eight Respondent**

DOREEN KOSI	**Ninth Respondent**
NKULULEKO SOWAZI N.O (In his representative capacity as sole trustee for the time being of the MEMEZA-QRX EMPOWERMENT TRAINING TRUST)	**Tenth Respondent**
THE REGISTRAR OF COMPANIES	**Eleventh Respondent**

J U D G M E N T

KATHREE-SETILOANE J:

[1] This matter concerns the application of s 162 of the Companies Act, 71 of 2008 ("the new Companies Act"), which allows for a court, on application, to declare a director either:

(a) delinquent and thus prohibited from being a director; or

(b) under probation, and thus restricted to serving as a director within the conditions of that probation.

The applicants, Mr Mavuso Msimang ("Mavuso Msimang") and Mrs Faith Msimang ("Faith Msimang"), trustees of the Thabizolo Family Trust ("the Thabizolo Trust"), which is a 39% shareholder in the fourth respondent, Memeza-QRX (Pty) Ltd ("the company"), seek such an order against the first respondent, Mr Peter Katuliiba ("Katuliiba") and the second respondent Mr Perry-Mason Mdwaba ("Mdwaba"), who are directors of the company. The company is a black empowerment and investment holdings company.

[2] The fifth to the tenth respondents are the remaining shareholders of the company. The third respondent, Ms Maloney Behan ("Behan") is also a director and shareholder of the company. The fourth director of the company, Ms N Mbele, had resigned with effect from 30 April 2011. In addition to being directors of the company, Katuliiba and Mdwaba also manage the company. The applicants seek an order, *inter alia*:

(a) declaring that Katuliiba and Mdwaba are delinquent directors as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act, subject to such conditions, if any, as the court considers appropriate;

(b) alternatively, declaring that Katuliiba and Mdwaba are placed under probation as contemplated in s 162(7)(a)(iii) of the new Companies Act, subject to such conditions, if any, as the court considers appropriate; and

(c) declaring that Faith Msimang is appointed as a director of the company in place of Katuliiba and Mdwaba in terms of s 163(2)(f) of the Companies Act;

(d) directing the company to convene a meeting, as contemplated in s 61 of the Companies Act, of all shareholders whose names appear in the company register of shareholders, such meeting to be held on a date being not more than 60 days from the date of the order, and for purposes of resolving the following –

(i) the steps to be taken to fill the vacancies on the board of directors to ensure that the board functions with the prescribed minimum of four directors;

(ii) the steps to be taken to fill the vacancy in the position of the company's auditor;

(iii) nominating a chairman to serve on the board of directors;

(iv) the steps to be taken to ensure that the company's annual financial statements are prepared and audited; and

(v) the steps to be taken to ensure that the tax status of the first respondent, during his employment with the company, is finally resolved with the South African Revenue Services ("SARS").

[3] In 2003, the company made its first and only major investment, a 30% shareholding in Young and Rubicam Holdings (Pty) Ltd ("Young and Rubicam RSA") from WPP Kraken BV ("WPP Kraken"), a company incorporated in accordance with the laws of the Netherlands. WPP Kraken is a subsidiary of WPP Group plc ("WPP"), a company incorporated in accordance with the laws of England, with a dual listing on the London and New York stock exchanges. Pursuant to the company's acquisition of shares in Young and Rubicam RSA, Young and Rubicam RSA changed its name to WPP-Memeza Holdings (Pty) Ltd ("WPP-Memeza Holdings"). WPP-Memeza Holdings is the sole shareholder of Young and Rubicam South Africa (Pty) Ltd ("Young and Rubicam"), a company incorporated in accordance with the company laws of South Africa.

[4] Young and Rubicam is the sixth largest advertising agency in the world, operating in more than 180 countries. It has operated in South Africa since the early 1970s. Its main objective in partnering with the company was to secure a black empowerment partner with robust empowerment credentials. By 2006, the company's investment in Young and Rubicam remained its sole investment and its major source of income, whic h was derived from an annual management fee payable in respect of management services rendered by the company to Young and Rubicam. The core business of the company is the rendering of management services to Young and Rubicam as a *quid pro quo* for its shareholders and the management fee.

[5] Mavuso Msimang is a co-trustee in the Thabizolo Family Trust, which holds a 39% shareholding in the company. Mavuso Msimang was also the chairman of the company from its inception in 2001 until July 2009, when he resigned following upon his unhappiness at being outvoted at a special shareholders' meeting, called at his instance, to approve the payment of a commission to Katuliiba for a business opportunity, which Katuliiba had acquired for the company. Mavuso Msimang is also the chairman and director of WPP-Memeza Holdings, which is the sole shareholder of Young and Rubicam in which the company has a 30% shareholding. Mavuso Msimang

holds this position by virtue of his appointment by WPP Kraken, which has a 70% shareholding in Young and Rubicam.

[6] Katuliiba is the managing director of the company. He is the sole shareholder in Investage 13 (Pty) Ltd (the sixth respondent), which is a 17% shareholder in the company. He is also a director of WPP-Memeza Holdings. He holds this position by virtue of a shareholders' agreement between the company and WPP Kraken, entitling the company to appoint directors to the board of WPP-Memeza Holdings. He became the managing director of the company following on Mavuso Msimang's resignation in July 2009. He was a director of Young and Rubicam until June 2011.

[7] Mdwaba is a shareholder and current director of the company. He is also the company secretary. He was a director of Young and Rubicam until June 2011.

[8] As shareholders in the Thabizolo Family Trust, the applicants have an interest in the solvency and conduct of the business of the company. The applicants allege that Katuliiba and Mdwaba have been guilty of serious and prolonged misconduct in their capacities both as directors of the company, and directors of Young and Rubicam, on whose board they serve as representatives of the company. This, they contend, has paralysed the management and affairs of the company, and has necessitated the launch of this application in terms of s 162 of the new Companies Act. The applicants take issue with Katuliiba and Mdwaba for their purported failure to:

(a) prepare the annual financial statements of the company since the financial year ending 28 February 2004;
(b) convene an annual general meeting of the company since the financial year ending 28 February 2006;
(c) appoint a director to replace Ms Mbele on the company's board of directors, which is required to have four directors. The applicants contend that despite a lapse of 18 months since Ms Mbele's resignation, which became effective from 30 April 2011, no steps have been taken to fill the vacancy;

(d) attend board meetings of Young and Rubicam during May 2011;

(e) co-operate with the black economic empowerment ("BEE") rating agencies to enable Young and Rubicam to obtain its BEE rating credentials for purposes of procuring advertising contracts. The applicants contend that this has resulted in Young and Rubicam being unable to participate in a bid for the advertising business of the SABC, which represents the loss of a significant opportunity, and source of revenue for Young and Rubicam. In addition, they contend that the lack of audited financial statements for the company, for the 2009 and 2010 financial years, in particular, has severely hampered Young and Rubicam's ability to obtain audit certificates as required by the BEE rating agencies.

[9] The applicants also take issue with Katuliiba, in particular, for failing to:

(a) approve bank guarantees, on 13 May 2011, to enable Young and Rubicam to provide security for the action instituted by the company against Young and Rubicam for payment of the management fee; and

(b) give a full and proper account of his monthly income received from the company relating to his status as taxpayer;

Other applications which may have a bearing on present application

[10] Of the eleven respondents, only Katuliiba, Mdwaba, and the company oppose this application ("the respondents"). Their principle contention is that several applications, which were launched before, and after, the present application (instituted on 20 June 2011), have a direct bearing on it, but have not been dealt with by the applicants in their replying affidavit. The respondents submit that the current application is just one of five applications that concern the dispute over the shareholding of the company, and that the current application must be postponed pending the determination of those applications.

[11] The first of the five applications, referred to by the respondents, is *Sylvester Haanyama, and Sheldon Erasmus v Investage 13 (Pty) Ltd and 15*

Others, under case no 40251/09 ("the Haanyama application"). On 14 October 2009, Mr Sylvester Haanyama ("Haanyama") and Sheldon Erasmus ("Erasmus"), former directors of the company, obtained an interim interdict ("the interim order") preventing the company from utilizing the funds in its bank account except for making payments to its auditors, attorneys, administrators and Katuliiba. The balance of the relief sought on the return day included an order setting aside their removal as directors of the company and their reinstatement, as well as an order setting aside the appointment of Katuliiba and Mdwaba as directors of the company. Mavuso Msimang supported Haanyama and Erasmus in this application and signed confirmatory affidavits confirming their version of events. The Haanyama application was referred to trial, on 17 May 2011, by consent of the parties. The trial is set down for 20 May 2013. Both the company and Katuliiba have brought an application to vary the interim order.

[12] The Haanyama application has brought into dispute not only the shareholding of Haanyama and Erasmus, but also the shareholding of the new shareholders in the company, namely the second (Mdwaba), third (Behan), seventh, eight, and ninth respondents. Haanyama and Erasmus were removed as directors of the company pursuant to a director's resolution, which was taken on 15 August 2009. Thereafter, the directors caused the company's register to be altered to reflect that Haanyama and Erasmus were no longer shareholders of the company (having held 15% and 5% of the shares respectively), and that the shares had been allocated to the new shareholders as follows: 12% to the second respondent (Mdwaba), 10% to the third respondent (Behan), 5% to the seventh respondent; 5% to the eight respondent; and 9% to the ninth respondent.

[13] Haanyama and Erasmus allege, in the Haanyama application, that they were divested of their shares in the company without signing an instrument of transfer, and that Katuliiba contravened the provisions of s 221 of the (now repealed) Companies Act, 61 of 1973 ("the old Companies Act"), by allotting and issuing shares in the company without prior approval of the company's

shareholders in general meeting, thereby creating new shareholders without proper authority.

[14] These allegations are then reiterated by the applicants, in the present application, together with the allegation that the company is currently operating in an unstable environment as a result of the conduct of the Katuliiba in altering the company's share register. The respondents, in answer, state that they find Mavuso Msimang's response remarkable, as he had, prior to the launching of the present application, been fully aware of the disputes which have arisen between the company, and Haanyama and Erasmus. They point out that Msimang was the directing mind of the company, as chairman of the board, at that time, and he was also a signatory, on behalf of the applicants, to the shareholders' agreement of 26 October 2004, which reflected neither Haanyama nor Erasmus as shareholders in the company. They further allege that he signed the share certificates for all the shareholders after 2004, and he participated in all directors' meetings of the company between 2004 and July 2008, but at no point during his tenure did he raise any objection to the present shareholders or their shareholding.

[15] On 26 January 2010, in the matter of *Sylvester Haanyama and Sheldon Erasmus v Investage 13 (Pty) Ltd and 15 Others*, under case no 03112/10, Haanyama and Erasmus sought an order that the company be restrained from receiving money, due to it from Young and Rubicam, into any bank account except for the one held at First National Bank ("the interdict application"). This application had the desired effect, as Young and Rubicam decided not to pay over the money it owed to the company. Consequently, the application was never set down for hearing by Haanyama and Erasmus.

[16] In June 2012, in the matter of *WPP Kraken and Others v Peter John Katuliiba; Perry-Mason Mdwaba and Memeza-QRZ (Pty) Ltd*, under case no 16899/2012, various applicants including the company, WPP-Memeza Holdings and Young and Rubicam sought an order against Katuliiba and Mdwaba interdicting them from conducting themselves directly or indirectly, in any manner whatsoever, which was contrary to their fiduciary duties that they

held towards Young and Rubicam and WPP-Memeza Holdings, and from publishing defamatory statements about the applicants particularly as regards accusations of 'fronting' and other ancillary relief ("the Young and Rubicam application"). Extensive affidavits have been filed by all the parties and there are interlocutory applications which require resolution before the application can be set down for hearing. Of particular relevance to the present application is that it has emerged, in the Young and Rubicam application, that Mavuso Msimang, in his capacity as chairman of WPP-Memeza Holdings, signed a resolution, on 17 June 2011, to remove Katuliiba and Mdwaba as directors of Young and Rubicam.

[17] As indicated earlier in the judgment, in June 2009 in the matter of *Peter Katuliiba and Memeza-QRX (Pty) Ltd v Sylvester Haanyama and Others*, under case no 40251/09, both Katuliiba and the company applied for an order on an urgent basis, *inter alia,* amending the interim order which was obtained by Haanyama and Erasmus on 14 October 2009 ("the application to vary"). This application was opposed by Mavuso Msimang, and was struck from the roll for want of urgency.

[18] At the hearing of the current matter, I was informed that the application to vary was set down on the normal motion role for the week 23 October 2012. On Monday 8 October 2012, two days before the hearing of the current matter, Haanyama, Erasmus and Mavuso Msimang filed further answering affidavits. The respondents contend that those affidavits are highly relevant to the current proceedings, thus making it clear that the current application is stale as it ignores the many legal and factual events, which have occurred after its launch. I understand that the application to vary was heard on 23 October 2012, and judgment has been reserved.

[19] As mentioned, on 14 October 2009 the company (and its directors) were interdicted, from transferring the accounts or credit balances of funds held in the RMB Private Bank ("RMB") account numbers 62050231027 and 62072314413 ("RMB accounts") for the benefit of the company, to any third party or entity and, from accessing the funds held in these accounts. This

notwithstanding, RMB and the company were permitted, in terms of the court order, to make payment from the RMB accounts of invoices received from H Moosa & Co, Bell Dewar Inc, Levitt Kirsten Management Services CC, and the monthly administration fee of Katuliiba in the amount of R25000 per month for the months of July, August and September 2009, and any other subsequent months thereafter.

[20] H Moosa & Co was the company's auditors. It resigned in February 2011. Bell Dewar Inc was the company's commercial attorneys, and Levitt Kirsten Management Services CC provided secretarial services to the company. In December 2009, the company informed Young and Rubicam that it must pay the management fees owed to it into a new bank account. This then resulted in the bringing of the interdict application, by Haanyama and Erasmus, to prevent Young and Rubicam from paying money into the new bank account claiming *inter alia* that:

"...I have further been advised that the only basis for the aforesaid request to be made [the request by the company to Young and Rubicam, and other debtors to make payment into the new bank account] is for the respondents who are presently in dispute with the applicants to unlawfully get their hands on funds owing by [Young and Rubicam] to [the company] to the ultimate detriment of the parties."

[21] The respondents in the interdict application, including Katuliiba, answered pertinently that they required the funds in order to continue to run the business of the company, hold shareholder's meetings, pay creditors, remunerate its directors, and meet the company's other statutory responsibilities. Similarly, in the present application, the respondents state that the effect of the interdict was to deprive the company of funds to remunerate its directors or pay its expenses.

[22] The respondents argue that it is clear from the various applications, referred to above, that the purpose of the present application is the removal of Katuliiba and Mdwaba as directors of the company before the outcome of the Haanyama application, which has now been referred to trial, so as to stifle

opposition to the takeover of the shareholding of the company. This, they contend, is evident from the Haanyama application, which brings to light that Haanyama, Erasmus and Mavuso Msimang are working in concert to remove Katuliiba and Mdwaba as directors of the company.

[23] The respondents take issue that there is no explanation from Mavuso Msimang, in the Haanyama application, of the affairs of the company between 2003 and 2009, despite the fact that he was a director and the chairman of the company during this period. They contend that it was also during this period that events concerning the removal of Haanyama and Erasmus and the change in shareholding of the company occurred yet, as is apparent from the Haanyama application, Mavuso Msimang supports their reinstatement as shareholders in the company. They, therefore, maintain that the events which Mavuso Msimang confirms, in the Haanyama application, are in direct contradiction with his own actions taken during the period of his chairmanship of the company.

[24] The respondents submit that a clear inference can be drawn that the improper purpose of the present application is to remove Katuliiba and Mdwaba as directors, so as to eliminate any opposition to a takeover of the shareholding of the company, before the outcome of the trial. They contend that the present application is thus an abuse of court process because the applicants invoke a statutory remedy, under the new Companies Act, for the improper purpose of removing Katuliiba and Mdwaba as directors of the company, in order to stifle opposition to a takeover of the shareholding of the company by the Msimangs, Katuliiba and Mdwaba.

[25] The applicants counter these contentions by arguing that although the numerous applications, relied upon by the respondents, may have some relevance to the issues in question, and that there may be disputes of fact in relation to some issues, any such disputes of fact are irrelevant to the failure on the part of Katuliiba and Mdwaba to:

(a) prepare the annual financial statements of the company since the financial year ending 28 February 2004;
(b) convene an annual general meeting ("AGM") of the company since the last held AGM in 2006; and
(c) appoint an auditor since February 2011, when the company's auditor resigned.

[26] The applicants point out that most of these contraventions preceded the interim interdict which was obtained on 14 October 2009 by Haanyama and Erasmus, and neither the Haanyama application nor any of the other applications relied upon by the respondents, have any relevance to the question of whether Katuliiba and Mdwaba may be declared to be delinquent directors for failure to carry out their statutory obligations to cause to prepare annual financial statements for the company since 2004, hold an AGM since 2006, and appoint a company auditor since February 2011. The applicants submit that although Mavuso Msimang may have a commercial objective for the removal of Katuliiba and Mdwaba as directors of the company, this does not make it impermissible for the applicants, as shareholders of the company, to invoke a statutory remedy – such as is provided for under s 162 of the new Companies Act – where the pre-requisites for invoking the remedy are satisfied. I agree.

[27] I am of the view, in this regard, that the use of the remedy, under s 162 of the new Companies Act, to effect the removal of directors from a company who are acting in contravention of their statutory duties, for a commercial purpose, does not have an objectionable and improper purpose. The mere invocation of a statutory remedy for reasons other than those, for which it is primarily intended, although typical, is not, in my view, complete proof of *mala fides*. In order to prove *mala fides,* a further inference that an improper result was intended is needed (*Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1999 (3) SA 389 (SCA) at 414I-J). I am, however, unable to draw that inference from either the current application or any of the other applications relied upon by the respondents.

The Statutory Framework

[28] The applicants submit that the failure of Katuliiba and Mdwaba to, prepare annual financial statements for the company since 2004, hold an AGM since 2006, and appoint an auditor since February 2011, constitute clear contraventions of the old Companies Act, and are, therefore, grounds for the relief claimed under s162(5)(c)(iv)(aa) of the new Companies Act.

[29] Section 162 of the new Companies Act provides that directors can be declared "delinquent" or "under probation" on various grounds, and on application by certain categories of applicants. This provision is directed at protecting companies and corporate stakeholders against company directors, who have proven themselves to be unable to manage the business of the company or have failed in, or are in neglect of, their duties and obligations as directors of a company. There is no equivalent provision in the old Companies Act.

[30] In terms of s162(2); (3) and (4) of the new Companies Act, three categories of possible applicants may bring an application to declare a person delinquent or under probation. These are:

(a) a company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company (s 162(2));
(b) the Companies and Intellectual Property Commission or the Takeover Regulation Panel (s 162(3)); and
(c) an organ of state responsible for the administration of any legislation (s162(4)).

[31] In terms of s 162(2)(a) and (b) of the new Companies Act, where the application is brought by the first category of persons, as provided for in s 162(2) of the new Companies Act, the Court must make an order declaring that person delinquent if he or she is a director of that company or within the

24 months immediately preceding the application, was a director of that company, and the circumstances contemplated in –

(a) s162(5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or

(b) s 162(7)(a) and (8) apply, in the case of an application for probation.

A person may be declared delinquent under the circumstances prescribed in 162(5) of the new Companies Act, which provides:

"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 No. 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, 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) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation;

(e) has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation; or

(f) within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective whether concurrently, sequentially or at unrelated times, that were[sic] convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and –

(i) the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty; and

(ii) the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, close corporation or juristic person at the time."

A court is obliged, in terms of s 162(5) of the new Companies Act, to make an order declaring a person to be a delinquent director if that person has conducted himself or herself in a manner contemplated in s 162(5)(a) to (f) of the new Companies Act.

[32] In terms of s 69(8) of the new Companies Act, a person is disqualified from being a director of a company if, amongst other things –

"(a) A court has prohibited that person to be director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act 69 of 1984)."

A director that has been declared to be delinquent, by an order of court, in terms of s162 of the new Companies Act is thus disqualified, and prohibited from being a director of a company. There is no need for the Court to order the removal of the delinquent person because of the 'automatic inherent

effect' of the order declaring a person to be delinquent in terms of s 162(5) of the new Companies Act (*Kukama v Lobelo* [2012] JOL 28828 (GSJ)).

[33] In terms of s 162(6)(a) and (b) of the new Companies Act, a declaration of delinquency, which is made in terms of:

(a) s 162(5)(a) or (b) is unconditional and subsists for the lifetime of the person declared delinquent, or

(b) s 162(5)(c) to (f) 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 subsists for a period of seven years from the date of the order, or a longer period if so determined by the court at the time of making the order (See: s162(6)(b)(i) and (ii)).

[34] In terms of s 162(11)(a) and (b) of the new Companies Act, a person who has been declared delinquent in terms of s 162(5)(c) to (f) may apply to court to:

(a) suspend the order of delinquency with or without conditions, at any time more than three years after the order of delinquency was made, or

(b) set aside an order of delinquency at any time more than two years after it was suspended in terms of s 162(11)(a) of the new Companies Act.

When considering an application contemplated in s 162(11) of the new Companies Act, the court may:

"(a) not grant the order applied for unless the applicant has satisfied any conditions that were attached to the original order, or imposed in terms of subsection (11)(a); and

(b) grant an order if, having regard to the circumstances leading to the original order, and the conduct of the applicant in the ensuing period, the court is satisfied that –

(i) *the applicant has demonstrated satisfactory progress towards rehabilitation, and*

(ii) *there is a reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future."* (See: s 162(12)(a) and (b)(i) and (ii))

Meaning of 'gross negligence' and 'wilful misconduct'

[35] The applicant relies, in particular, on s 162(5)(c)(iv)(aa) of the new Companies Act, which provides that a court must make an order declaring a person to be a delinquent director if the person acted in a manner 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. Although the concept of a 'delinquent director' is an innovation in the new Companies Act, the concepts of 'gross negligence' and 'wilful misconduct' are not new to our company law.

[36] Our courts have had occasion to consider and develop the concept of 'gross negligence' in numerous cases. In *Transnet Ltd t/a Portnet v Owners of the MV "Stella Tingas" and Another* 2003 (2) SA 473 (SCA) at para 7, the Supreme Court of Appeal observed:

"...It follows, I think, 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 properly 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 no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity."*

[37] In the earlier judgment of *S v Dhlamini* 1988 (2) SA 302 (A) at 308D-E, 'gross negligence' was described as follows:

"Gross negligence in our common law, both criminal and civil, connotes a particular attitude or state of mind characterised by an entire failure to give consideration to the

consequences of one's actions, in other words, an attitude of reckless disregard of such consequences."

The Supreme Court of Appeal, in considering the reference to "reckless disregard" in *S v Dhlamini* observed, in *Philotex (Pty) Ltd and Others; Braitex (Pty) Ltd and Others v Snyman and Others* 1998(2) SA 138 (SCA) at 143G-J to 144A-B, that:

"The test for recklessness is objective insofar as the defendant's actions are measured against the standard of conduct of the notional reasonable person and it is subjective insofar as one has to postulate that notional being as belonging to the same group or class as the defendant, moving in the same spheres and having the same knowledge or means to knowledge: S v Van As 1976 (2) SA 921 (A) at 928C-E. One should add that there may also be a subjective element present if the defendant has the risk-consciousness mentioned in [*S v Van Zyl* 1969 (1) SA 553 (A) at 559D-G] *but that, as indicated, is not an essential component of recklessness and its existence is no impediment to the application of the objective test referred to the above.*

It remains, as far as subjectivity is concerned, to warn that risk-consciousness in the realm of recklessness does not amount to or include that foresight of the consequences ('gevolgsbewustheid') which is necessary for dolus eventualis: Van Zyl *at 558, 559E-F. Accordingly, the expression 'reckless disregard of the consequences' in* Dhlamini *must not be understood as pertaining to foreseen consequences but unforeseen consequences – culpably unforeseen – whatever they might be.*

In its ordinary meaning, therefore, 'recklessly' does not connote mere negligence but at the very least gross negligence and nothing in s 424 warrants the words being given anything but its ordinary meaning."

[38] The meaning of the concept 'wilful misconduct' has also been considered by our courts in the past. In *Rustenburg Platinum Mines Ltd v South African Airways* and Pan American World Airways Inc 1977 (1) Lloyds LR 19, (Q.B (Com.Ct.)) 564, Ackner J (at 569) held:

"it is common ground that 'wilful misconduct' goes far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness maybe."

The above dictum was approved and adopted into our law in *KLM Royal Dutch Airlines v Hamman 2002 (3) SA 818 (W)*, at para 17.

[39] In the application of the 'gross negligence' or 'wilful misconduct' test, the Court must have regard to the conduct of Katuliiba and Mdwaba in the performance of their duties as directors of the company under the company's memorandum of incorporation and the statutory framework. In so doing, regard must be had to the scheme of the transitional arrangements as provided for in Schedule 5 of the new Companies Act, and its application to the old Companies Act.

Transitional Arrangements

[40] Schedule 5 of the new Companies Act entitled 'Transitional Arrangements' ("t he transitional arrangements"), contains provisions which have been designed to ensure a seamless transition from the old to the new Act. Item 2 of the transitional arrangements provides for the continuation of pre-existing companies. It provides that as of the general effective date (the date on which s 1 of the Act came into operation, being 11 May 2011), every pre-existing company that was, immediately before that date, incorporated or registered in terms of the old Companies Act, or recognised as an 'existing company' in terms of the old Companies, continues to exist as a company, as if it had been incorporated and registered in terms of the new Companies Act, with the same name and registration number previously assigned to it, subject to item 4 of the transitional arrangements which relates to what is stated in the a company's memorandum of incorporation, and any rules made by the company.

[41] Significantly, items 2 (7)(a) and (b) of the transitional arrangements provide that if immediately before the general effective date, a particular pre-existing company has passed its financial year end but has not completed the requirements in terms of the previous Act for publishing, audit and approval of its annual financial statements for the financial year –

(a) the provisions of the previous Act continue to apply with respect to the publishing, audit and approval of those statements; and

(b) the provisions of the new Companies Act will apply to each subsequent financial year end and annual financial statement of that company.

[42] Item 7 of the transitional arrangements, which relates to company finance and governance of companies, ensures that a company director, prescribed officer, company secretary or auditor of a pre-existing company immediately before the effective date, being 11 May 2011, continues to hold that office as from the effective date, subject to the company's memorandum of incorporation, and the Act. Item 7(4) of the transitional arrangements provides for any vacancy in the officer of director, company secretary or auditor of a pre-existing company as from the effective date to be filled in accordance with the new Companies Act.

[43] Item 7(5) of the transitional arrangements then makes provision for the new Companies Act to apply to the duties, conduct, and liability of every director of a pre-existing company from the effective date, being 11 May 2011. Section 76 of the new Companies Act provides for the 'standard of directors conduct', whilst s 77 provides for the 'liability of directors'. Section 76 (3) provides:

"Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director–

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person–

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director."

[44] To the extent, therefore, that Katuliiba and Mdwaba have failed to prepare annual financial statements for the company since the financial year ending 2004; convene an AGM of the company since the last held AGM in 2006, and appoint an auditor since February 2011, when the company auditors resigned, the provisions of the old Companies Act will continue to apply with respect to the publishing, audit and approval of the annual financial statements for the February 2011 financial year end, and the provisions of the new Companies Act will apply to the February 2012 financial year end.

Statutory obligation to prepare Annual Financial Statements

[45] In terms of s 286(1) of the old Companies Act, a director of a company shall in respect of every financial year of the company cause to be made out in one of the official languages of the Republic annual financial statements, and shall lay them before the AGM of the company required to be held in terms of s 179 in respect of the financial year. In terms of s 286(4)(a) of the old Companies Act, any director or officer of a company who fails to take all reasonable steps to comply with, or to secure compliance with, the provisions of this section or with any other requirements of the Act as to matters to be stated in annual financial statements, shall be guilty of an offence.

[46] In terms of s 302 of the old Companies Act, a copy of the financial statements of a company shall not less than twenty days before the date of the annual general meeting of the company be sent to every member of the company and every holder of debentures of the company (whether or not such member or holder of such debentures is entitled to receive notices of the general meetings of the company) and to all persons other than members or holders of debentures of the company who are entitled to receive such notices. However, if so authorized by the company's articles of association, a copy of its financial statements may be made available in electronic format to

all persons who have agreed thereto in writing. In terms of s 302(5) of the old Companies Act, if a company defaults in complying with the provisions of s 302, the company concerned and every director who knowingly is a party to the default, shall be guilty of an offence.

Statutory obligation to hold AGM

[47] Section 179 of the old Companies Act provides for the holding of AGMs. Section 179(1)(b)(i) to (iii) of the old Companies Act enjoins every company to hold an AGM within a period of 18 months after the date of the incorporation of the company concerned. Subsequent AGM's must be held not later than nine months after the end of every ensuing financial year of that company, and not more than fifteen months must elapse between one AGM and the next. Section 179(2) provides that an AGM shall deal with and dispose of the matters prescribed by the Act. The following matters are specifically prescribed in the old Companies Act:

(a) the consideration of the annual financial statements at the AGM (s 286(1));

(b) the consideration of group and financial statements (s 288);

(c) the appointment of an auditor or auditors (s 270(1);

(d) the dealing with resolutions of which notice has been given in terms of s 185(6).

[48] Significantly, in terms of s 179(4) of the old Companies Act, any company which fails to comply with the provisions of s 179(1), which obliges it to hold an AGM within the time limits prescribed therein, or with any direction given by the Registrar of Companies under s179(4), and every director or officer of the company who knowingly is a party to the failure, shall be guilty of an offence.

Statutory obligation to appoint Auditor at AGM

[49] Finally, in terms of s 270(1) of the old Companies Act, a company is obliged at every AGM to appoint an auditor or auditors to hold office from the conclusion of the meeting until the conclusion of the next annual general meeting of the company. Section 270(2) provides that a retiring auditor shall

be deemed to be reappointed at any AGM without any resolution being passed, unless he is not qualified for reappointment or a resolution has been passed under s 278 of the Act, or he has given the Registrar of Companies notice in writing of his unwillingness to be reappointed at the next annual general meeting.

Conduct of Katuliiba and Mdwaba

[50] The applicants submit that the company's failure to hold an AGM since 2004, to prepare annual financial statements since 2006, and to appoint auditors since February 2011 constitute clear contraventions of the Companies Act for which the company directors, including Katuliiba and Mdwaba, should have been held criminally liable. The applicants argue that the cumulative effect of such contraventions of the Act, by Katuliiba and Mdwaba, certainly justify the conclusion of gross negligence and wilful misconduct in the performance of their duties as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act.

[51] In order to assess whether Katuliiba and Mdwaba have acted in a manner that amounted to gross negligence and wilful misconduct as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act, their conduct in relation to their duties, as directors, to the company bears scrutiny. Katuliiba and Mdwaba have on their own admission acted in contravention of the old Companies Act by failing to cause the preparation of annual financial statements for the company since the financial year ending 2004, and by failing to convene an AGM since 2006.

[52] In terms of clauses 90 and 93 of the company's memorandum of incorporation, the company is required to keep accounting records that fairly present the state of affairs of the company, and to cause audited annual financial statements to be laid before the AGM of the company in compliance with sections 286 of the old Companies Act. The respondents, however, explain that they were unable to prepare annual financial statements for 2006 because, as appears from the Young and Rubicam application, WPP-Memeza Holdings had still not in 2006 prepared its financial statements.

[53] The respondents explain that the company had purchased its shareholding in WPP-Memeza through a loan from WPP-Kraken. The repayment of the loan was done by way of the dividends issued from time to time by WPP-Memeza Holdings. They maintain that it was essential for the proper preparation of the company's financial statements that it had a proper statement of its loan account with WPP Kraken, which could only be rendered after WPP-Memeza Holdings had paid dividends – as the WPP-Memeza Holdings investment was the main investment held by the company – and this accounting was central to its profitability.

[54] The respondents allege that the failure of WPP-Memeza Holdings to prepare financial statements for 2006 is the primary cause of the breakdown in the relationship between WPP-Memeza Holdings and the company. They contend that in view of what Katuliiba states in the Young and Rubicam application, which is that:

"...WPP-Memeza has not produced audited financial statements since 2006 and no dividend has been declared from that date despite the fact that its subsidiaries such as Y&R and Mediaedge are very successful. If the dividends are insufficient to repay the loan agreement when it falls due then the loan agreement will be terminated and Memeza [the company] stands to lose its shareholding in WPP-Memeza. Memeza has the real concern that this dispute is part of an ongoing campaign to oust Memeza when the loan falls due..."

the failure to prepare audited annual financial statements for 2006 cannot be placed at their door, as the fault did not lie with them but rather with WPP-Memeza Holdings. They also point out that the failure of the company to prepare audited financial statements in 2006 occurred whilst Mavuso Msimang was the director and chairman of the company.

[55] I am not persuaded by the respondents' contentions. Since the establishment of the company, only one set of annual financial statements have been prepared, and that was for the year ending 29 February 2004.

Whilst Katuliiba and Mdwaba provide an explanation for their failure to prepare annual financial statements for the financial year ending February 2006, no explanation is provided for the financial year endings February 2005, and 2007 to 2012. Assuming that the last annual financial statements were prepared on the last permitted day of 2004, which was November of that year, the annual financial statements of the company for the financial year ending February 2005 are almost 8 years overdue, for the financial year ending February 2006, seven years overdue, for the financial year ending February 2007, six years overdue, for the financial year ending February 2008, five years overdue, and so forth. I am accordingly of the view that Katuliiba and Mdwaba have acted in breach of their fiduciary duties to the company, and in contravention of sections 286 and 302 of the old Companies Act, in failing to cause the preparation of the annual financial statements for the company since the financial year ending February 2004. Such conduct was in reckless disregard of their functions and duties, as directors, to the company thus constituting gross negligence as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act.

Appointment of Auditors

[56] In terms of clause 95 of the memorandum of association, the company shall appoint an auditor in terms of chapter X of the old Companies Act. The company's auditor resigned in 2011. The applicants contend that to date, no steps have been taken by the company to appoint a new auditor within the time period prescribed in the Companies Act. The respondents, however, explain that they were unable to do so because the company had no funds as a result of the interim order (obtained by Haanyama and Erasmus, in the Haanyama application on 14 October 2009), which prevented the company from utilizing the funds in its bank account, except for payments to its auditors at the time, its attorneys, administrators and Katuliiba himself. The respondents explain that this necessitated the application to vary, in June 2010, to vary the interim order in order to allow funds to be released, so that an auditor could be appointed, and the business could continue to run with the expenses duly certified by the auditors as being legitimate business expenses.

[57] The application to vary was opposed by Mavuso Msimang. No grounds are advanced by Mavuso Msimang as to why the proposed and imminently sensible order, which would allow the company to continue to operate under the eyes of its auditors, should not be granted. In the circumstances, it can hardly be said that Katuliiba and Mdwaba are to blame for the failure of the company to appoint auditors subsequent to February 2011. They have, in good faith, appointed an interim auditor but lack the funds to pay the auditor, as a consequence of the operation of the interim interdict. Their conduct, in this regard, does not constitute a breach of their fiduciary duties, nor does it deviate from the standard of a director's conduct as envisaged under the common law or under s 76 of the new Companies Act.

Failure to hold AGM

[58] In terms of clause 31 of the memorandum of association, the company is required to hold its AGM within 18 months after date of the incorporation and, thereafter, in each year hold an AGM provided that not more than 15 months shall elapse between the date of one AGM and the date of the next AGM, and that an AGM shall be held within 6 months after the expiry of the financial year of the company. In terms of clause 35 of the memorandum of association, the AGM is required to dispose of matters prescribed in the old Companies Act, which include the sanctioning of a dividend, considering the annual financial statements, the election of directors and the appointment of an auditor.

[59] The company held its last annual general meeting on 11 February 2006. At a special shareholders' meeting convened at the instance of Behan (the third respondent) in her capacity as a shareholder, on 18 July 2009, the company resolved that an AGM be held not later than the end of September 2009. However, it is common cause that to date no AGM has been held. As a result of the failure to hold an AGM since 2006, the company has been unable to give due consideration to the matters as prescribed in the memorandum of association and the old Companies Act.

[60] The respondents are, however, resolute that since the Haanyama application no AGM can be held because of the demand by Mavuso Msimang that Erasmus and Haanyama be entitled to attend. The respondents argue that it is clear from the sworn statements of Haanyama and Erasmus, attached to the replying affidavit in the current application, that they still maintain this position. The respondents explain that the AGM for 2009 was not held because of the Haanyama application, and the company's attempt to hold an shareholders' meeting in 2010 was stifled by the applicants and, in particular, Mavuso Msimang. They allege that during September 2010, Katuliiba endeavoured to convene a meeting of shareholders to be held on 11 September 2010. However, on 9 September 2010, the applicants' attorney objected to the holding of this shareholders' meeting, on the grounds that the notice of the meeting was not circulated to Haanyama and Erasmus both of whom, on the applicants' version, own 15% and 5% of the shares of the company, respectively. The notice of the meeting was only circulated to the new shareholders, namely the 2nd, 5th, 7th, and 9th respondents, whose rights to hold shares in the company are in dispute. The applicants sought an undertaking that the shareholders' meeting, proposed to be held on 11 September 2010, would not proceed unless all the shareholders, whose shareholding was in dispute, were not permitted to attend. They also indicated that should the undertaking not be furnished, they 'reserve their right to do whatever they deem necessary at appropriate place and appropriate forum'. Needless to say, the proposed shareholder's meeting was subsequently cancelled.

[61] The respondents contend that it was the applicants, and specifically Mavuso Msimang, who sought to prevent the AGM from happening unless the company acceded to their demands. They submit that to hold an AGM, in the face of an express threat to interdict the proceedings, would have been to expose the company and its directors to adverse costs orders, especially in circumstances where the company had no funds of its own with which to defend the litigation, and would have been negligent on the part of the directors.

[62] The respondents rely on the shareholding dispute that has been raised by Hanyaama and Erasmus, in the Haanyama application, as well as a threat of litigation from Haanyama, Erasmus and Mavuso Msimang, in particular, as their reason for failing to perform their statutory obligations to hold an AGM in 2009 and 2010, respectively. The respondents, again, fail to explain why they did not cause the company to hold an AGM in 2007 and 2008. On the assumption that the last AGM was held on the last permitted date in 2006 which, in terms of s 179 of the old Companies Act, would have been November 2006, then the AGM for 2007 is five years overdue, the AGM for 2008 is four years overdue, and so forth. At the time that the interim interdict was obtained in the Haanyama application, the AGM was three years overdue (2006-2009), and the annual financial statements were five years overdue (2004-2009). Katuliiba and Mdwaba have, on this basis alone, been acting in conflict with the memorandum of association and, in contravention of s179 of the old Companies Act. Such conduct was in reckless disregard of their functions and duties, as directors, to the company thus constituting gross negligence as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act.

Declaration of Delinquency

[63] The shareholder dispute with Haanyama and Erasmus only arose in June 2009, yet the respondents are unable to explain their failure to cause the preparation of annual financial statements, and hold a single AGM between the period 2004 and 2009. Mavuso Msimang resigned as a director of the company in July 2009. Assuming that the period from his resignation was the only period under the watch of the current directors (July 2009 to present), there would still be a substantial delay in carrying out their statutory duties, to the company, to cause the preparation of annual financial statements and hold an AGM since 2009.

[64] By the time the shareholders dispute arose in June 2009, Katuliiba and Mdwaba were already acting in breach of their fiduciary duties, and in contravention of the old Companies Act. The applicants then brought this application, in June 2011, to declare Katuliiba and Mdwaba to be delinquent directors in terms of s 162(5)(c)(iv)(aa) of the new Companies Act. Although

Mavuso Msimang was himself a director of the company, prior to July 2009, and therefore equally responsible for the failure to cause the preparation of annual financial statements for the company since February 2004, and hold an AGM since 2006, at the time when the current application was launched, he was not a director of the company. However, that Mavuso Msimang also acted in dereliction of his duties to the company, during the period between 2004 to July 2009, does not then absolve Katuliiba and Mdwaba from failing to carry out their duties to the company. The relief sought under s 162 of the new Companies Act, applies only to persons who are current directors of a company, or persons who within the 24 months immediately preceding the application, were directors of that company.

[65] That there is a dispute concerning the company's shareholding does not, in my view, permit Katuliiba and Mdwaba to embark on conduct in reckless disregard of their duties as directors to the company. The shareholders' dispute should not be used as an instrument to paralyse the management of the company. As is apparent from the affidavits of Haanyama and Erasmus (annexed to the applicants' replying affidavit in this application), this was not the intention behind launching the Haanyama application. Haanyama confirms, in this regard, that he has not threatened to halt or disrupt any meetings of the company:

"I confirm that the last shareholder's meeting for the shareholders of Memeza-QRZ that I attended and had knowledge of was way back in 2004.
I further confirm that no further notices from Memeza-QRX for either shareholders meetings or board meetings were ever extended to me despite the fact that all parties concerned knew my contact details.
Subsequent to the issuing of a court interdict in October 2009, I have no knowledge of any Memeza-QRX shareholders meeting being called.
Had such a meeting been called, I had no intention to apply for any interdict preventing such a meeting to be held.
As a matter of fact it was indeed my wish and desire that such a meeting would be called to discuss among other things how all the shareholders would respond to our court action in line with good corporate governance."

[66] Similarly, Erasmus states that the aim of the Haanyama application was not to interfere in the proper operation of the company:

"I have not had nor do I currently have any intention of interfering in the proper operation of Memeza-QRX...
I have not been informed of any shareholders' meetings by Mr Katuliiba nor of any Board of Directors meetings of Memeza-QRX since 2003 even though my address and contact details have not changed at any stage and have at no stage threatened to disrupt any such meetings should they have been called as is required under the Companies Act.
I wish to place on record that the express intention of proceeding with the litigation referred to by Mr Peter Katuliiba in his legal documents, was in order to have my shareholding within Memeza-QRX restored as it was removed from me unlawfully and that Memeza-QRX be operated correctly in terms of its Shareholder's Agreement as well as the corporate governance required by it under the Companies Act.
I expressly deny that I at any stage would disrupt or threaten to disrupt the orderly operation of the Company contained within its Articles of Association or its Shareholder's Agreement."

[67] It is also, in my view, perfectly clear from the order, which was granted in the Haanyama application on 14 October 2009, that the interim interdict only operates as against the payment of the company's funds to entities or persons other than those specified in the order. It does not, in any manner whatsoever, restrict the directors of the company from causing the preparation of annual financial statements for the company, or holding an AGM during the period of its operation. I, therefore, remain unconvinced that the interim order, in the Haanyama application, acted to paralyse the company's directors and, in particular, Katuliiba and Mdwaba, from carrying out their duties to cause the preparation of annual financial statements for the company, and hold AGMs during the period of the operation of the interim interdict. Assuming that there was a threat of litigation from the applicants, as well as from Haanyama and Erasmus, this can never be a legitimate excuse for company directors not to carry out their duties to the company, as provided for in the memorandum of incorporation, and the Companies Act.

[68] Both Katuliiba and Mdwaba have acted in contravention of their duties to the company, as provided for in the company's memorandum of incorporation, and s 286, 302, and 179 of the old Companies Act by failing to cause the preparation of annual financial statements for the company since the financial year ending 28 February 2004, and failing to hold an AGM since the last held AGM in 2006. As directors of the company, Katuliiba and Mdwaba ought to have been aware of their duties to the company, under the memorandum of incorporation and the Companies Act, but have acted in reckless d isregard of those duties, by failing to give consideration to the consequences of their actions for the company.

[69] Their failure or omission, under the old Companies Act, to cause the preparation of annual financial statements for the company since the financial year ending 28 February 2004, and hold an AGM since its last AGM in 2006, is thus not only grossly negligent, but also constitutes wilful misconduct, as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act, as both Katuliiba and Mdwaba knew and appreciated that such conduct was wrong, but, nevertheless, omitted to carry out their statutory duties to the company, regardless of the consequences for the company, and not caring what the result of their carelessness maybe.

[70] Accordingly, I find that the cumulative effect of the conduct of Katuliiba and Mdwaba in failing to carry out their duties as directors to the company, in relation to causing the preparation of annual financial statements for the company since February 2004, and the holding of an AGM since 2006, justifies making an order declaring them to be delinquent directors, under s 162 of the new Companies Act, as they have acted in a manner that amounts to gross negligence and wilful misconduct in relation to the performance of their functions within, and duties to the company, as contemplated in s 162(5)(c)(iv)(aa) of the new Companies Act. Katuliiba and Mdwaba are accordingly disqualified and prohibited from being directors of the company.

Shareholders' Meeting

[71] It is common cause that a shareholders' meeting must take place as soon as possible in order to, *inter alia*, fill the vacancies on the board of directors, fill the vacancy in the position of the company auditor, and cause the preparation of the company's annual financial statements. The parties accordingly jointly propose that the Court direct a shareholders' meeting to be held in terms of s 61 of the new Companies Act, which provides that the board of the company, or any other person specified in the company's memorandum of incorporation or rules, may call a shareholders meeting at any time. The parties also agree that only the shareholders who appear in the company share register, dated 15 May 2008, would be entitled to attend, and vote at, the shareholders' meeting. This would exclude Haanyama and Erasmus. I am inclined to grant this order.

Appointment of Faith Msimang to the Board

[72] The applicants also seek an order declaring that Faith Msimang (the first applicant) is appointed as a director of the company in place of Katuliiba and Mdwaba, in terms of s 163(2)(f) of the new Companies Act, which affords the court a discretion, upon considering an application in terms of s 163(1) of the Act, to make an interim or final order it considers fit, which *inter alia* includes an order appointing directors in place of or in addition to all or any of the directors then in office, or declaring any person delinquent or under probation as contemplated in s 162.

[73] The discretion conferred upon the court to make an order, in terms of s 163(2)(a) to (l) of the new Companies Act, is conditional upon the court having an application in terms of s 163(1) before it. Section 163(1) affords shareholders, and directors of a company, the right to apply to court for relief from oppressive or prejudicial conduct or conduct that unfairly disregards the interests of the applicant. No such relief is sought by the applicants. I accordingly decline to grant the order sought by the applicants in terms of s 163(2)(f) of the new Companies Act. It would, in any event, be more appropriate that the shareholders, at a shareholders' meeting to be called in

terms of s 61 of the new Companies, be afforded the opportunity to decide who should fill the vacancies on the Board of the company.

[74] In the result, I make an order in the following terms:

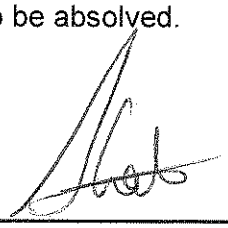
(1) The first and second respondents are declared to be delinquent directors as contemplated in s 162(5)(c)(iv)(aa) of the Companies Act, 71 of 2008 ("the Companies Act").

(2) The fourth respondent is directed to convene a meeting, as contemplated in s 61 of the Companies Act, of all shareholders whose names appear on the fourth respondent's register of shareholders dated 15 May 2008, such meeting to be held on a date not being more than 60 days from the date of this order, and for the purposes of resolving the following:

(i) the steps to be taken to fill the vacancies on the board of directors to ensure that the board functions with the prescribed minimum of four directors;
(ii) the steps to be taken to fill the vacancy in the position of the fourth respondent's auditor;
(iii) nominating a chairman to serve on the board of directors;
(iv) the steps to be taken to ensure that the fourth respondent's annual financial statements are prepared and audited;
(v) the steps to be taken to ensure that the tax status of the first respondent, during his employment with the fourth respondent, be resolved with the South African Revenue Services;
(vi) dealing with any other affair of the fourth respondent.

(3) It is ordered that only the persons reflected on the fourth respondent's register of shareholders, dated 15 May 2008, shall be entitled to vote at the shareholders' meeting to be convened in terms of s 61 of the Companies Act.

(4) The first, second and fourth respondents are ordered to pay the costs of the application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.



F KATHREE-SETILOANE
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANTS:	*Mr L Morison SC with Mr T Manchu*
APPLICANTS' ATTORNEYS:	*Malebye Motaung Mtembu Inc*
COUNSEL FOR THE RESPONDENTS:	*Mr J Heher*
RESPONDENTS' ATTORNEYS:	*Fluxman Inc*
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