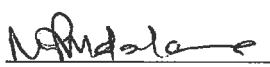


**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION,  
JOHANNESBURG**

CASE NO: 30537/2019

(1)	REPORTABLE: <del>YES</del> NO
(2)	OF INTEREST TO OTHER JUDGES: <del>YES</del> NO
(3)	REVISED.
<u>24 February 2020</u>	<u></u>
Date	Signature

In the matter between:

**AFRIC OIL (PTY) LTD**

Applicant

and

**TSEKE BENY NKADIMENG**

First Respondent

**COMPANIES AND INTELLECTUAL  
PROPERTY COMMISSION**

Second Respondent

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## JUDGMENT

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Mdalana-Mayisela J

1. This is an application to declare the first respondent a delinquent director under section 162(5) of the Companies Act 71 of 2008<sup>1</sup> ("the Act"). In the alternative, the order sought is that the first respondent be placed under probation in terms of section 162(7) of the Act for a period of 5 years and may not be or act as a director of any company during that period. The application is unopposed. During argument, I was satisfied upon my enquiring from applicant's counsel that a

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<sup>1</sup> Section 162(5) of the Companies Act states that: "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 Corporation 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 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; or*
- (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 of whether concurrently, sequentially or at unrelated times, that were 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."*

proper service in compliance with the rules has been made on the first respondent.

2. The applicant is a petroleum wholesaler. At the relevant time the applicant consisted of six non-executive directors which are Marious Damain Matroos; Dr Thabo Clifford Kgogo; Kgolofelo Kgongwedi Dorcus Masoga; Rubeena Solomon; Keith Errol Ashen and Maurizio Mariano.
3. In addition to the aforesaid non-executive directors, the Board of the applicant also consisted of two executive directors which are: the Chief Executive Officer and the Chief Financial Officer. At the relevant time, the first respondent was the Chief Executive Officer of the applicant and Isaiah Mutandiwa was the Chief Financial Officer. The first respondent was appointed the CEO in terms of the contract of employment. His contract was for a fixed term of 5 years. As Chief Executive Officer together with the CFO they were responsible for the day-to-day running and operation of the applicant.
4. The shareholding in the applicant was as follows: 71,13% held by Afric Oil Holdings (Pty) Ltd; Efora Energy Limited holding 100% shares in Afric Oil Holdings (Pty) Ltd and the Government Employees Pension Fund (managed by the Public Investment Corporation – is the majority shareholder in Efora Energy Ltd); 28.87% held by the Compensation Fund (managed by the Public Investment Corporation) and the first respondent holds an interest in Moopong Investments Holdings (Pty) Ltd and Gentacure (Pty) Ltd.
5. The employment contract concluded with the first respondent as CEO expired on 31 August 2017. The Board resolved on 31 August 2017 not to extend or renew his employment contract. The first respondent resigned from the Board as Director with effect from 1 September 2017. The circumstances which give rise to the application to declare the first respondent a delinquent director arise from the auditor's report from Ernst and Young ("EY") report in which a number of matters amounting to misconduct were levelled against the CEO and the CFO. They related to matters such as staff loans to the first respondent personally

without the Board's approval; as well as unauthorised cash collections by first respondent. The Ernst and Young's report was provided to the Board during or about 13 and 14 July 2017 in respect of the year ending 31 December 2016. Pursuant to the findings in the Ernst and Young's report, the Board resolved that the conduct of the first respondent necessitate an application to the Court for him to be declared a delinquent director. A fraud case was also opened with the Sandton police station by the applicant against the first respondent. A cash amount which was handed over to the first respondent by former Boland Diesel Depot Manager, Andre Bronkhorst was also recorded. The various amounts received by the first respondent are detailed in paragraphs 8.6.1 to 8.6.7 of the founding affidavit totalling R599,000.00.

6. The question that remains is whether the conduct of the first respondent amounts to conduct which falls within section 162(2) of the Act. The first respondent has not opposed the application and the facts as stated in the founding affidavit are not disputed. There is no reason for the Court to reject the facts as unfounded or false. I accept the facts as correct and that indeed the first respondent committed the misconduct that is alleged in the Ernst and Young report. I am also satisfied that the conduct aforesaid falls within section 162(2) of the Act<sup>2</sup> which entitles the applicant to bring this application on the strength of these facts to declare the first respondent a delinquent director. I am satisfied that a proper case has been made out by the applicant for the first respondent to be declared a delinquent director. Section 162(5) requires that the declaration of a delinquency subsists for a period of not less than seven years or any other period prescribed by the Court. I am satisfied that the first respondent's declaration of delinquency should subsists for a period of seven years.

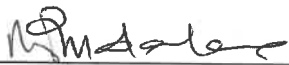
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<sup>2</sup> Section 162(2) of the Act states that: "A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if –

- (a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and
- (b) any of the circumstances contemplated in –
  - (i) subsection (5)(a) to (c) apply, in the case of an application for a declaration of delinquency; or
  - (ii) subsections (7)(a) and (8) apply, in the case of an application for probation."

7. Accordingly, I make the following order:

7.1 The first respondent is declared a delinquent director under section 162(5)(c) of the Companies Act 71 of 2008 for a period of seven years;

  
M M P Mdalana-Mayisela  
Judge of the High Court,  
Gauteng division

On behalf of the Applicant

Advocate: F Van Wyk

Instructed by  
Kern Armstrong & Association  
Office 104, Sherwood House  
Greenacres Office PARK  
Cnr Rustenburgh & Victory Road  
Hyde Park  
Tel: 010 109 1055  
Fax: 086 613 1709  
Email: [Zelmamri@kernattorneys.co.za](mailto:Zelmamri@kernattorneys.co.za)  
Ref: **Z KERN/EN/A057**