REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 1141/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 6 December 2022 E van der Schyff

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION NPC.	APPLICANT
and	
DR C.S. SIHLANGU	FIRST RESPONDENT
DR. T. O. SADIKI	SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] In this application, the applicant seeks an order that the respondents be declared delinquent directors in terms of s 162 of the Companies Act 71 of 2009 (the CA).

The applicant relies on the provisions of s 165(5)(c) of the CA. In this judgment, I deal only with the salient issues.

Factual background

[2] The respondents, two medical doctors, were nominated as directors of the applicant. They accepted the nominations and were appointed as such. They were, at the time of their nomination and appointment, directors of a company known as Health Professionals Group (Pty) Ltd (HPG). The applicant avers that the respondents failed to disclose that they were directors of HPG. This failure, the applicant alleges, gave rise to a conflict of interest that amounted to a breach of trust in relation to the performance of the respondents' functions within, and duties to the applicant. The applicant contends HPG offered services similar to the services offered by itself, and that by serving on the board of directors of two companies that offer the same services the respondents improperly competed with the applicant.

[3] The papers filed of record indicate that the respondents indeed disclosed their directorship in HPG, although the specific date on which the disclosure was first made, is not ascertainable.

i. Annexure CC8 to the founding affidavit is a document titled 'Confidentiality and Conflict of Interest Disclosure Form: 2019 THE SOUTH AFRICAN MEDICAL ASSOCIATION NPC (SAMA)'. This document was completed and signed by the first respondent, Dr. Sihlangu' on 26 January 2019. Dr. Sihlangu alerted to a potential conflict of interest when he stated on this document: 'I am a director and shareholder in Health Professionals Group (Pty) Ltd – a marketing and consulting company established in 2018 to provide affordable and reliable professional protection for health professionals in South Africa through access to professional indemnity, life products and financial services while acting in a corporate socially responsible manner.' It is relevant to note that the 'Statement of Procedure' incorporated in the said document reads as follows: 'On disclosure of a potential conflict of interest the SAMA Board (with

the exception of the director or prescribed officer declaring such potential conflict) will determine the existence of a conflict of interest and take appropriate steps to resolve the conflict.'

ii. Annexure CC10 is the same disclosure form, completed by the first respondent and dated 24 May 2019. Dr. Sihlangu again declared his directorship in HPG.

iii. Annexure CC11 is the same form completed and signed by Dr. Sadiki on 25 January 2019. Dr. Sadiki declared a potential conflict of interest by stating: 'I Dr. Sadiki (SAMA BOD) declare that I hold shares and directorship status at the Health Professionals Group (Pty) Ltd, which is a company concerned with sales and marketing of medical indemnity insurance. HPG Pty/Ltd and its partners are aware of the potential conflict.'

iv. From an email from SAMA's legal advisor, dated 3 April 2019, annexed to the answering affidavit, it is evident that the applicant was aware of the respondents' interest in HPG.

[4] The applicant contends that the acting Company Secretary did not take any action against the respondents at the time they disclosed their interests in HPG based on the activities disclosed. This contention fails to consider that the respondents' obligation was merely to disclose a potential conflict of interest. The applicant's own disclosure form reflects that after a potential conflict of interest was revealed, the SAMA Board would determine the existence of a conflict of interest and take appropriate steps to resolve the conflict.

[5] The respondents aver that at the time they were elected as SAMA board members, they had already established HPG as a company for profit with totally different intentions. HPG was established to provide its members in the health profession with insurance products, which SAMA did not do. 'SAMA being limited to medical practitioners and acting as a professional association and Trade Union consisting of elected representatives and being [a] non-profit organisation, was never considered a 'competitor' of HPG. One of the products which HPG was marketing, the legal insurance, overlapped with SAMA benefits. However, the respondents contend, that this should be viewed against the context that SAMA, at the time being in control of

SAMATU, enjoyed organisational rights, which included the right to represent members in disciplinary proceedings or grievances and matters of 'mutual interest', something which HPG could not provide.

[6] The respondents deny that by taking part in the strategic planning session during January and February 2019, they took personal advantage of the information obtained as directors to gain an advantage for HPG. The applicant's bold statement in this regard is not substantiated by facts, and neither is the contention that the applicant was harmed or caused to suffer damage or loss by any conduct of the respondents as a result of a conflict of interest that existed, or arose subsequent to their appointments as directors..

Discussion

[7] The applicant fails in making out a case that the respondents, while being directors of SAMA, grossly abused their position as directors, took personal advantage of information or an opportunity contra to s 76(2)(a) of the CA, intentionally or by gross negligence inflicted harm upon the applicant contrary to s 76(2)(a) 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, or contemplated in s 77(3)(a), (b), or (c).

[8] The applicant failed to make out a case that the respondents' conduct inevitably leads to the inference that it is necessary to protect the investing public against them.[1] There is no evidence that the respondents made use of information acquired only because of their position as directors of SAMA for their personal advantage or for HPG's advantage. Neither is there evidence that the respondents appropriated business opportunities that should have accrued to the applicant. The respondents' role in the SAMA-SAMATU litigation cannot be construed as negligent or wilful misconduct, nor can it be considered as resulting from a breach of trust.

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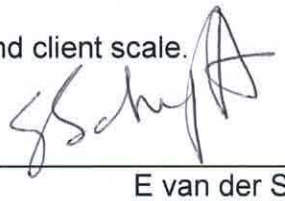
[1] See *Gihwala v Grancy Property Ltd and Others* 2017 (2) SA 337 (SCA) at paras [142 – 143]; *Msimang v Katuliiba* 2012 JDR 2391 (GSJ) para [29].

[9] A court should be slow to grant a punitive costs order so as not to limit the constitutional right to have a dispute resolved by the application of law in a fair public hearing. In this matter, however, the applicant should have refrained from approaching the court in the absence of evidence substantiating its view that the respondents 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 . There is no reason justifying the respondents to be out of pocket.

ORDER

In the result, the following order is granted:

1. The application is dismissed with costs on an attorney and client scale.



E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. Y. P. Krüger SC
With:	Adv. F Storm
Instructed by:	Welman Bloem Inc.
For the respondents:	Adv. D. J. Groenewald
Instructed by:	Serfontein, Viljoen and Swart Attorneys
Date of the hearing:	7 November 2022
Date of judgment:	6 December 2022