IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 21092/2015

In the matter between:

THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION	Applicant
And	
RONALD STEVEN MICHAEL CRESSWELL	First Respondent
PIERRE BASSON	Second Respondent
OWEN WIENAND	Third Respondent

JUDGMENT: 27 March 2017

DAVIS J

Introduction

[1] This is an application brought in terms of s 162 of the Companies Act 71 of 2008 ("the Act") to declare the third respondent delinquent. Briefly, the relevant facts can be summarised thus: the affairs of the company known as Skyport Corporation Limited (in liquidation) came to the attention of applicant during August 2007 by way of media articles as well as statements published on Skyport's website.

[2] According to Ms van Zyl, who deposed to the founding affidavit, from these documents appellant learnt that Skyport started its business in July 2007, had purchased land for approximately R 140 m and was intent on erecting an international airport at a cost of R 1 billion by 2010. Skyport applied to the Civil

Aviation Authority for a license to operate an international airport near Malmesbury, a claim which was later denied by the Civil Aviation Authority which stated that it had no knowledge of the application for such a licence. It expressed doubt that cabinet would approve the construction of an international airport near Cape Town. The applicant was also placed information that Skyport intended to list on the London Stock Exchange.

[3] Mr van Zyl stated that there was a perception created by these statements that quick and a "possibly secure return on investment" could be generated by Skyport. As a result, "several red flags were raised regarding the claims made by Skyport" and on 5 April 2008 and 29 October 2009 the Minister of Trade and Industry appointed Inspectors P Mafhua, A Chetty and Ms van Zyl in terms of sections 258 (2), 259 (1) and 259 (2) of the Companies Act 61 of 1973 ... "to investigate the affairs of Skyport and related entities from the date of Skyport's incorporation".

[4] These inspectors conducted interviews with the range of company officers and shareholders. These interviews and the investigation by the inspectors gave rise to information regarding the share capital, the sale of shares and issue of debentures to directors which can be summarised as follows:

1. Skyport had a founding share capital of 1000 shares;
2. these shares were later converted to 3 billion shares and of those, 20 million were made available for the first phase of public uptake at a start-up-price of R1.75 per share;

3. Skyport initially concluded an agreement with a brokerage firm known as Blue Chip Equity and transferred to this firm 10 million shares priced at R1.75 per share;
4. it appeared that the amount of R17, 5 million was never actually received from Blue Chip Equity;
5. in March 2008 the existing shareholders of Skyport received a newsletter inviting them to a special once-off offer to purchase additional Skyport shares at R1,75 per share;
6. according to the second respondent, this was a public offer which was authorised under the provisions of the old Companies Act.
7. the first respondent maintained that he sold share directly to the public when he was a director (and not through the brokerage firm of Blue Chip):
8. the second respondent however stated that he never sold shares to the public but rather to Blue Chip and Platinum Marketing (another brokerage firm).
9. second respondent promised Mr SJ Krynauw shares upon the realisation of certain events and gave a certain Mr Wiid 1 million shares for no consideration.

[5] The inspectors also reported that Skyport had consumed significant amounts of revenue and was commercially insolvent, notwithstanding that it was still carrying on business. It had no readily realisable assets to meet its liabilities as they fell due in the ordinary course of business. Directors had made personal withdrawals from Skyport's banking accounts. Furthermore, the Civil Aviation Authority had never granted Skyport a license and hence during March 2008 Skyport's justification for

operating an airport and everything related thereto could not be realised, notwithstanding that it continued to receive funds from investors.

[6] The inspectors also found that amounts varying from R 307 to R 20 000 and R 159 000 had been paid from Skyport's bank account into the personal bank account of third respondent who was unable to explain why these funds had been transferred.

[7] Ms van Zyl, who had deposed to the affidavit as a director of investigations employed by applicant, confirmed that she was one of the inspectors. With this knowledge she concludes her affidavit by stating:

> 'Under the circumstances, the respondents have grossly abused their position as directors to the detriment of Skyport and its creditors, as well as the public at large. There should therefore never again be allowed to act as directors of companies.'

Answering Affidavit

[8] Before evaluating arguments which presented both by counsel for applicant and for the third respondent, it is important to examine the answering affidavit of third respondent. Third respondent contends that the information contained in media articles and statements published on Skyport's website is "arrantly hearsay information and it is inadmissible".

[9] Referring to the various interviews conducted by the applicant, third respondent avers that he was not present when these were conducted and thus he was not able to comment on the information which might have been provided to the inspectors pursuant thereto. Regarding the letter of Mr Krynauw and the promise

that he would be provided with a million ordinary shares to be allocated to him and that Mr Wiid received 1 million shares for no consideration, third respondent notes that 'insufficient information has been provided to enable me to respond to this aspect."

[10] Third respondent admits that Skyport never generated its own revenue but rather that its only source of income was from the sale of share which was utilised to pay directors salaries and operational expenses. Accordingly, Skyport had not generated any revenue from its operation "but rather (was) consuming revenue".

[11] Third respondent confirms that a number of amounts were paid into his personal bank account.

> 'I was asked the questions years later out of the blue and was unable to provide any answer. At no stage did any of the directors questioned me (sic) about the payments and I firmly believed that they were due to me cause I would have been asked about this if they were not.'

[12] Third respondent also confirmed that a lack of a proper accounting system was the main reason for not being able to account for the utilisation of flow of funds. He states 'I make no excuse for the failure to implement a proper accounting system. I realised the shortcomings and I was in the process of rectifying them.' Third respondent also accepts that the Civil Aviation Authority had informed Skyport that it did not grant Skyport's licence. He noted that there was support from the Swartland Municipality for the airport project but that the project had become a 'casualty of politics'.

[13] Third respondent agreed that Skyport had no assets and was unable to cover its day to day operating costs and furthermore that there was only R 600 in Skyport's Absa bank account. In the words of this answering affidavit he notes that this paragraph from the founding affidavit 'correctly makes the point that the company's assets were consumed in the process of trying to get license.' To the averment that Skyport was commercially insolvent, third respondent says 'it should be noted that the business of the company did not require vast amounts of capital and that the company was interacting with suppliers. In other words it was not as though the company was running up debt in circumstances in which it could not pay it. I was never provided with the copy of the report prepared by the inspectors, but submitted that there is no relevance for the purpose of the present proceedings."

[14] So much for the factual matrix upon which this case must be decided. I turn now to deal with the arguments presented by applicant.

Applicant's argument

[15] Applicant has relied on s 162 (5) (c) (iv) (aa) of the 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 directors function within and duties to the company.

[16] The law in relation to the meaning of 'gross negligence' and 'wilful misconduct' was helpfully set out in *Msimang NO a.a v Katulina a.o* 2013 (1) ALL SA 580 (GSJ) at paras 35-39 as follows:

'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.

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 quality 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."

In the earlier judgment of *S v Dhlamini* 1988 (2) SA 302 (A) at 308 D-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 or 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 143 G-J to 144 A-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 928 C-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 559 D-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 ("gevolgbewustheid") which is necessary for *dolus eventualis*: *Van Zyl* at 558, 559 E-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 it ordinary meaning, therefore 'recklessly' does not connote mere negligence but at the very least gross negligence and noting in s 424 warrants the words being given anything but its ordinary meaning."

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, Acker 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 negligence, and involves a person doing or omitting to do that which sir 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 (2) SA 818 (W), at para 17.'

[17] In *Misimang, supra* the applicants launched an application in terms of s 162 of the Act on the basis that the respondents had failed to prepare the annual financial statements of the company since the financial year ending 28 February 2004 (the case was heard in 2012), convened an annual general meeting of the company since the financial year ending 28 February 2006, failed to appoint a director who had resigned from the company for a period of more than 18 months, failed to attend board meetings, failed to cooperate with the black economic empowerment rating agencies to enable an advertising company in which the company held a 30% shareholding to obtain BEE rating credentials for the purpose of procuring advertising contracts. In the case of one of the respondents it was alleged that he had failed to approve bank guarantees to enable the advertising company to provide security for the action instituted by the company for payment of

management fees and to give a full an proper account of monthly income received from the company relating to his status as a taxpayer.

[18] In finding that s 162 of the Act was applicable to the facts as set out by the applicant the court, per Kathree-Setiloane J, found that the cumulative effect of the conduct of the respondents, in failing to carry out their duties as directors of the company particularly in relation to causing the preparation of annual financial statements and the holding of an annual general meeting, justified making an order declaring them to be delinquent directors in terms of s 162 of the Companies Act: 'as they had 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...' (para 7)

[19] A similar approach is to be found in *Cape Empowerment Trust Limited v Druker and others* [2016] JOL 36987 (WCC), in which amongst other condemnations of the directors behaviour, Yekiso J said at para 80:

> '[I]t is glaringly apparent that the King Code of Governance principles relating to compliance with applicable law and adherence to rules of accepted practice; a duty to ensure the integrity of the companies as vehicles of investment; and the need for the directors to act in the best interest of the company appear not to have been observed, and, as a matter of fact, appear to have been totally disregarded.'

[20] On the basis of these legal principles, Ms Neukircher, who appeared together with Mr van Rensburg on behalf of the applicants, submitted that in the present case the court was dealing with a director who had allowed Skyport to carry on business while knowing that it was commercially insolvent and did not have

realisable assets to meet its liabilities, made personal withdrawals from Skyport's bank account, received payments from Skyport's bank account into his own personal bank account, contravened a variety of provisions of the Act by making offers for the sale of Skyport shares directly to the public without a prospectus, failed to hold annual general meetings, failed to keep proper minutes of meetings, to keep proper accounting records, to ensure that annual financial statements were compiled and to submit them before an annual general meeting and failed to follow proper procedure in the allocation of shares to directors and officers.

Respondent's case

[21] Mr Tredoux, who appeared together with Mr Coston on behalf of the respondents, initially raised three defences to the case made out by applicants, namely the unconstitutionality of any retrospective operation and application of s 162 of the Act, whether applicant had set out sufficient facts and circumstances to show that third respondent had contravened any of the applicable provisions of s 162 of the Act and the admissibility of the inspectors report in particular that third respondent had been denied legal representation during the interviews conducted pursuant to the investigation.

[22] The constitutional argument was abandoned by Mr Tredoux during oral hearing and he made it clear that the respondent's defence were based solely on the question as to whether an adequate case had been made out in the founding papers and further and related thereto whether this court could rely on the inspectors reports in assessing the application brought by the applicants.

[23] Mr Tredoux attacked the basis of the founding affidavit saying that Ms van Zyl had relied on the content of attachments to the founding affidavit, in particular, parts of the record of evidence placed before the inspectors without making specific reference to this evidence in the founding affidavit. In his view, the founding affidavit fell foul of the principles set out in *Swissbourough Diamond Mines v Government of the RSA* 1999 2 SA 279 (T) at 323 I to 324 H:

> 'An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.
>
> Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annex to its affidavits documentation and to request the Court to have regard to it. What is required is the identification of portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met.'

[24] In particular, Mr Tredoux concentrated his argument on the applicant's averment that the third respondent 'should never again be allowed to act as a director of companies'. A lifelong ban, in his view, required the application of s 162 (6) (a) of the Act, namely that the declaration of delinquency would be unconditional and subsist for the lifetime of the delinquent director. This however could only be granted if the court made a finding in terms of s 162 (5) (a) or (b) of the Act. Section 162 (5) (a) provides that a court must make an order declaring a person to be a delinquent director if the person concerned was either ineligible to be a director or had been disqualified from being a director in terms of s 69 of the Act.

Section 162 (5) (b) provides that a court must make an order declaring a person to be a delinquent director if that person while under an order of probation in terms of s 162 or s 47 of the Close Corporations Act of 1984, acted as a director in a manner that contravened the probation order.

[25] As it had not been alleged that either s 162 (5) (a) or (b) applied in respect of third respondent, Mr Tredoux contended that there was no evidence for the specific relief sought in the founding affidavit. Furthermore, the applicant did not seek to make out a case in terms of s 162 (5)(c) of the Act that the order of delinquency would subsist for seven years from the date of the order or longer as determined by the court. In summary, the applicant was required to deal with all of the relevant facts and circumstances in which it would rely in its founding papers. This it has not done, but had created the impression that the order which it sought was one which imposed a permanent ban on third respondent acting as a director ever again. This was the only case which the third respondent was required to meet.

[26] Accordingly, Mr Tredoux submitted that the applicant had failed to make out the necessary case in its founding affidavit and provide the evidence to enable this Court to grant any relief at all. Section 162 (5)(c) requires this court to exercise a discretion in deciding whether to grant an order. The applicant had not placed facts before the court in order for the latter to discharge the discretionary powers granted to it under the section. Furthermore, Mr Tredoux submitted that the applicant was required to adduce primary facts which are capable of being used for drawing inferences as to the existence or nonexistence of other facts, known as secondary facts. In the absence of primary facts, secondary facts are nothing more than a deponent's own conclusion and do not constitute evidential material capable of

supporting a cause of action. In this case, all Ms van Zyl had done was to rely on the inspectors report and thus had come to court relying upon secondary as opposed to primary facts.

Evaluation

[27] In my view, it is possible to evaluate the competing submissions by way of an examination of the answering affidavit and, in particular, the answers provided by third respondent in respect of the averments contained in the founding affidavit. As indicated, Ms van Zyl referred to payments made by Skyport into the personal bank account of third respondent. Third respondent answered that he was unable, due to the passage of time, to recall the exact nature thereof. Furthermore, no evidence was available at the enquiry nor provided in the founding affidavit to suggest that these payments was not due to the third respondent.

[28] Mr Tredoux submitted that this conduct was not so serious that it can be described as demonstrating a conscious risk taking a, complete obtuseness of mind or a total failure to care and hence did not constitute gross misconduct sufficient to invoke s 162 (5) (c) of the Act. But, as Ms Neukircher noted on behalf of the applicant, if a person in the position of third respondent receives an amount of R 159 000, it behoves him or her to explain how these monies were transferred from the company's business account into a personal bank account. The fact that time has passed surely did not exculpate third respondent from providing some basis of an explanation which lay clearly within his own compass of knowledge.

[29] Third respondent conceded that there was a failure to keep receipts pertaining to expenses incurred by the company but that steps was 'going to be

taken' to address the problem. Turning to cash withdrawals from the company's bank account, third respondent did not dispute that they had been made but said that no evidence had been presented to prove that these amounts were not due to the third respondent. However, the point of the allegation of Ms van Zyl in the founding affidavit was that third respondent had made a number of cash withdrawals from Skyport's bank account at Club Mykonos Langebaan. To this averment there was no answer from third respondent. Third respondent conceded that the company did not have a proper accounting system. He further conceded that Skyport's only source of income was from the sale of shares which were utilised to pay directors salaries and operational expenses and that Skyport had not generated any revenue from its operations.

[30] To the averment that Skyport had no assets and was unable to cover its day to day operating expenses and that there was only R 600 in its bank account, third respondent states that the paragraph 'correctly makes the point that the company assets were consumed in the process of trying to get the license'. There is no denial of the further averments contained in the founding affidavit. To the averment by Ms van Zyl that Skyport was commercially insolvent and was still carrying on business third respondent says the following:

> 'Paragraph 34 makes the point that the company was commercially insolvent and were still carrying on business. It should be noted that the business of the company did not require vast amounts of capital, and that company was not interacting with suppliers. In other words, it was not as though the company was running up debt in circumstances in which it could not pay it.'

[31] In attempt to dilute the power of this evidence as raised by it applicant in support of the application of s 162 (5)(c) of the Act, Mr Tredoux submitted that the inspectors report upon which Ms van Zyl had relied constituted inadmissible evidence. Mr Tredoux accepted, as he was required on the basis of the finding in *Bernstein and others v Bester and others NNO* 1996 (2) SA 750 (CC), that a witness at an enquiry under s 417 and 418 of the Companies Act of 1973 was not constitutionally protected from answering questions in which the witness could be exposed to civil liability and further that these sections were not unconstitutional for that reason. However, he submitted that the relief sought against third respondent in this case will have serious consequences for him and will affect his status and fundamentally his protected right to choose his occupation or profession in terms of s 22 of the Republic of South Africa Constitution Act 108 of 1996.

[32] Mr Tredoux also submitted that the purpose of an interview as envisaged by s 258 and 259 of the 1973 Companies Act related to a question of determining whether a well-founded suspicion of grave impropriety exists. This does not mean that the transcript of evidence was admissible as evidence in proceedings by its mere presentation to the court or by making corresponding allegations in the founding affidavit.

[33] But as I indicated earlier in this judgment, third respondent has made a number of concessions in his answering affidavit; that is concessions to averments which were made by Ms van Zyl, who relies not only on the inspector's report but on personal knowledge as being one the inspectors. On the basis of the answering affidavit there is sufficient evidence of which account can be taken for

this Court to assess whether s 162(5)(c) of the Act is applicable and whether the application can succeed.

[34] Skyport is a public company. It is clear from the interview with Ms Ismael, a Skyport shareholder, that members of the public purchased Skyport shares in 2007. Skyport held itself out to the public as a business which was going to construct a second airport within the Western Cape. In short, the Civil Aviation Authority had clearly subverted any possibility of the designated business of Skyport being implemented once no licence had been granted. On the concessions made by third respondent, obviously after having taken legal advice, it is evident that significant sums of money, even to the extent of an amount of R 159 000.00 were extracted from Skyport's bank account into third respondent's bank account, Skyport did not have a proper accounting system so it could not account for the utilisation and flow of funds pursuant to the various allegations as I have outlined them in this judgment. It employed the proceeds from the sale of shares to pay directors salaries and operational expenses. It was, in effect, insolvent.

[35] Section 162 (5)(c)(vi) (aa) and (bb) are concerned with a director of a company who acts in a manner that amounts to gross negligence, wilful misconduct or breach of trust in relation to the performances of that director's functions and duties to the company. Directors have clear responsibilities to the public in the form of investors, creditors, shareholders, employees to perform in a fashion wherein not only does the company behave in an accountable manner to these stakeholders but that it adheres to a level of transparency which ensures that the principle of accountability is vindicated. None of this was possible as a result of the conduct of third respondent; that is conduct which is admitted by him in his own papers.

[36] In determining the question of gross negligence, a court should resist examining the various averments in a singular fashion but rather look holistically at the alleged conduct and performance of the director pursuant to the application in terms of s 162 of the Act. Not only did third respondent disregard his duties as a director under the company's memorandum of incorporation and statutory framework, but he comported himself in flagrant violation thereof. In the circumstances his conduct clearly amounts to more than negligence.

[37] To summarise: it was grossly negligent for a director to have allowed a company to continue business in so parlous and insolvent a set of circumstances, to extract company cash in order to pay directors fees and to continue business in the clear knowledge that the Civil Aviation Authority was not prepared to grant permission for the crucial element of Skyport's business and to allow a public company to operate without proper accounting systems.

[38] I agree with applicants that this is a case which is even more extreme than those to which I have made reference, namely *Misimang, supra* and *Druker, supra.*

[39] In a last attempt to salvage his case, Mr Tredoux contended that there was a possibility of criminal sanctions being applied insofar as third respondent was concerned and that this would bring the inspectors report within the framework of *Ferreira v Levine NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC). On the papers, there is clear denial that any criminal proceedings are being pursued in this case. In any event s 162 falls within the framework of civil litigation and hence under the scope of the judgment in *Bernstein, supra.*

[40] I accept readily that the founding affidavit went too far when it sought to claim that third respondent should be declared a delinquent director in perpetuity. It

is correct that in order to justify such a finding, s 162 (5) (a) or (b) would have to be applied. By contrast, the entire case, as argued, rests on s 162 (5) (c) of the Act. The fact that an extreme declaration was asked for in these papers does not, in my view, preclude a court, on the same facts, from finding that another subsection of the same section is applicable and that a declaration of delinquency should be imposed for a far lesser period. The third respondent clearly came to court to deny that he was delinquent per se. His answering affidavit make this clear as he concludes by saying that no relief should be granted. The applicant has shown that third respondent was delinquent and that his delinquency is sourced in gross negligence, at the very least.

[41] For these reasons the following order is made:

1. Third respondent is declared delinquent in terms of s 162 (5)(c) (iv) (aa) of Act 73 of 2008 for a period of seven years.

2. The third respondent is ordered to pay the costs of the application which costs shall include the costs of two counsel and shall include the costs occasioned by the postponement of the application on 16 November 2016.

DAVIS J