

SOUTH AFRICA / JUDGMENT

Hacker v Hartmann and Others (1415/2017) [2019] ZAECPEHC 22 (10 April 2019) [2019] ZAECPEHC 22

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

Majiki

CASE / FILE NUMBER

1415/2017

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IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION – PORT ELIZABETH)

CASE NO. :

1415/2017

Heard

on: 6 September 2018

Date delivered: 10

April 2019

In

the matter between:

INGE
JOANE HACKER
Applicant
And
MARK
KEISER HARTMANN AND OTHERS
Respondents

JUDGMENT

MAJIKI J:

[1] The applicant approached court seeking in the main the following orders:-

(i) Declaring the first respondent to be a delinquent director in terms of section 162 of the companies Act No. 71 of 2008 (the Act);

(ii) Directing that the first respondent be removed as a director of the second and third respondent and authorising the applicant to bring proceedings in the name of and on behalf of the second respondent against the first respondent for repayment of financial assistance provided to him in contravention of section 45 of the Act. The

first, fourth to sixth respondents oppose the application. The purported opposition on behalf of the second, third and ninth

respondent is contested by the applicant.

[2] The applicant and the first respondent are the surviving siblings of the late John Hartmann and his surviving spouse Faith Hartmann. Even though the applicant's directorship is to be challenged as the first respondent contends, the two siblings are co-directors of the second and third respondents' companies. The second

respondent is a hotel and the third respondent is a property owning company. The fourth to sixth respondents are trustees of Repocalyptic Trust which holds 52% shares of the second respondent. The remainder of 48% shares is held by Hartmann Family Trust (HFT), fifth to ninth respondents. HFT holds 100% shares of the third respondent.

[3] The first, second, third, fourth, fifth, sixth and ninth respondents had filed counter applications dated 21 July 2017, which were later abandoned. The only issue that requires determination arising therein relate to costs. The respondents then had simultaneously filed a provisional abridged answering affidavit deposed to by the first respondent. The same respondents also filed a supplementary affidavit deposed to by the first respondent on 8 September

2017. The applicant filed replying affidavits to the said affidavits together with an application to strike out parts of the respondents' affidavits.

[4] The respondents' heads of argument were filed two court days out of time, on 28 August 2018 instead of the 24th. The first respondent filed an application for condonation for such late filing. It was premised on the reason that counsel who was supposed to attend same could not be available to timeously finalise same due to other work pressure. The applicant opposed the application. Amongst others, the applicant contended that lateness was not an isolated occurrence, in the respondents' conduct of the entire litigation in this matter. Even if condonation is granted, their conduct ought to be met with an appropriate order of costs.

The condonation application was granted.

- [5] The applicant has launched an application to strike out from the first respondent's provisional abridged answering and supplementary affidavits a number of averments on various grounds. Those grounds are that the averments are scandalous, vexatious argumentative and or irrelevant. The abridged answering affidavit with annexures is about 203 pages. The supplementary answering affidavit is about 588 pages, excluding confirmatory and supporting affidavits.

STRIKING OUT APPLICATION

- [6] Rule 6(15) of the Uniform Rules of Court provides:

"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant..."

The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted."

- [7] The starting point in exercising the discretion whether to strike out any matter is;
- (i) the matter sought to be struck out must indeed be scandalous, vexatious or irrelevant;
 - (ii) the court must be satisfied that if the applicant would be prejudiced if the application is not granted.

In *Gelyke Kanse and Others v Chairman of Senate Stellenbosch University* 2018 (1) AllSA 46 at paragraph 160 it is explained that the establishment of such prejudice does not mean that if the offending allegations remain, the applicant's

chances of success will be reduced. On the contrary, the requirement is substantially less than that. The applicant has relied on these grounds in her application to strike out. In *National Director of Public Prosecutions v Zuma*

- [2009] ZASCA 1; 2009 (2) SA 277 SCA para 23 it was held the test for irrelevance is whether the allegations do not apply to the matter at hand or do not contribute one way or another to a decision of that matter. Inadmissible evidence is by its very nature irrelevant. The applicant further contended that over and above these grounds, the court should exercise its discretion to strike out as irrelevant, any matter in the second answer which is simply repetition of averments in the first answer.

- [8] There has been no notice of opposition to the striking application, however, during argument, Mr Rosenberg stated that it is opposed. In the heads of argument it is stated that whatever is said to be vexatious constitutes the first respondent's case. He wishes to advance it in those strong terms. Mr Nel who made

submissions

on the striking application submitted that the applicant has also levelled serious attacks on the first respondent and his integrity. In argument it was persisted with that the applicant's motives to divide the assets to be sold amongst the two siblings is relevant. This goes to the heart of the requirement of good faith in section 165(5) of the Act. Further the outline of what the applicant herself has received in money from the company is relevant. Issues relating to background and context as to which the companies had been conducted cannot be irrelevant or saying they are would be a narrow approach.

[9] Before I deal with the grounds set out for striking I must state that the more than 1000 pages of papers filed by the respondents, in particular the affidavits of the first respondent, are full of repetition and prolix material which poses a very strenuous read.

[10] In my attempt to deal with the allegations sought to be struck out I will summarise those falling under the same ground and pronounce thereon collectively, except where the finding is different. It may not be possible in this judgment to set out each and every allegation with a corresponding finding and reasons thereof. Allegations that use abusive language, hearsay, those that do not relate to the issues at hand or do not contribute to them in any way will be struck out. The context and history must still address the issues in the case.

IRRELEVANT ALLEGATIONS

Ad paragraph 2.7

Briefly, it is averred that applicant ought not to have come to court because not approaching court is in line with the intention of the founding trustees of HFT. Their parents always intended that the disputes relating to the trust and related entities be resolved privately, through alternative dispute resolution.

I agree, the relief sought by applicant and the issue to be determined therein is not related to what would regulate the trust which the first respondent seeks to bring in, in this answer. The application is about resolving issues in the companies in second and third respondent.

Ad paragraphs 3.9 and 3.11

First respondent says Ms Wendy Hay acted improperly and sided with the applicant without consulting him in breach of her appointment as independent trustee. She presented to him as a fait accompli resolutions of HFT, second and third respondents to terminate the first respondent's directorship as delinquent director.

He goes on to say he worked hard for both companies without being paid. Further the applicant ignored assets of third respondent

when applying means test based on the second respondent only. The companies are closely related.

I agree it would not be relevant whether he was consulted, if resolutions were taken having followed due process. The

issue is the effect of his loans to the entities, how they were obtained and the liquidity position of the entities. Further

issue would be his entitlement to remuneration, if the contribution counts, the facts proving the contribution would bear relevance.

Ad paragraph 4 “Annexure E”

These are said to be irrelevant. With regard to Annexure E, no relevant components of it upon which the first respondent may be purporting to rely have been set out and incorporated in the answering affidavit. Paragraph 19 of annexure E is said to be scandalous and vexacious. The subparagraphs therein set out the family background, the shareholding as averred by the first respondent in the second and third respondents.

The only relevant portion therein which stands not to be struck relate to his averments about his claim about shareholding and the family background as it relates to the operations of the business. The rest of the averments are irrelevant. As for annexure E no facts or basis for it has been laid in the affidavit.

Ad paragraph 6.2

I agree the allegation about dispute of close family relatives and explanation about family ties is irrelevant.

Ad paragraphs 6.3, 6.3 and 6.4

I agree the allegations about the applicant's reasons to come to Port Elizabeth being suspect and her husband's proposal to sell properties without the first respondent's knowledge and consent are irrelevant to the issues in the application.

Ad paragraphs 6.8, 6.9, and 6.10 to 6.12

The issues about previous financial bailout and benefits to the applicant by their parents are indeed hearsay and irrelevant. There is no case of about calculation of what the applicant and the first respondent would share in the remaining assets.

Ad paragraph 6.16

Similarly, all the averments about nearly losing grading status are irrelevant.

Ad paragraph 7

The averments herein are irrelevant, repetitive of first respondent's speculative perspective of applicant's motives.

Ad paragraph 8.6

The averments about how and when the application papers were served are irrelevant.

Ad paragraph 8.8

The averments herein are irrelevant. The application does not concern shareholding or termination of trust.

Ad paragraph 9.10

The applicant submitted that the averments herein are irrelevant, I disagree. The contents hereof are not to be struck out.

Ad paragraphs 9.11 and 9.12

I agree with the applicant that whether the first respondent loses his trusteeship or not is irrelevant for the purposes of determining this application.

Ad paragraph 9.16

The illness of the first respondent's ex-wife is irrelevant.

Ad paragraph 10.5

I do not agree that the first sentence is hearsay and irrelevant, if he avers that this was what Ms Wendy Hay said to him. The rest of the paragraph may be unnecessarily long but a point is alleged therein that Ms Hay failed to apply her mind in the issue.

Ad paragraphs 10.6, 10.7, 11, 12.1 to 12.7, 12.9, 12.11 12.12, 12.13 to 12.21

I agree the whole allegations about allegations and action against Ms Hay are irrelevant herein. The rest are also irrelevant, I have already alluded to the issue of shareholding above. Similarly the history of the acquisition of properties is irrelevant.

Ad paragraph 17.1 and 17.2

I do not agree these paragraphs stand to be struck out.

Ad paragraph 18.1

The contents hereof are to be struck out, for being argumentative. There may be slight relevance in relation to why the first respondent is opposing the application and put the allegations about the applicant's motives remains irrelevant.

[11] Other grounds for striking out first respondent's answering affidavit.

I agree that to the extent that the first respondent refers to the application as being extortionist attempt to use sword of the court in an inappropriate manner is scandalous and vexatious.

Ad paragraph 2.10

I agree reference to applicant's actions as to be preposterous demands is scandalous and vexatious.

Ad paragraph 3.4 and 3.4.1

I agree reference to the applicant's motives for the application as bearing pressure in extortionist manner is scandalous and vexatious.

Ad paragraph 6.1

The contents hereof are not scandalous or so argumentative as to warrant a striking.

Ad paragraph 6.3 and 6.4

I agree to aver that the applicant and her husband swooped in, tried to do a reverse takeover of business entities, the use of the word pipe dream is scandalous and vexatious.

Ad paragraph 6.5.2 to 6.9

Reference to warped reasoning, blatant in targeting the first respondent and Port Elizabeth's assets are indeed vexatious.

Ad paragraph 6.10 to 6.12

I agree reference to the applicant as leading a luxurious life and chosen not to work is indeed vexatious.

Ad paragraph 6.13

Reference to revelation of blatant dishonesty and the motive of the application as abuse of court process on fast (sic) grounds whilst failing to put annexure "F" into context, whilst it ought not to be part of the papers in the first place is vexatious.

Ad paragraph 6.14

I agree use of words, ruthless, opportunistic disingenuous, devious and self interest in these circumstances is scandalous and vexatious.

Ad paragraph 6.15

Similarly use of sabotage, strong-arm tactics stooping the lowest, playing games of brinkmanship is scandalous and vexatious.

Similarly reference to exceed (sic) to blackmailing demands and pattern of blackmail is scandalous and vexatious.

Reference to applicant's motives, use of words grab the money and run, heartless are scandalous and vexatious.

Ad paragraph 8.9

Reference to the application as malicious and revengeful is scandalous and vexatious.

Ad paragraph 9.2, 9.3

Reference to the applicant as tending to overdramatise, to achieve her own agenda and circling him like and deliberately distorting the picture vultures are indeed scandalous and vexatious.

Ad paragraph 9.6

Use of weapon in terorem for financial gain is scandalous and vexatious.

Ad paragraph 9.12

I do not agree that the last sentence hereof is scandalous and vexatious.

Ad paragraph 9.13

Use of extortionist is scandalous and vexatious.

Ad paragraph 9.14

Allegations of vindictiveness and malice, ripping huge amount of money, extorting her way of a lump sum are indeed scandalous and vexatious.

Ad paragraph 10.2 to 10.4

The use of language like applicant started these antics of hers, gathered support of so-called independent trustee clandestinely, concocted mandate they conspired to achieve in 10.2 to 10.3 are scandalous and vexatious.

Ad paragraph 12.7

Reference to carcass in the field the vultures are circling is scandalous and vexatious.

Ad paragraph 12.12, 13.8

The use of language grumbling about share transfer, complete nonsense and double standards is scandalous and vexatious.

Ad paragraphs 13.11, 15.3

The contents hereof fall not to be struck out.

Only contents of paragraph 17.2 referring to ulterior and illegal motive fall to be struck out as scandalous and vexatious.

The contents hereof are to be struck out for being argumentative. The slight relevance relates to why the first respondent is opposing the application and allegations about the applicant's motives.

[12] AFFIDAVIT OF ROLAND HEIRESS DATED JULY 2017

Only the paragraphs that are to be struck are referred to herein.

Ad paragraph 6 to 8

Paragraphs 6 – 7 stand to be struck for being irrelevant.

Ad paragraph 14

The contents thereof are relevant only in as far as the information relating to latest municipal valuation and managing director's

entitlement to remuneration.

Ad paragraph 16

I agree paragraph 16 ought to be struck out as hearsay evidence.

Ad paragraphs 23, 24, 25 27

I agree the contents of these paragraphs are irrelevant.

Ad paragraph 26

Only the part of first respondent's interest bears relevance, the rest of the contents are irrelevant.

RESPONDENTS' SUPPLEMENTARY ANSWERING AFFIDAVIT

Ad paragraph 1.4

I agree that this paragraph has to be struck out, it is repetitive of issues already canvassed elsewhere by the first respondent and contains irrelevant averments.

Ad paragraph 2.1

I agree the third sentence hereof falls to be struck out for being vexatious and scandalous.

Ad paragraphs 2.3 to 2.6

I do not agree that the contents hereof are irrelevant.

Ad paragraphs 3.4, 3.5

The contents of this paragraph is repetitive, refer applications that are no longer up for adjudication and are therefore irrelevant.

Ad paragraph 4.1, 4.2

These paragraphs fall to be struck out, they contain irrelevant, vexatious and scandalous material

Ad paragraphs 4.3, 4.4, 4.6, and 4.7

Second sentence of this paragraph 4.3 and the rest of the mentioned paragraphs fall to be struck out they are irrelevant.

Ad paragraph 6

The contents hereof about alleged loans to the applicant or her husband are irrelevant.

Ad paragraphs 7.4 to 7.13

This falls to be struck out contains irrelevant, scandalous and vexatious material.

Ad paragraphs 7.15, 7.16, 7.18 and 13.5

The averments about alleged action to be sought are irrelevant.

Ad paragraph 10.2

The contents hereof are repetitive and argumentative fall to be struck out.

Ad paragraph 11.2 and 11.3 and 12.4

I agree the contents hereof stand to be struck out for being irrelevant.

Ad paragraph 13.4

The last sentence of application being used as weapon in terrorem is struck for being vexatious and scandalous.

Ad paragraph 14.2 and 14.3

Both annexures E and P are irrelevant and are hereby struck out. Annexure P has not been canvassed in the affidavit.

Ad paragraphs 15.2 – 15.3

The contents hereof are struck out as irrelevant.

Ad paragraph 15.5

The contents hereof are repetitive, scandalous and vexatious and fall to be struck out.

I agree the entire paragraph is hereby struck out as irrelevant, scandalous and vexatious.

Ad paragraph 17.4

The contents hereof fall to be struck out for being repetitive, scandalous and vexatious.

Ad paragraph 18.2

The averments relating to summons are irrelevant and fall to be struck out.

Ad paragraphs 19.1.2, 19.1.3, 19.1.4 and 19.1.5

The contents hereof are struck out. The averments about the first respondent being the only one to provide suretyship to Nedbank for second respondent and insinuations about the applicant are irrelevant, scandalous and vexatious.

Ad paragraph 19.2.2 – 19.2.5

These paragraphs are struck out for being vexatious and scandalous.

Ad paragraph 19.3.3

The contents hereof are not to be struck out

Ad paragraph 19.3.4

The contents hereof fall to be struck out, they are scandalous and vexatious.

Ad paragraph 19.3.5

Other than the admission that over the past year he drew more than the agreed remuneration package, the contents hereof contain repetitive and vexatious material.

Ad paragraph 19.3.6

Other than the averments relating to debatement of the applicant and first respondent's loan accounts, the rest of the averments are repetitive and vexatious and fall to be struck out.

Ad paragraph 19.3.7, 19.3.8

Other than averments about the mortgage bond in favour of Nedbank, in excess of the debt, the rest of the averments fall to be struck out as either being hearsay evidence, or repetitive and vexatious.

Ad paragraph 19.4.1 to 19.4.4

The contents of these paragraphs are repetitive and irrelevant they fall to be struck out.

Ad paragraph 19.4.5

Other than the open offer for early termination of HFT, the rest of the averments are repetitive, scandalous and vexatious, they fall to be struck out.

Ad paragraph 19.4.6

The contents hereof fall to be struck out, they are repetitive and irrelevant.

Ad paragraphs 19.5.5 to 19.5.17

Contents hereof are not to be struck out.

Ad paragraph 19.5.18

The second, fourth and fifth sentences are scandalous and vexatious.

Ad paragraph 19.5.20

The sixth sentence hereof is scandalous and vexatious.

Ad paragraph 19.5.22

The seventh sentence, tenth to twelfth sentence fall to be struck out as speculative, scandalous and vexatious.

Ad paragraph 19.6.1, 19.6.2

Other than denial of default in rent, the contents of this paragraph fall to be struck out as scandalous and vexatious. Annexure Q is not supported by any averments making reference to it.

Ad paragraph 19.6.5

Other than averments relating to rental due being exceeded by payments made by second respondent the rest of the averments are repetitive and are irrelevant and fall to be struck out. The two last sentences thereof are scandalous and vexatious.

Ad paragraph 19.6.6

The contents of this paragraph are irrelevant and fall to be struck out.

Ad paragraph 19.6.7

Other than the averment about verbal agreement remaining not replaced the rest of the contents of these paragraphs are irrelevant and fall to be struck out.

Ad paragraph 19.6.8 to 19.6.10

I disagree these paragraphs out not to be struck.

Ad paragraphs 19.6.11 and 19.16.12, 19.16.13 and 19.16.4

The contents of these paragraphs are irrelevant and fall to be struck out.

Ad paragraph 19.6.15

The contents hereof ought not to be struck out

Ad paragraph 19.6.16

The contents hereof fall to be struck out as scandalous and vexatious.

19.7.1 and 19.7.2

The contents hereof are repetitive, scandalous and vexatious. They fall to be struck out.

Ad paragraphs 19.7.3 and 19.7.4

The contents hereof are irrelevant and fall to be struck out.

Ad paragraph 19.7.5

The contents hereof are irrelevant and repetitive. They fall to be struck.

Ad paragraphs 19.7.6 to 19.7.15

Ad paragraph 19.7.16, 19.7.17

The contents hereof are irrelevant, scandalous and vexatious and stand to be struck out.

19.7.18, 19.7.19, 19.7.21, 19.7.24

The contents hereof are irrelevant, contain hearsay, scandalous and vexatious averments they fall to be struck out.

Ad paragraph 19.17.20

Other than the averments about improvement of trading results the rest of the averments fall to be struck they are scandalous and vexatious.

Ad paragraph 19.7.29

Other than averments about generation of income for JM, the rest of the averments fall to be struck as they are scandalous and vexatious.

Ad paragraph 19.7.30

The contents hereof contain repetitive, scandalous and vexatious material. The paragraph falls to be struck out.

Ad paragraph 20

20.1.1 – The contents herein are scandalous and vexatious and fall to be struck out.

Ad paragraphs 20.1.4, 20.1.5, 20.1.6 20.1.7, 20.1.7, 20.2.1, 20.2.2, 20.2.3, 20.2.4, 20.2.5

The contents hereof fall to be struck as it is repetitive material and irrelevant.

Ad paragraph 20.1.8

The contents hereof fall to be struck for they are scandalous and vexatious.

Ad paragraph 20.3.1

This paragraph is unnecessary repetition, it falls to be struck out.

Ad paragraphs 20.3.2 and 20.3.3

The contents hereof contain irrelevant material and are to be struck out.

Ad paragraphs 20.3.4, 20.3.5 and 20.3.6

The contents hereof contain repetitive, irrelevant and vexatious material and fall to be struck.

Ad paragraphs 20.3.8, 20.3.9, 20.3.12, 20.3.13 20.3.14, 20.3.15 and 20.3.16

These paragraphs contain past information that is irrelevant and fall to be struck out.

Ad paragraph 20.3.10

The contents hereof contain repetitive material. They fall to be struck out.

Ad paragraph 20.3.11

Other than reference to the salaries and expenses the rest of the contents contain irrelevant, repetitive, scandalous and vexatious material, which falls to be struck out.

Ad paragraphs 20.3.17, 20.3.18

The contents hereof are irrelevant, scandalous and vexatious, they fall to be struck out.

Ad paragraphs 20.4.2, to 20.4.16

Other than the explanation of why security service provider, that his drawings did not endanger the companies financially or otherwise and applicant received more than 4.2 million via the second respondent to date the rest of the contents herein are irrelevant, scandalous and vexatious and contain repetitive material, they fall to be struck.

Ad paragraph 20.4.16

Other than denial of being reckless, the rest of the averments are repetitive, scandalous and vexatious, they fall to be struck.

Ad paragraph 20.4.17

This is repetitive and falls to be struck out.

Ad paragraphs 20.4.18, 20.4.19, 20.4.20, 20.4.21 and 20.4.22

The contents hereof are repetitive, irrelevant and vexatious and fall to be struck out.

Ad paragraphs 20.5.1 - 20.5

The contents hereof are repetitive, irrelevant and contain scandalous and vexatious averments and fall to be struck out.

Ad paragraphs 20.6.1 – 20.6.7

Save for the information that the applicant ought to have taken into account in her financial analysis the rest of the averments are scandalous and vexatious and fall to be struck out.

Ad paragraph 20.7

The contents hereof are irrelevant, scandalous and vexatious.

Ad paragraph 21.5

The seventh, ninth and tenth sentences fall to be struck they are scandalous and vexatious.

Ad paragraph 21.7

Other than averment about omission of information the rest of the contents of this paragraph are irrelevant and contain scandalous and vexatious statement, they fall to be struck out.

Ad paragraphs 21.11 and 21.12

The contents hereof are scandalous and vexatious. Paragraph 21.12 contains repetitive averments. These paragraphs fall to be struck out.

Ad paragraphs 23.1 – 23.4

The contents hereof are irrelevant. Paragraph 23.4 specifically contains repetitive, scandalous and vexatious averments, they fall to be struck out.

Ad paragraph 23.7

The contents hereof are irrelevant and repetitive and fall to be struck out.

Ad paragraph 23.8

The second and the last sentences of this paragraph are scandalous and vexatious they fall to be struck out.

Ad paragraphs 23.9, 23.10, 23.11, 23.12, 23.14 and 23.15

Other than the auditor's views on the impact of the application on financial statements and their uncertainty of recoverability of his loan account the rest of the averments are irrelevant and repetitive, they fall to be struck out.

Ad paragraphs 23.18 and 23.20

The contents hereof are repetitive and irrelevant, the first sentence of paragraph 20 is scandalous and vexatious they are struck out.

Ad paragraph 24.9

The contents hereof are repetitive they also scandalous and vexatious averments fall to be struck out.

Ad paragraph 24.12

The fifth sentence of this paragraph is scandalous and vexatious, the averments that relate to debatement of his loan are repetitive.

Ad paragraph 24.15

Other than averring that determination of benefits in a forensic manner would have been the legal relief expected, the rest of the averments herein are repetitive and irrelevant. They fall to be struck out.

Ad paragraphs 25.3 and 25.4

The contents hereof are repetitive and contain irrelevant averments, they fall to be struck out.

Ad paragraph 25.8

Other than averments that he never prevented applicant from performing her duties as director the entire contents of the paragraph are irrelevant repetitive, scandalous and vexatious.

Ad paragraph 25.10

The reference to applicant as milking companies is scandalous and vexatious and falls to be struck out.

Ad paragraphs 25.12, 25.13, 25.14, 25.16 and 25.18

The contents hereof are repetitive and contain scandalous and vexatious averments, they fall to be struck out.

Ad paragraphs 26.1 and 26.2

The contents hereof are irrelevant they fall to be struck out.

Ad paragraph 26.3

The contents hereof are repetitive and irrelevant they fall to be struck out.

Ad paragraph 26.9

The contents hereof are scandalous and vexatious, they fall to be struck out.

Ad paragraph 26.10

Ad paragraphs 27.1 – 27-4

Other than the first respondent's denial of the applicant's averments the rest of the contents contained herein are irrelevant, scandalous and vexatious fall to be struck.

Ad paragraphs 31.2 and 31.3

The contents hereof are scandalous and vexatious fall to be struck out.

[13] SUPPLEMENTARY AFFIDAVIT OF ROLAND HEIRISS

There is no clear answer and how the emails find relevance is averred in this paragraph. It falls to be struck out.

[14] FURTHER SUPPLEMENTARY AFFIDAVIT OF ROLAND HEIRISS

AFFIDAVIT OF MARIKA BERG AND

AFFIDAVIT OF NICOLETTE SAAYMAN

I am of the view that none of the contents hereof fall to be struck out.

[15] AFFIDAVIT OF MARIE – JOSE GABIELLE HARTMANN

Ad paragraph 10

The third paragraph herein consists of hearsay evidence and falls to be struck out.

Ad paragraphs 12 and 13

The second paragraph herein is irrelevant and constitutes hearsay evidence and falls to be struck out.

That is so far as the application to strike out goes. The applicant has been successful in its application to strike in respect of substantial parts that were sought to be struck out. The respondents will therefore be liable for the costs of the striking

application. I now deal with the main application.

LOCUS STANDI OF THE FIRST RESPONDENT TO REPRESENT THE SECOND AND THIRD AND WITH NINTH RESPONDENTS.

- [16] During the hearing the applicant's counsel sought clarity as to the confirmation of which respondents oppose the application. Mr Rosenberg confirmed that the opposing respondents were the first, second, third respondents and trustees of Repocolyptic trust (as fourth, fifth and sixth respondents). In his first answering affidavit the first respondent also said he is opposing the application as the cited trustee of HFT (ninth respondent). Mr Rosenberg however, recorded that there were no instructions to oppose the application on behalf of HFT.
- [17] With regard to the second and third respondent the first respondent said he opposed the application on the basis that he is the managing director of both companies. He has also been mandated by Repocalyptic Trust, the majority shareholder with 52% shareholding) of the second respondent to oppose the application on behalf of the second respondent. He is also claiming to be true holder of 52% shareholding in the third respondent and that makes him a majority shareholder and therefore entitled to oppose the application on behalf of the third respondent.
- [18] The applicant contests the first respondent's standing to represent these other respondents. With regard to the ninth respondent, no other trustee of HFT has opposed the application. They have actually resolved not to so, oppose it. In the light of the address by the respondents' counsel, it is accepted that there is no opposition on behalf of HFT. The first respondent's opposition on behalf of the ninth respondent also falls away.
- [19] There is also neither a resolution on behalf of Repocolyptic trust that it should oppose the application nor are there any for the second and third respondents. The powers of attorneys furnished in that regard are signed by the first respondent, both as managing director and majority shareholder in third respondent. There is no authority from the board of directors for the first respondent to exercise powers on behalf of the board of directors of the said companies.
- [20] With regard to the second and third respondents section 66(1) of the Companies Act 71 of 2008 (the Act) requires that the business and affairs of a company be managed by or under the direction of its board (collectively) which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or its memorandum of incorporation provides otherwise, the shareholders or director, if not a collective, cannot exercise such powers unless provided for in the memorandum of Incorporation.

DECLARATORY

ORDERS

[21] For the two main orders sought the applicant relies on the following sections: 162(2):

“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 any order declaring a person delinquent or under probation...”

Section 162(5) (c) provides:

A court must make an order declaring a person to be a delinquent director if a person –

.... while a director grossly abused the position of director; .. (iii) intentionally, or by gross negligence, inflicted harm upon

the company or a subsidiary of the company, contrary to such 76 (2) (a);

(iv)(aa) acted in a manner 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... .”

Section 45(1)

(a) “In this section, “financial assistance” includes lending money, guaranteeing a loan or other obligation and securing any debt or obligation

(b) but does not include lending money in the ordinary course of business by a company whose primary business is the lending money ...”

Section 165 (6)(a)

(a) “In exceptional circumstances a person contemplated in subsection (2) may apply to court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that sub-section, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave if the court is satisfied that the delay

required for the procedures contemplated in subsection (3) to (5) to be completed may result in irreparable harm to the company or substantial prejudice to the interests of the applicant or another person.”

The application of this section does not require a substantive application.

THE LATE FILING OF ANSWERING AFFIDAVIT

[22] Firstly, the respondents filed their answering affidavits late. In the exercise of my discretion, considering that all papers had been filed and parties wanted the hearing to proceed with all issues ventilated I grant the condonation for the late filing of the answering affidavit.

APPLICANT'S CASE

[23] The applicant avers that she is the director of second and third respondents together with the first respondent.

She is also an employee who does general administrative oversight role for the second respondent but has little to do with its day to day operations. She and first respondent are also trustees of HFT.

[24] She then outlines various facilities which the third respondent has with Nedbank totalling to 14million rand, secured with mortgage bond in favour of the bank over the immovable property in the amount of 25 million rand and cession of lease to the bank. The third respondent's source of income is derived from a monthly lease from second respondent. This enables the third respondent to service its credit facilities with the bank. These facts do not seem to be in dispute.

[25] According to the applicant during the time of the launching of this application the financial position of the second respondent was dire, in particular with regard to funding its operating costs. It continued to deteriorate, she says largely due to extraction of cash from the second respondent by the first respondent on a monthly basis. In particular, from 2010 he appropriated cash and there was extensive growth in his debt loan account. At the end of financial year ending on 28 February 2010, she saw in the financial statements that such loan account increased year on year. Therefrom she declined to sign off the financial statements. However, she was not supported by her fellow trustees in Repocalyptic Trust, (her mother and Mr Heiriss) she ended up signing the financial statements, in 2014 and 2015 her fellow trustees respectively resigned from the Repocalyptic Trust. She was now residing in Port Elizabeth, she was able to observe serious improprieties in the businesses management accounts. Loan accounts were incorporated in lump sum amount as a liability rather than itemised as an asset. His monthly domestic costs were paid by the second respondent and not debited accordingly in his loan account. When she raised

these concerns with the first respondent, he would either dismiss her or inform her that he controlled majority shareholding in third respondent which entitled him to a dominant position in the second respondent.

[26] By October 2016 the cash flow position of the second respondent had become extremely tight. In November 2016 she raised her concerns with the company auditors and that the second respondent would not meet the standards of liquidity and solvency appropriate to support continued financial assistance to directors. In December 2016 the first respondent had unilaterally increased his salary twice; with increase of 61.99 per cent in two years without board's approval. He asked her and the second respondent's bookkeeper to expunge

his loan accounts. He refused to acknowledge his indebtedness to the second respondent and to stop further borrowings and reduce his salary to the previously agreed amount. In the financial year end 2016 he made a number of payments to himself or third parties from who he derived benefit totalling to R1 536 985.75;

On 28 February 2017 same amounted to R 1 689 921.98;

On 31 March 2017 same amounted to R 212 053.98

These totalled to

R 3 438 961.71

On 27 March 2018 they amounted to R10 586 587.66

These were debited to his loan account. The first respondent acted on behalf of the second respondent lending money to himself. He neither had authority to effect loans on behalf of second respondent nor did he have intentions of repaying them or realistic expectation to be able to do so.

[27] These constituted financial assistance, a contravention of section 45 of the Companies Act, they were not authorised by the board of directors and there was no special resolution of shareholders adopted within two years of the financial assistance. The shareholders were not notified of the financial assistance. Furthermore, the said section requires that the board be satisfied that immediately after the provision of financial assistance the company would satisfy solvency and liquidity test. The second respondent is not able to afford all the payments to the first respondent. There are no fixed terms of repayment; the interest charged at 7.75 per year is deemed to constitute income and taxed as such whilst not paid.

Section 45 precludes directors from using company monies to pay for their private matters, for example the first respondent used the company resources whilst dealing with his divorce action demands and legal costs for unauthorised actions against the applicant.

[28] This resulted in serious financial strain to the second respondent, it deteriorated to an extent that it became substantially in arrears with the local municipality for rates and consumption charge. The rentals to the respondent could not be paid in full. There was a threat that the second respondent would not be able to meet its wage bill in January 2017. The facility of the second respondent with Nedbank could not be reviewed due to non-submission of financial statements, among others. The auditors had confirmed some of her concerns, as a result she felt vindicated in her refusal to sign off the financial statements.

[29] She and seventh respondent, an independent trustee of HFT saw a need to call a meeting of the trustees for which she gave due notice of, proposed that meetings of the shareholders of the second and third respondents be called with a view to address first respondent's conduct and his possible removal as director of second and third respondents. Indeed resolutions were taken on behalf of the trust a meeting held on 6 March 2017, to amongst others, to remove the first respondent as director. If not, proceed with the section 162(2) of the Act

application, alternatively application to the companies tribunal for a determination in terms of which the first respondent be so removed. The meetings of the shareholders of second and third respondents were requisitioned for eight (8) days later. The said meetings could not take place, instead, shortly before one of the board meetings, the first respondent sent an email with allegations against her and subsequently suspended her as the director of the second respondent and later as an employee. The meeting ended abruptly when they could not agree on the date of shareholder's meeting.

- [30] The first respondent had already refused to agree to stop raiding the resources of the second respondent; he would also minimise it by stating that the applicant and him were not compatible as directors. The first respondent as the employee of the second respondent granted himself unlawful salary increases in April 2015 and November 2016. She regarded the first respondent's actions in increasing salary, taking loans and paying his expenses without authority as reckless trading. His actions amounted to gross negligence, wilful misconduct or breach of trust.
- [31] The applicant further states that according to the opinion of Mr Heiriss on behalf of the second respondent's auditors and concerns they raised in the annual statements for the period ending on 29 February 2016, the second respondent did not meet the solvency and liquidity test referred to in section 4 of the Act. On 10 March 2010, following concerns she raised, Mr Heiriss stated that he was waiting for an opinion on his audit report which he qualified due to uncertainty of the first respondent's loan. The independent auditors also confirmed the qualification saying they were unable to obtain all the necessary information and explanation they needed to be satisfied that the loan receivable amounting to R8 593.591 (2015: R6 453 286) is fully recoverable, in the main.
- [32] The auditors also recorded observations, which confirmed the requirements of section 45(3) about solvency and liquidity test, already referred to above. Further, they stated that if the section 45 requirements are not met, the transaction could be considered void and employees, creditors etc. as stakeholders can hold directors personally liable for the returning of the funds to the company, assuming there have been no other breaches in the director's conduct.
- [33] On 3 April 2017 the applicant demanded certain undertakings from the first respondent, in particular aimed at restraining him from making payments from the second and third respondents' accounts, or increase salaries without a resolution of board. Further, that the applicant would be given unrestricted access to financial information on the conduct of affairs of the company, which had always been resisted by the first respondent. Two days after that, 05 April 2017 the first respondent caused a payment a sum of R45 000.00 to be made to him from second respondent's bank account. A day later the undertakings sought were given.

RESPONDENT'S CASE

- [34] The first respondent's initial argument is that the applicant has not placed any facts that formulate the basis for any case on behalf of the third respondent. The founding affidavit is lean and is more focused on section 45 of the Act. The contravention of section 45 has to be proved, allegations cannot lead to obtaining an order of delinquency, when the facts on which the contravention is based are disputed. Further, non-compliance with section 45 is not decisive of delinquency. Further, he is of the strong view that the issues in dispute are not capable of determination on the papers. The court should, in adjudicating the matter, adopt a robust approach and dismiss the application in accordance with to the Plascon Evans rule.
- [35] The first respondent disputes that the third respondent's financial solvency is not strong. It has a very high net asset value with ownership of commercial land in Summerstrand in the tune of no less than 80 million rand. With regard to the financial pressure put by the first respondent's drawings or loan account the respondents dispute that there has been such pressure. The net asset value of the third respondent has grown tremendously during the first respondent's fourteen (14) years tenure at the helm, managing the entities. He was the sole operational director despite the fact that there was no resolution or no provision in the memorandum of incorporation providing for that.
- [36] The second and third respondents are owned by the same family and have always operated as one business unit. They did not keep strict and proper record of, inter-company loan accounts. The nature of the special relationship between the two companies cannot be ignored. If when assessing the solvency status of the second respondent, everything that it offers to the third respondent at no cost, could be taken into account, the face of second respondents' finances change drastically. This has an effect of dispelling the fears that the applicant says she is entertaining. There is a flaw in applicant's reasoning and approach when she says the financial health status of the companies is not primary, the primary issue is misappropriation of funds in contravention of section 45 of the Act. Heiress says things had never been done by the book by the family. The applicant signed financial statements since 2010 and only raised concerns with those of year ending February 2016. She always knew of the first respondent's loan accounts.
- [36] During argument the court was called upon, on behalf of the respondents, to consider that the entities in question are domestic companies operated for the benefit of the same family. When approaching the issue of absence of resolutions, the court ought to consider the relationship between the two shareholder siblings is that they are at loggerheads. The applicant herself could not produce either company's resolution appointing her as a director. The first respondent acted as a sole director and had been managing the companies. He has run the entities for years, his conduct when doing so ought to count when testing his directorships. The tacit and express authority of an operational director against an absent one is also a factor to be taken into account. The applicant has not criticised the second respondent's abilities. Delinquency declarations has consequences, he will lose his source of income, they will remove him from employment and his business. That will be the end of his 22 year professional career.

[38] With regard to the first respondent's loan accounts the respondents aver that the funds referred to, were never meant to be true loan accounts debits. They are an agreed portion of his remuneration package as managing director of the two companies. Only the excess would be loan. He acknowledges that after 22 years of service, over the last year at times he drew more than his agreed remuneration for the year. The intention had always been to transfer such loan accounts to HFT, where they would be dealt with upon the dissolution or termination of the trust. Alternatively, the first respondent would still be able to repay that portion when it becomes repayable and the loan would remain an asset of the second respondent. The applicant herself has always transferred her loans to HFT. The interest on loan accounts was

never meant to be a recoverable interest it is a simple book entry in line with South African Revenue Services (SARS) requirements.

His expenditure paid by second respondent was construed to be part of his remuneration and cannot be regarded as financial assistance.

[39] With regard to substantial unauthorised increase in his remuneration package, he disputes that he was not entitled to the said package. He avers that the manner in which it is structured has a long history. It used to be so with former directors who were partners (his father and Mr Sanderson). As regards the cash component of the package he avers that he in fact has been underpaid. This requires forensic investigation as to the precise terms and conditions of his package. Only that exercise would determine if his drawings exceed his entitlement and that would require oral evidence or alternative dispute resolution. The second and third respondents have always been sister companies. The second respondent always generated income that paid substantial expenses on behalf of third respondent. Further, there was an executive committee (Exco) in 2007 which acted as remuneration committee as well, it determined his remuneration package as 1 million rand per year, reviewed annually. Annexure C to Mr Heiress Affidavit is a copy of minutes of Exco meeting on 6 October 2009 recording the 2007 resolution. The nature and extent of financial assistance is uncertain, it is not possible to decide that issue on papers

[40] The first respondent avers that the applicant failed to disclose her own financial benefits she received from the second respondent under the guise of emoluments. She never rendered any significant services to the second respondent. Those facts are material and ought to have been disclosed. Section 45 of the Act requires the applicant to act in good faith, in the best interests of the company.

[41] With regard to undertakings and obstructing the applicant to carry out fiduciary duties, the first respondent states that he is complying with the undertakings and disputes that he is obstructing the applicant in any manner. The court should limit the issues for consideration to the state of affairs as at the time of the launch of the application. The parties are not *ad idem* about the construction of the undertaking and those differences cannot be resolved on the papers.

- [42] With regard to the application to bring application for recovery of the first respondent's indebtedness the respondents submit that the applicant has failed to comply with section 165(2). Only after that, may an application in terms of section 165(5) made. Section 165(5) requires that the court be satisfied that the requirements of section 165(5)(b) are met. Section 165(2) provides that a demand may be served to commence or continue legal proceedings to protect the legal interests of the company. Section 165 (5) provides that a person who has made a demand in terms of section
- (2) may apply to court for leave to bring or continue proceedings in the name and on behalf of the company. Section 165(5)(b) provides that the court must be satisfied that the applicant is acting in good faith (the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company) and that granting the leave will be in the interest of the company.
- [43] Compliance with demand affords the company served with the demand to apply to court to have it set aside in terms of section 165(3) on the grounds that it is frivolous, vexatious or without merit. Alternatively, it is obliged to appoint an independent and impartial person or committee to investigate the demand and issue a section 165(4) report. According to the respondents the applicant has not complied with any of these.
- [44] The issue for this application is the determination of whether a case for order declaring the first respondent to be delinquent director has been made. Furthermore, whether a case for approving that the applicant brings a derivative action, on behalf of the second respondent, for the repayment of financial assistance provided to the first respondent in contravention of the Act has been made.
- [45] As regards the first respondent's locus standi to represent the remaining respondents, (trustees of Repocolyptic trust second and third respondents), the first respondent relies on his shareholding or the majority shareholding of Repocalyptic trust and the fact that he is a managing director of the second and third respondents. Section 66(1) of the Act is clear that it is the board that has authority to exercise powers and perform the functions of the company. Even if the first respondent has been a defacto manager in the companies, the section requires him to have a resolution of the board to litigate on behalf of the companies.

I have considered the fact that they are, as he puts it, at loggerheads with the other director, however, in the circumstances

where the litigation revolves around his conduct and the substantial relief being sought against him, he would not, without more,

unilaterally make the decision to exercise the powers of the board. I therefore find that he is non-suited to represent the said respondents.

- [46] With regard to the first relief sought, the court has to be satisfied that a director grossly abused his position, intentionally or by gross negligence, inflicted harm upon the company or acted in a manner that amounted to gross negligence, wilful misconduct or breach of

trust in relation to the performance of his functions and duties to the company. The applicant contended that the first respondent's conduct of making payments to himself or third parties on his behalf constitutes financial assistance prohibited in terms of section 45 of the Act.

[47] The respondent has urged me to look at these circumstances only to the time of the launch of proceedings. He stated that he furnished undertaking to refrain from the conduct complained of in the terms sought by the applicant. Further, I must not apply myself to breaches, if any, that occurred thereafter, which is when the current proceedings were in progress. These would include legal costs the first respondent has expended after the launch of the application. Therefore, I must also disregard that the applicant has had to obtain an interdict to restrain the first respondent from continuing to make payments to himself or third parties for his benefit, amongst others. In the final analysis I must consider that the third respondent has a healthy financial status.

[48] The legal position in determination of factual disputes in applications as articulated in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A), at 634 is that, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent justify such an order. In certain circumstances the denial by the respondent of a fact alleged by the applicant may not be such as to raise a genuine or bona fide dispute of fact, if the respondent has not availed of his right to cross examine the deponents and the court is satisfied as to

the credibility of applicant's factual averment, it may proceed on the basis of the correctness thereof. The court may reject on the papers the denials or allegations by the respondent if they are so far-fetched or clearly untenable.

[49] The first respondent has admitted, in respect of year 2017, that he received payments exceeding what he says are his remuneration. However, these cannot be quantified in an application procedure. For most of other payments he contends, they are his remuneration which would need forensic investigation in order to determine if they are more than his actual due. Just on the common cause issue of excess unauthorised payments, the first respondent has not put up a defence that such is not a contravention of section 45 of the Act. Whether quantum is disputed or not, to the extent of his own admission, he has extracted monies more than his remuneration from the second respondent. Misappropriation of second respondent's monies has been admitted thus far. He only states that in the history of the family business section 45 has never been strictly adhered to. I agree with the applicant this does not constitute a valid defence.

[50] As regards the rest of the loans, no valid authority for them or compliance with section 45 has been pleaded. On the concerns the applicant raised with February 2016 financial statements. Heiress has stated that the second respondent did not meet section 4 liquidity test. I am unable to accept that, because these are family business companies, that there has

been a history not to do things by the book, they were not proper loans to be repaid on demand, that the applicant also had loans, therefore, that constitute a defence for unauthorised loans which can negate a finding of misappropriation. A lot has gone wrong in the management of these loan accounts, even the charging of interest was never meant to be repayable, but a book entry in line with SARS requirements.

- [51] With regard to remuneration, the allegation is that some of the amounts constitute his agreed remuneration and none of his drawings placed the second respondent in financial peril. However, to the extent that it exceeds, they should be added on his loan account. Specific averments of cash extracted have been made. A genuine denial would state that a specific sum of that represents remuneration. It cannot be that such is left to some future speculation of outcome of some forensic investigation. Further, still aver that if it exceeds it is a loan and an asset, all the loans are recoverable, they increase the face of financial health of the second respondent. This is not supported by any of the facts, even the allegation that the trust to which it is said the loans could be transferred to, has no documentary support that this is the arrangement with the trust. I am also not able to accept that there is an issue regarding the construction of the undertakings. In my view to undertake not to make further payments, for example is precise, so as undertaking to ensure access to information. There can be no confusion in determining whether such are honoured or not.
- [52] I have noted that the answers to huge remuneration package, without ratification by the board, alleged by the applicant place version that Exco approved One Million Rand package per annum, increasing annually for the first respondent in 2007. Again this is brought about by the first respondent as a proposition that if there is any financial assistance he received, it cannot be ascertained. He and Heiress on the other hand prepared a table with values. It is my view that if there is merit on this submission about the said resolution, which I doubt as it is not stated where the remuneration committee or Exco derived its powers, the first respondent and Heiriss should have been able to put up firm

facts

of how much he earned as against what was due. This is compounded by the fact that even the applicant was not given access

to information and had to obtain a court order in order to have it.

- [53] Heiress admits that the liquidity of the second respondent is materially influenced by the loan accounts. However, he tones it down by saying this is not unusual in family business. The fact is Nedbank failed to review the credit facility, his speculation about the usual bank's attitude to the loans in family business does not take the issues any further. This together with auditor's submission that the company failed to meet section 4 liquidity test, lead to one conclusion, the loans do cause harm to the second respondent. It is no doubt if liquidity is affected, the company cannot pay its debts when they become due, including employees salaries, harm has been caused there.

- [54] An allegation has been put by the respondent that the applicant is not acting in good faith. It is alleged she withheld information about her loans, poor management and wants to liquidate the companies. None of these constitute a defence that addresses the root of the basis for the application which is the first respondent's extraction of cash from first respondent which leads to problems in respondent's finances. Even if it is so that in the context and history of the companies, the businesses were treated like any other family matter, things not done by the book, business money exchanged hands between family members without proper record and legal implications or the applicant herself knew about such, that does not justify condonation of the conduct that trumps the provisions of the Act. What is sought to be achieved by enacting the Act, is to ensure protection of innocent third parties, amongst others.
- [55] As for the third respondent, what constitutes its main liability are the facilities it has. It derives its income from the second respondent's rentals. If it is unable to service its facilities due to the second respondent's failure to pay rent, I am unable to contend with the submission that no facts have been pleaded to formulate a case on behalf of the third respondents. The second respondent's inability to service the third respondent is linked to the draining of resources by the first respondent from the second respondent.
- [56] In my view, averments that do not provide a defence for the application cannot be regarded as creating real genuine dispute of facts. On the common cause facts and with allegations that do not factually and legally dispute the applicant's version, I am satisfied that the applicant is entitled to the first relief sought. This is so, without even considering what the applicant avers continued to happen even after the launch of these proceedings.
- [57] In *Giwhala and Others v Grancy Property Ltd and Others* 2017
- (2) SA 337 SCA at 149, it was held that it is the serious misconduct of a director that results in delinquency. If they lose their profession and work as a result of the delinquency order against them, that is so because they have been found to have committed a serious misconduct. The court drew an analogy with an attorney who is struck off the roll of attorneys as a result of his misconduct. This is not to punish but a consequence of the conduct they would have been found guilty of.
- [58] Regarding the second relief, relating to the applicant being granted leave to bring an action on behalf of the second respondent for recovery of what would be proved to be due by the first respondent, the respondents aver that neither a case in terms of section 165(5) of the Act has been made nor any exceptional circumstances have been set out for approaching the court under section 165 (6) Act, have been placed by the applicant. Section 165 (2) requires service of a demand on the company as an initial step. The next step is what is provided for in section 165(3) which affords the company an opportunity to set aside the demand if it is of the view that it is frivolous or vexatious. Alternatively, appoint an independent person or committee to investigate the demand and issue a report in terms of section 165(4) (a). Thereafter, within sixty (60) days of demand or with leave of court, any longer period the

company may allow proceedings to be initiated or may refuse to comply with demand. Only then that an application to bring proceedings may be made in terms of section 165(5). It is only in certain exceptional circumstances that a person may come directly to court for leave to sue without making a demand, that is provided for in section 165 (6).

- [59] The applicant on the other hand contended that her action is not in terms of section 165(5), instead she has invoked section 165 (6). In her founding affidavit she placed the following circumstances for applying to court for leave to sue on behalf of the second respondent. She stated that, she and the first respondent are the only directors of the companies. Considering that he has already frustrated the board meeting convened to resolve on the dates of holding of the shareholders' meetings, it is unlikely that he would vote in favour of a motion that the second respondent institute proceedings against him. He was invited to repay the said monies in the founding affidavit and if he declined to do so, the applicant states that the second respondent would be left without remedy.
- [60] I am satisfied that the applicant has made out a case in terms of section 165 (6) (b) and (c) for the granting of leave to sue. Indeed it is unlikely that the first respondent would co-operate with a process to ensure that the second respondent's interests are protected or harm is prevented. His conduct which lead to the interdict granted by this court to restrain him from continuing with his draining the first respondent of cash and his stance in the present application say so much in that regard.
- [61] In the circumstances, I am of the view that the applicant has made out a case for the reliefs prayed for to be granted.

In the result, the following order is made

1. The first respondent is declared a delinquent director as contemplated in section 162(5)(C) of the Companies Act 71 of 2008.
2. The first respondent is removed as a director of second and third respondents.
3. The applicant is authorised to bring proceedings in the name of and on behalf of the second respondent against the first respondent for repayment of the financial assistance proven to have been provided to him or for his personal benefit by the second respondent in contravention of section 45 of the Companies Act 71 of 2008.
4. The first respondent pays the costs of the abandoned counter-applications.
5. The first respondent pays the costs of the application to strike.
6. The first respondent pays the costs of this application and those costs to include costs of two counsel.

B MAJIKI

JUDGE OF THE HIGH COURT

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