

DISPUTE RESOLUTION ALERT

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COMMERCIAL LAW: DECLARATIONS OF DELINQUENT DIRECTORS AND THE PUSH FOR CORPORATE ACCOUNTABILITY

On receipt of an appropriate application, a court is obligated to opine, and if satisfied, declare a director of a company whose actions amount to gross negligence, wilful misconduct or breach of trust in relation to the performance of that director's functions and duties to the company, to be a "delinquent director" in terms of s162(5)(c)(iv)(aa) of the Companies Act, No 71 of 2008 (Act). The concept of a "delinquent director" is one introduced by the 2008 Act, however, the criteria listed above are not new to South African corporate law.

CONVERGENCE AND NEW MEDIA: WHO OWNS YOUR SOCIAL MEDIA CONTENT?

More often than not, people sign up for social media accounts without reading the particular platform's terms of service. As a result, they are usually completely unaware of the conditions of use or the rights they have signed away in order to create their profile. Have you ever stopped to consider who owns your Facebook account or your Instagram profile picture? If not, you may be surprised to discover the reality as we break down the terms that you have agreed to on various social media platforms.

COMMERCIAL LAW: DECLARATIONS OF DELINQUENT DIRECTORS AND THE PUSH FOR CORPORATE ACCOUNTABILITY

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The case *The Companies and Intellectual Property Commission v Cresswell & Others* [21092/2015] (judgment 27 March 2017) is particularly noteworthy as being the first application of its kind to be initiated by the Companies and Intellectual Property Commission (CIPC) as opposed to by a disgruntled creditor of the company. The Act makes provision in chapter 7, part D and E for the Commissioner of CIPC or the Minister of Trade and Industry to appoint investigators to investigate any alleged contravention of the Act. CIPC, acting on the investigator's report, is empowered by the Act to take the necessary legal action against the transgressors thereof.

The criteria of "gross negligence" and "wilful misconduct" were explored in context by Judge Dennis Davis of the Western Cape High Court in the *Cresswell* judgment. Davis, J emphasised the importance of proper corporate governance stating that:

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.

In 1988, in *S v Dhlamini* 1988 (2) SA 302 (A), the old Appellate Division declared gross negligence to be characterised by an entire failure to consider the consequences of one's actions, an attitude of "reckless disregard" for those consequences. In *Philotex (Pty) Ltd and others; Braitex (Pty) Ltd and others v Snyman and others* 1998 (2) SA 138 (SCA), the Supreme Court of Appeal amplified this definition by stating that "reckless disregard" cannot pertain to foreseen consequences of one's actions but must refer to unforeseen consequences. This is due to the legal definitions of "intentional" and "negligent" conduct in our law. If one foresees the consequences of one's actions but proceeds to perform that action regardless, one's conduct is said to be intentional. Negligence is the failure to foresee consequences which a reasonable person in the same position would have identified and taken steps to mitigate. Put differently, gross negligence is the total failure to give consideration to the consequences of one's actions.

In *Transnet Ltd t/a Portnet v Owners of the MV "Stella Tingas" and another* 2003 (2) SA 473 (SCA), the Supreme Court of Appeal has previously held gross negligence to be "conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care".

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The director was held to be a "delinquent director" for a period of seven years which, in effect, disqualifies him from being a director of any company in terms of s69(8)(a) of the Act.



South African law adopted a dictum of the English courts in 2002 when considering the definition of wilful misconduct. It was defined to be "far beyond negligence, even gross or culpable negligence" and doing that "which [one] knows and appreciates is wrong, and is done or omitted regardless of the consequences".

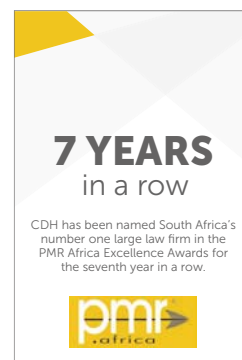
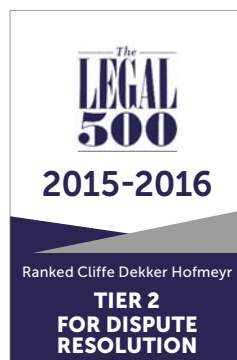
The definition of gross negligence stops at the intentional conduct of an individual. Conduct which goes beyond gross negligence, and would consequently be intentional conduct, is then classified as wilful misconduct.

In previous judgments, the courts have found that the cumulative effect of failing to carry out duties as directors of a company, in relation to preparing annual financial statements and holding annual general meetings, was beyond negligent conduct and therefore justified an order declaring the directors to be delinquent in terms of s162 of the Act. On another occasion the courts found that a "total disregard" for the King Code of Corporate Governance principles, relating to compliance with applicable law and adherence to rules of accepted practice, amounted to wilful misconduct and gross negligence.

In the *Cresswell* case, the director had allowed a company to carry on business while being fully aware that the company was commercially insolvent and did not have reliable assets to meet its liabilities. The director also made personal withdrawals from the company bank account and contravened various sections of the Act such as making offers directly to the public for the sale of shares in the company without a prospectus. Further to this, the director failed to hold annual general meetings, keep minutes of meetings and accounting records, compile and submit annual financial statements to an annual general meeting, and follow proper procedure in the allocation of shares to directors and officers.

In conclusion, Davis, J, found that the case before him was far worse than the previous cases referred to, and that at the very least, the director, by his gross negligence, had been shown to be "delinquent". The director was therefore held to be a "delinquent director" for a period of seven years which, in effect, disqualifies him from being a director of any company in terms of s69(8)(a) of the Act.

Grant Ford and Andrew MacPherson



CONVERGENCE AND NEW MEDIA: WHO OWNS YOUR SOCIAL MEDIA CONTENT?

All users of these social media platforms have, usually unknowingly, granted the respective platform, a non-exclusive, transferable and worldwide licence to use any content on the platform which is owned by the user without any further consent, notice or compensation.

While each platform offers unparalleled connectivity and communication advantages, it is critical for users to understand the rights that they relinquish and the attendant risks that they attract.



More often than not, people sign up for social media accounts without reading the particular platform's terms of service. As a result, they are usually completely unaware of the conditions of use or the rights they have signed away in order to create their profile. Have you ever stopped to consider who owns your Facebook account or your Instagram profile picture? If not, you may be surprised to discover the reality as we break down the terms that you have agreed to on various social media platforms.

The terms of service of Facebook, Instagram, LinkedIn and Twitter are all quite clear: they stipulate that all users retain ownership of any and all content posted on the respective platforms. So far so good, right? Wait, there's a catch: all users of these social media platforms have, usually unknowingly, granted the respective platform, a non-exclusive, transferable and worldwide licence to use any content on the platform which is owned by the user without any further consent, notice or compensation.

These licences enable the social media platforms to use content owned by individual users to market their business and service. However, it doesn't end there. In the words of Twitter, or to "Twitter-phrase", "this license [sic.] authorises [Twitter] to make your [c]ontent available to the rest of the world and to let others do the same". The social media giant may, therefore, sublicense a user's profile picture or any other content uploaded by said user without that user's knowledge or further consent.

All LinkedIn and Twitter users have also granted the platforms editing rights, namely, the right to edit, modify, translate and reformat any content posted on the platform. This has the potential to be highly problematic for users, particularly

when their content is translated into other languages. Given the nature of the LinkedIn platform, this could negatively impact recruitment, marketing and networking opportunities. It is therefore essential that users understand that they have granted each platform full editing rights over any content published by them (including re-posts of other user's content) whether in their professional capacity or otherwise.

Social media is now the norm. While each platform offers unparalleled connectivity and communication advantages including staying updated with family and friends, receiving breaking global news stories, debate and discourse, exploring employment opportunities, entertainment and digital marketing, it is critical for users to understand the rights that they relinquish and the attendant risks that they attract. These platforms offer seemingly free online services, however, the cost each user incurs is the use of any content uploaded on to the platform. We cannot imagine a world – professional or personal – without social media, but perhaps the next time you cheerfully click "accept" on the terms and conditions box for a new account, you should pay closer attention to the fine print.

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