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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 96886/2015

Date:

8/12/17

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

8/12/2017 *Retai*
DATE SIGNATURE

In the matter between:

DERICK WYNAND KRUGER

APPLICANT

And

JOHANNA MARIA KRUGER

FIRST RESPONDENT

PIETER ANDRE DAMES

SECOND RESPONDENT

**THE MASTER OF THE HIGH COURT,
GAUTENG DIVISION PRETORIA**

THIRD RESPONDENT

THE COMPANIES AND INTELLECTUAL PROPERTY
COMMISSION (CIPC)

FOURTH RESPONDENT

JUDGMENT

PRETORIUS J.

- (1) In this application the applicant requests an order to remove the first and second respondents as trustees of the Derilin Trust in terms of section 20(1) of the **Trust Property Control Act**¹. A further order is sought declaring the first respondent to be a delinquent director in terms of the provisions of section 162(5) of the **Companies Act**². The first and second respondents opposed the application.

THE PARTIES:

- (2) The applicant is a farmer, married to the first respondent. The first respondent is a financial controller, married to the applicant. The applicant and the first respondent are both qualified accountants.
- (3) The second respondent is a registered auditor. The second respondent has resigned as a trustee of the Derilin Trust whilst the application was heard in court. No order is sought or will be granted against the second respondent.

¹ Act 57 of 1988

² Act 71 of 2008

- (4) The third respondent is the Master of the High Court, Gauteng Division, Pretoria. No relief is sought against him.
- (5) The fourth respondent is the Companies and Intellectual Property Commission ("CIPC"). No relief is sought against the fourth respondent.

THE FACTS:

- (6) The applicant and first respondent were married to one another on 21 February 1997, out of community of property. The applicant and the first respondent are in the process of getting divorced and summons in this regard had already been issued, by the first respondent, in 2014.
- (7) During 2005 the Derilin Trust was created. The applicant, the first and second respondents are the only trustees of the Trust. The purpose of creating the trust was to structure the financial affairs of the applicant and the first respondent. The trust beneficiaries are the applicant, the first respondent and the applicant's and the first respondent's two children born out of the marriage. They both are currently minors.
- (8) There has to be a minimum of three trustees according to the trust

deed and the second respondent was appointed on 15 November 2007.

- (9) The only asset of the Trust is a 100% shareholding and related shareholder account in Crimson King Properties 273 (Pty) Ltd ("Crimson King"), which was incorporated in 2006. The only directors of Crimson King are the applicant and the first respondent. Crimson King is a property holding and consultancy company and the registered owner of the farm Exeter 239, MR, Limpopo.
- (10) The termination of the agreement lead to Crimson King losing R910 000 per annum as income. The applicant and first respondent had entered into an agreement with Statusfin Financial Services (Pty) Ltd ("Statusfin"). This finance application was approved on the basis, inter alia, that the monthly income of R70 000 over two years, was sustainable. The application for financial assistance was signed by the applicant on 8 July 2014 and by the first respondent on 16 June 2014. The first respondent had at all times been aware of this agreement and that it was entered into with the knowledge of the income of Ceragon and relying on the income from Crimson King as a basis for the credit agreement.
- (11) During August 2011, Crimson King and a company Ceragon (South Africa) entered into a lucrative consultancy agreement. According to

the agreement Crimson King would provide consultancy services to Ceragon at a monthly payment. This agreement was entered into for an indefinite period at a monthly consultancy fee of R70 000, as well as an additional annual one-time payment *"equal to the last Consultancy Fee paid to the Consultant for the prior month upon the elapse of every twelve full months"*. The first additional payment was paid to Crimson King in December 2013. It was expected that such a payment would be received in December of each following year. This agreement could be terminated by either party by written notice of 60 days. On 13 August 2014 Ceragon terminated the agreement and backdated the termination notice to 31 July 2014, informing Crimson King that it would terminate the agreement on 30 September 2014.

(12) After the Ceragon agreement had been terminated the applicant's investigation as to the reason for such a termination, lead to the conclusion that the first and second respondents and individuals at Ceragon caused the agreement to be terminated. Subsequent to the termination of the aforesaid agreement the first respondent, in her personal capacity, entered into an agreement with Ceragon. She thus took over the contract with Ceragon, thereby causing the Trust to lose the income.

(13) It is evident from all the correspondence attached to the founding affidavit that the first respondent deliberately caused the termination of

the agreement, causing great financial loss to the Trust.

LEGAL PRINCIPLES:

REMOVAL OF TRUSTEE:

- (14) Section 20(1) of the **Trust Property Control Act**³ ("**Trust Act**") provides:

"(1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries."

- (15) Section 9 of the **Trust Act**⁴ provides:

"(1) A trustee shall in the performance of his duties and the exercise of his powers act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another."

(2) Any provision contained in a trust instrument shall be void in so far as it would have the effect of exempting a trustee from or indemnifying him against liability for breach of trust where he fails to show the degree of care, diligence and skill as required in subsection (1)."

³ *Supra*

⁴ *Supra*

(16) The fiduciary obligations of a trustee include exercising the care, diligence and skill which can be reasonably expected where a person manages the affairs of another, such fiduciary obligations as the first respondent had managing Crimson King's affairs.

(17) In **Tijmstra NO v Blunt-Mackenzie NO and Others**⁵ Kirk-Cohen J discussed **Sackville West v Nourse and Another**⁶ as follows:

"The effect of this authority is that a tutor must invest the property of his ward with diligence and safety. It is also said that a tutor must observe greater care in dealing with his ward's money than he does with his own, for, while a man may act as he pleases with his own property, he is not at liberty to do so with that of his ward. The standard of care to be observed is accordingly not that which an ordinary man generally observes in the management of his own affairs, but that of the prudent and careful man; or, to use the technical expression of the Roman law, that of the bonus et diligens paterfamilias...

At 535 in fin the learned Judge continued:

'We may accordingly conclude that the rule of our law is that a person in a fiduciary position, like a trustee, is obliged, in dealing with and investing the money of the beneficiary, to observe due care and diligence, and not to expose it in any way

⁵ 2002(1) SA 459 (T) at 472 - 474

⁶ 1925 AD 516

to any business risks.”

- (18) In **Administrators, Estate Richards v Nichol and Another**⁷ the following was stated:

“A person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person, that is to say the standard of the bonus et diligens paterfamilias of Roman law...”

- (19) In **Gowar & Another v Gower and Others**⁸ in paragraph 30 the court emphasised two principles:

“For present purposes, two principles must be emphasised. First, the power of the court to remove a trustee must be exercised with circumspection. Second, neither mala fides nor even misconduct is required for the removal of a trustee.”

- (20) In **Volkwyn NO v Clarke and Damant**⁹ Murray J found at 471:

“It is of course true that proof of dishonesty or mala fides is not essential for a case for the removal of executors or administrators. . . .”

and at 474:

⁷ 1999(1) SA 551 (SCA) at 557 D-F

⁸ 2016 (5) SA 225 (SCA)

⁹ 1946 WLD 456

“(T)he essential test is whether such disharmony as exists imperils the trust estate or its proper administration. . . .”

- (21) In the **Gowar case**¹⁰ the Supreme Court of Appeal set out the test as *“whether or not the conduct of the trustee imperils the trust property or its proper administration and the welfare of the beneficiaries”*. Section 20(1) provides that such a removal will be *“in the interests of the trust and its beneficiaries”*.
- (22) In **Phillips v Fieldstone Africa (Pty) Ltd and Another**¹¹ Heher JA decided that *“The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice.”* It was held that a fiduciary who acquires for him or herself is deemed to have acquired for the trust. It is of no relevance, according to Heher JA, whether the trust has suffered no loss or damage; that the trust itself could not use the information or even refused to do so; that there existed no privity between the principal and the money would not have gone to the trust in any event, the fiduciary had no duty to obtain the benefit for the trust or the fiduciary acted in a honest manner. In the present instance the first respondent was dishonest, arranged for Ceragon to cancel the agreement with the trust and to enter into an agreement in her own name. There can be no doubt that she flaunted all the rules pertaining

¹⁰ *Supra*

¹¹ 2004(3) SA 465 (SCA) at paragraph 31

to the duties of a trustee as set out in all the above-mentioned authorities. She did not observe greater care when dealing in the trust property, but instead, caused the agreement between Crimson King and Ceragon to be terminated in an unscrupulous manner. Her actions and conduct imperilled the trust estate and the applicant as beneficiary. In these circumstances, if the principles in the above authorities apply, it has been proved that she must be removed as a trustee of the Derilin Trust on a balance of probabilities.

DELINQUENT DIRECTOR:

LEGAL PRINCIPLES:

(23) In **Afrisure CC and Another v Watson NO and Another**¹² the Supreme Court of Appeal decided that the rule against conflict of interest is strict. The fiduciary obligations owed by a trustee to the trust and its beneficiaries are the same as the fiduciary obligation owed to a company by its director.

(24) Section 162 of the new **Companies Act**¹³ provides the reasons for a director to be declared "delinquent" on application to court. This is a provision which has no equivalent in the old **Companies Act**¹⁴. The purpose of this provision is to protect a company where one or more of its directors act in a manner that proves that the director or directors

¹² 2009(2) SA 127 (SCA) at paragraph 54 to 56

¹³ *Supra*

¹⁴ *Supra*

are unable to manage the affairs of the company, fail in his or their duty or neglect the duties and obligations as directors of a company.

(25) Section 162(2), (3) and (4) of the new **Companies Act**¹⁵ provide:

“(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 an order declaring a person delinquent or under probation if-

(a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and

(b) any of the circumstances contemplated in-

(i) subsection (5) (a) to (c) apply, in the case of an application for a declaration of delinquency; or

(3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if-

(a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and

(b) any of the circumstances contemplated in-

(i) subsection (5) apply, in the case of an application for a declaration of delinquency;”

¹⁵ Supra

(26) Section 162(5)(c) provides:

“(5) A court must make an order declaring a person to be a delinquent director if the person-

(c) while a director-

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76 (2) (a);

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76 (2) (a);

(iv) acted in a manner-

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77 (3) (a), (b) or (c);”

(27) Section 76(2)(a) of the new **Companies Act**¹⁶ deals with, *inter alia*, standards of conduct and liabilities of directors. Section 76(2) provides:

“(2) A director of a company must-

(a) not use the position of director, or any information obtained while acting in the capacity of a director-

¹⁶ *Supra*

(i) *to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or*

(ii) *to knowingly cause harm to the company or a subsidiary of the company;”*

- (28) In **Msimang NO and Another v Katuliiba and Others**¹⁷ Kathree-Setiloane J found:

“Section 162 of the new Companies Act provides that directors can be declared “delinquent” or “under probation” on various grounds, and on application by certain categories of applicants. This provision is directed at protecting companies and corporate stakeholders against company directors, who have proven themselves to be unable to manage the business of the company or have failed in, or are in neglect of, their duties and obligations as directors of a company.”

- (29) Section 162(8) makes it peremptory for a court to declare a person a delinquent director if such a person has conducted her/himself in the manner set out in section 162(5)(a) to (f)¹⁸. This was confirmed by the Supreme Court of Appeal in **Kukama v Lobelo and Others**¹⁹.

¹⁷ [2013] 1 All SA 580 (GSJ) (27 November 2012) at paragraph 29

¹⁸ *Supra*

¹⁹ (38587/2011) [2012] ZAGPJHC 60 (12 April 2012) at paragraph 40

- (30) In this instance the first respondent used her position as a director in Crimson King to persuade Ceragon to terminate the agreement with Crimson King, to enable her to enter into an agreement with Ceragon on her own behalf. There can be little doubt that her conduct in this regard was to the detriment of the company of which she was one of the two directors. There can be no doubt that it has been proven on a balance of probabilities that the first respondent acted in a manner which is classified as a “*delinquent director*” in terms of the abovementioned provisions of the Act and that she must be removed as a director.

ALLEGED FACTUAL DISPUTES:

- (31) The principles set out in **Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd**²⁰ apply. These principles were once more confirmed in **Thebe Ya Bophelo Healthcare Administrators (Proprietary) Limited and Others v National Bargaining Council for the Road Freight Industry and Another**²¹:

“The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules set out in Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd and as qualified in Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd are to be followed. These are that where an applicant in motion proceedings seeks final

²⁰ 1984(3) SA 623 (A) at 634E – 635C

²¹ 2009(3) SA 187 (W) at paragraph 19

relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected."

- (32) I quote the first respondent's statement in the answering affidavit where she stated clearly:

"With the fear of repeating what I have said hereinabove I need to reiterate that the money generated from the Ceragon agreement currently in my name is used for the school fees, clothes, food, boarding and well-being of the minor children born from the marriage between myself and the Applicant. What the Applicant seems to misunderstand is the fact that I took the necessary steps to ensure a continued income for myself in order to look after the children who are the beneficiaries of the trust. What the Applicant fails to show is that whatever I have done can ever be alluded to as prejudicial towards the beneficiaries of the trust.

I will probably explain myself better if I show the flipside of the

coin. If I did not take the necessary steps in order to secure the agreement with Ceragon in my own name it would have meant that I would continue to be employed by a company owned by the trust of which Mr Kruger has absolute power and to which he shows total ignorance."

- (33) It has thus been unequivocally conceded by the first respondent that she had caused the whole chain of events. Counsel on her behalf, conceded as much during argument, but urged the court to deal with the matter by not harping on the history, but to consider the consequences. She has taken matters into her own hands to the detriment of the trust, Crimson King and the applicant. Her reasons for doing so, should not be taken into account, even more so if the *dictum* in **Tijmstra**²² is adhered to. Her reasons cannot be regarded as valid reasons, as she had taken the law into her own hands, without dealing with the divorce and maintenance issues according to the law.

- (34) The material facts are admitted and there can be no argument as to a dispute of facts. I have carefully considered the actions by the first respondent. It is clear that the first respondent decided, without any basis, to help herself to the only valuable asset of the Trust in a manner which exceeded her powers. She exercised her powers for an improper purpose and allowed her personal interests to be in conflict

²² *Supra*

with the interests of both the trust and Crimson King, as well as the first respondent as beneficiary of the trust. She furthermore breached the provisions of section 76(2)(a) of the new **Companies Act** by using her position as director of Crimson King to gain a personal advantage to the detriment of the company, Crimson King and causing harm to the company and the trust.

(35) She, unilaterally, decided to use the money from Ceragon to the benefit of herself and her minor children, pending the divorce action. She did not take into consideration that the applicant is not only a trustee of the Trust, but also a beneficiary. She intentionally manipulated events so that the only asset in the Trust, namely the shareholder loan account in Crimson King, was cancelled.

(36) Her explanation that it was for maintenance for her and the minor children cannot be countenanced, as there are ample laws and rules to obtain maintenance pending a divorce action.

(37) If I have regard to the provisions of section 162(5)(c) of the new **Companies Act**²³, it is obvious that the first respondent, through her wrongful conduct, caused great financial harm intentionally to Crimson King. She grossly abused her position as director by taking advantage of the opportunity to cancel the agreement with Ceragon to the

²³ *Supra*

detriment of not only the company, but also the trust and the applicant.

In **Gihwala and Others v Grancy Property Ltd and Others**²⁴ Wallis

JA held:


"The first, in one of its common forms, is insider trading, whereby a director makes use of information, known only because of their position as a director, for personal advantage or the advantage of others. The second is where a director appropriates a business opportunity that should have accrued to the company. Our law has deprecated that for over a century. The third case is where the director has intentionally or by gross negligence inflicted harm upon the company or its subsidiary. The fourth is where the director has been guilty of gross negligence, wilful misconduct or breach of trust in relation to the performance of the functions of director..."

- (38) I find that such conduct as displayed by the first respondent, falls squarely within the provisions of section 162(5). Here the first respondent was not only guilty of negligence, but of wilful misconduct in respect to the performance of her function of director as set out in **Gihwala**²⁵. Accordingly, I have no choice, but to declare her as a delinquent director.

²⁴ 2017(2) SA 337 (SCA) at paragraph 143

²⁵ *Supra*

- (39) In these circumstances I find that she had breached her fiduciary duty in respect of the trust, as well as the company to such an extent that she should be removed from the trust as trustee and be removed from the company as a delinquent director.
- (40) Her defence that the applicant has an ulterior motive in bringing this application has to fall by the wayside. It is vehemently denied by the applicant and there is no such evidence to sustain such a defence. Even if the applicant had an ulterior motive, but the pre-requisites for an order had been met, then the order may be granted. In this instance there is no such defence. I find that there are no material factual disputes and that no ulterior motive by the first respondent has been proven.
- (41) In the result I make the following order:
1. The first respondent is removed as trustee of the Derilin Trust (Master's reference no IT368/05) in terms of the provisions of section 20(1) of the Trust Property Control Act, 57 of 1988.
 2. The first respondent is declared a delinquent director in terms of the provisions of section 162(5) of the Companies Act, 71 of 2008.
 3. The first respondent is removed as a director of Crimson King Properties 273 (Pty) Ltd.
 4. The first respondent is ordered to pay the costs of this application on the scale as between attorney and own client.



Judge C Pretorius

Case number : 96886/2015

Matter heard on : 7 November 2017

For the Applicant : Adv B Swart SC
Adv M Fabricius

Instructed by : Shapiro and Ledwaba Inc

For the Respondent : Adv AF Arnoldi SC

Instructed by : Van der Merwe and Associates Inc

Date of Judgment : 8/12/2017