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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4793/2018

In the matter between:

ALBERT JOHANNES VILJOEN

Applicant

(Identity number: 82[...])

and

ALBERT JOHANNES VILJOEN

(Identity number: 57[...])

1st Respondent

HENCETRADE 34 (PTY) LTD.

2nd Respondent

(Registration number: 1999/010500/07)

HEARD ON: 31 JANUARY 2019

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 21 FEBRUARY 2019

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- [1] The first respondent is the founder and managing director of the second respondent company. I will refer to the first respondent as respondent and the second respondent as the company.
- [2] The applicant is the son of the respondent, also a shareholder and director. The company has two other directors.
- [3] The applicant applies for an order declaring the first respondent a delinquent director in terms of section 162(5) of the Companies act 71 of 2008 and also seeks leave to bring and institute proceedings on behalf of and in the name of the company in terms of section 165(6) of the act.
- [4] In terms of section 162 a person may be declared delinquent, *inter-alia* if such person is a director and any of the circumstances contemplated in subsection (5)(a), (b) or (c) applies.
- [5] Subsection (5)- prescribes that an order of delinquency must be issued if a person, while being a director, *inter-alia* took personal advantage of information or an opportunity contrary to the provisions of section 76(2)(a), or intentionally or grossly negligently inflicted harm upon the company contrary to the last mentioned section or acted in a manner amounting to gross negligence or willful misconduct in breach of trust in relation to the performance of his duties or acted in a manner contemplated in section 77(3)(a),(b) or(c).

- [6] In terms of section 76(2)(a) a director of a company is prohibited from using his position as such to gain an advantage for himself or any other person than the company or a subsidiary thereof and from knowingly cause harm to the company or a subsidiary.
- [7] In terms of section 77(3)(c) a director is liable for any loss, damage or costs sustained by the company as a direct or indirect consequence of the director having been a party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder or had any other fraudulent purpose.
- [8] The applicant alleges that the respondent as managing director and authoritative decision-maker of the company was instrumental in causing the company;
- to operate a cash loan account held by an employee in her personal name to the detriment of the company;
 - to commit tax fraud;
 - to partake in BBBEE fronting;
 - to dilute or conceal assets of the company and,
 - to make payments to the respondent in excess of what he was legally owed by the company.
- [9] I proceed to deal with the aforesaid complaints in as far as they are relevant and material to the issues.

CASH LOAN ACCOUNT.

- [10] According to the applicant he established that a cash loan facility was established utilising an account held in the personal name of an employee. Monies are paid from the company's bank account into the employee's account from where it is suspectedly distributed.
- [11] According to the respondent the loan account is used to assist employees in obtaining cash loans. An employee would approach Me Da Silva in whose name the account is held and if a loan is approved and paid to the employee out of the account, the repayment of the loan is effected by deducting the amount thereof together with an administration fee from the salary of the employee, which is then paid into the loan account again. Any profits gained from the transaction fee remain in the loan account. The applicant was throughout aware of that.
- [12] Obviously the company finances the loans. That notwithstanding, the so-called profits are not held by the company but paid into the personal account of the aforesaid employee.

TAX FRAUD.

- [13] According to the applicant the financial affairs of the company were not shared with directors, in particular himself. He however saw a balance sheet of the company dated 24 May 2018 from which it appeared that the company had a VAT obligation of some R 5.6 million, which was at the time not disclosed to the SARS. The applicant raised his concerns in that regard by means of a letter by his attorneys addressed to the respondent and the company's chartered accountants. According to the applicant, the respondent and the accountant then lodged a VAT

resubmission for the company for the period dating back to December 2013. Because of that the status of the company at SARS was changed from compliant to non-compliant.

- [14] According to the respondent the decision to resubmit a VAT submission was a joint decision of all the directors. In the resubmission the accountant informed the SARS that the mistake was due to a misinterpretation of the VAT report. From the resubmission it appeared that an amount of approximately R 3.4 million was owing. According to respondent the company was unable to pay the VAT during the period of the transgression. The accountant, on various occasions, made the directors aware of the underpayment and misrepresentation in respect of VAT and explained the implications thereof to the directors.
- [15] The aforesaid revelations by the respondent is alarming. In so many words he admits that VAT liability of the company was misrepresented to SARS because the company was unable to meet its liabilities in that regard. Moreover the accountant warned against the implications of doing so. That is clearly fraudulent and in contravention of section 77(3)(c) of the act. The respondent maintains that the applicant took part in the decision to resubmit the VAT submission. Significantly he refrains from alleging, in specific terms, that the applicant was part of the fraud, except for stating that the directors were made aware of this by the accountant on various unspecified occasions. In any event, if other directors were aware of this, it does not avail the respondent.

BBBEE FRONTING.

[16] The applicant's allegations in this regard appears to be well founded. Even on the respondent's version, shares were transferred to the BBBEE partners for an unknown price or value, initially transferred to a so-called interim holder and the unknown value and price is to be paid back by means of deduction from dividends. The payment will therefore depend on dividends being declared and the extent or value thereof. In any event, I do not deem it necessary to make any finding in this regard since it does not play any significant role in my eventual conclusion.

DILUTING ASSETS.

- [17] The applicant alleges that the financial records of the company reflected a profit of R 1.9 million as at 11 June 2018 and no bad debts were recorded. However, on 17 August 2018 the records reflected a reduced profit of R 373000 and bad debts recorded as R 1.44 million.
- [18] The balance sheet of the company recorded the value of machinery and equipment as at 30 September 2017 at cost of R 21285.00 and the date thereof as 1 July 1999. The purchase of new equipment since then is not reflected. According to the applicant, in the period 2016 to 2017 equipment to the value of R148000.00 was acquired but not recorded.
- [19] According to the applicant the aforesaid were done so as to project lower asset values and therefore lower share values to the prejudice of shareholders.

- [20] The respondent maintains that no assets are excluded from the financial records. Bad debts are only recorded and reflected in the statements after discussion with directors. The bad debts involved the debts of two companies, one of which was Ruwacon and whose debt was already regarded as a bad debt in September 2017.
- [21] If the debt of the last mentioned company was already regarded as bad in 2017, the question arise why it was not recorded as such on 11 June 2018? The aforesaid creates the impression that the financial records and bookkeeping of the company was done in a haphazard manner. It is however not material to the conclusion that I arrive at.

PAYMENTS TO 1st RESPONDENT.

- [22] The applicant alleges that the respondent regularly received an amount in the aggregate of R 40000.00 per month from the company over and above respondent's salary. Over the period such payments amount to approximately R 3 million. Initial records of the company as reflected in the trial balance reflects the respondent's loan account as being R169543.58 as at 30 September 2016. The detailed ledger however reflects the respondent's loan account as an opening balance on 1 October 2016 to be R1.496 million, which is also the amount reflected as the closing balance on 30 September 2017. Contrary to that, the financial statements on 30 September 2017 still depicts the respondent's loan account as R169543.58. The detailed ledger reflects an opening balance of some R 1.6 million as at 1 October 2017, which increased due to monthly receipts of approximately R44000.00, to an amount of R1.9 million as at 30 April 2018.

- [23] The respondent, in general terms, alleges that he from time to time contributed capital to the company as loans and was therefore fully entitled to be repaid. He mentions the fact that he had a favourable loan account in the close *Corporation Alie Properties CC* in the amount of R1413056.00 and in the company in the amount of R169658.00. The Close Corporation is not in a financial position to repay that loan.
- [24] The respondent fails to explain how the balance of the loan account in the company escalated overnight from the amount of R169658.00 to the amount of R1.4 million. He also does not deny the applicant's allegation that the aggregate payments to the respondent over the period amounts to R3 million.
- [25] The allegations of the applicant to the effect that the company paid for personal liabilities of the respondent, *inter-alia* water and electricity and levies in respect of immovable properties of the respondent, are not answered to nor denied by the respondent.
- [26] The respondent's reference to the loan account in the CC creates the impression that, because the CC is unable to repay the loan, it has been transferred to the company, which repays that loan.
- [27] It is clear from the aforesaid that the total amount of payments to the respondent as alleged by the applicant and not denied by the respondent, by far exceeds the aggregate of both the aforesaid loan accounts. If the payments purport to be payments in respect of the loan account in the close Corporation, such payments are clearly detrimental to the company. The aforesaid clearly qualify as acts envisaged in

section 162(2)(b) read with subsection (5)(c)(iii) and section 76(2)(a)(i) and (ii).

[28] I have already found that the respondent was also party to tax fraud in the attempt to avoid VAT liability. In the circumstances I am enjoined by the pre-scripts of section 162(5) to issue an order of delinquency.

LEAVE TO SUE.

[29] As initially said, the applicant also applies for leave to institute proceedings on behalf of the company in terms of section 165(6) of the act.

[30] Section 165 regulates the steps to be taken by a person before applying for leave to institute proceedings on behalf of the company. That *inter-alia* entails a demand being made on the company in terms of subsection (2) and (4). Those steps are prerequisites for an application and order in terms of subsection (5).

[31] Subsection (6) makes provision for leave to be applied for and granted in exceptional circumstances. It reads as follows;

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

(a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in-

- (i) irreparable harm to the company; or

- (ii) substantial prejudice to the interests of the applicant or another person;
- (a) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and
- (b) that the requirements of subsection (5) (b) are satisfied."

[32] Nowhere in the founding affidavit does the applicant explicitly deal with the required exceptional circumstances. I have been asked to find that there are exceptional circumstances based on the totality of evidence.

[33] Clearly the intended proceedings are aimed at a claim for damages, inter-alia against the first respondent. Whilst the first respondent remained in office and the decision-making authority of the company, there would be slim prospects of a positive response to any demand. However, once the respondent is removed from office, there remains no compelling reason why serious consideration of such a demand will not be given. As aforesaid, the applicant failed to specifically deal with the circumstances which could be regarded as exceptional.

[34] I am not convinced that such an order should be granted at this stage. I will however leave the door open for the applicant to approach the court on the same papers, duly amplified, for relevant relief.

COSTS.

[35] The applicant seeks a cost order on a punitive scale. I am not convinced that such an order is justified in the circumstances of this case. There is however no reason why an order of costs should not follow the result.

In conclusion the following orders are granted:

1. The first respondent is declared a delinquent director of second respondent in terms of section 162(5)(c) of the Companies act, 71 of 2008.
2. Leave is granted to the applicant to approach the court on the same papers, duly amplified, for an order in terms of section 165(5) or (6) of the Companies act, 71 of 2008.
3. The first respondent is ordered to pay the costs of the application.

A. F. JORDAAN, J

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