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| Reportable:                        | YES / NO |
| Circulate to Judges:               | YES / NO |
| Circulate to Regional Magistrates: | YES / NO |
| Circulate to Magistrates:          | YES / NO |

**IN THE HIGH COURT OF SOUTH AFRICA  
(Northern Cape Division, Kimberley)**

Saakno / Case number: **1995/2014**  
Datum verhoor/Date heard: **21/08/2015**  
Datum gelewer/Date delivered: **18/09/2015**

In the matter between:

**CHRISTODOLOUS DEMETRIADES  
NICOS DEMETRIADES**

First Applicant  
Second Applicant

and

**MZWANDILE RIJN TOLLIE  
DEEPS BETTING GROUNDS (PTY) LTD  
ANGEL BETTING WORLD (PTY) LTD  
COMMISSIONER OF THE COMPANIES AND INTELLECTUAL  
PROPERTY COMMISSION**

First Respondent  
Second Respondent  
Third Respondent  
Fourth Respondent

*Coram:* Erasmus, AJ

**JUDGMENT**

**ERASMUS, AJ**

**INTRODUCTION:**

[1] The applicants seek confirmation of a *rule nisi* issued on 14 November 2014, rectified by virtue of an order dated

5 December 2014 ('the main application'). In terms of the *rule nisi* the respondents were called to show cause as to why the following order should not be made final:

- "1.1 *that the first respondent be declared a delinquent director of the second respondent;*
- 1.2 *that the first respondent be disqualified from acting as a director of the second respondent;*
- 1.3 *that the third respondent (which should have been referred to as the fourth respondent – my insertion) be ordered and directed pursuant to the order in terms of paragraph 1.1 of the rule nisi to amend its records accordingly;*
- 1.4 *that the first respondent be ordered to pay the second respondent the amount of R25,000.00;*
- 1.5 *that the first respondent and the third respondent be ordered to take all necessary steps to withdraw the application for a bookmaker license currently pending before the Northern Cape Gambling Board;*
- 1.6 *that the first respondent be interdicted and prohibited from,*
  - 1.6.1 *interfering with or taking any part in the administration and running of the business of the second respondent;*
  - 1.6.2 *entering upon any of the second respondent's business premises;*
  - 1.6.3 *communicating in any way directly or indirectly with any of the directors or employees of the second respondent other than through the applicant's attorneys;*
  - 1.6.4 *communicating or purporting to communicate with the Northern Cape Gambling Board on behalf of the second respondent;*
- 1.7 *that the first respondent together with any other respondents electing to oppose this application, jointly and severally, the one paying the other to be absolved pro tanto be ordered to*

*pay the costs of the application on an attorney and client scale."*

- [2] Paragraphs 1.6.1 to 1.6.4 operated as an *interim* interdict, pending the final determination of this application.
- [3] The first respondent ('Tollie') gave notice of his intention to oppose the application on 4 December 2014. During this stage of the proceedings Tollie was represented by Mr. Kgotlagomang of Towell & Groenewaldt Attorneys. On 5 December 2014, and by agreement between the parties, the application was postponed until 8 May 2015 to the opposed roll and the *rule nisi* was extended until the said date. It was further ordered that Tollie and the third respondent ('Angel Betting') file their answering affidavits on or before 13 February 2015 and that the applicants file their replying affidavits, if any, on or before 6 March 2015.
- [4] Tollie and Angel Betting failed to comply with this court order in that the answering affidavit was only filed on 7 May 2015. An application for condonation for the late filing of the opposing papers was also filed on this day. This resulted in the main application being postponed on 8 May 2015 to 21 August 2015 and the *rule nisi* once again being extended until that date. Tollie and Angel Betting were ordered, jointly and severally, to pay the wasted costs

occasioned by the postponement on a scale as between attorney and client.

### **AD APPLICATION FOR CONDONATION**

- [5] The applicants opposed the application for condonation. In the application for condonation the applicants in the main application were cited as the first and second respondents respectively, Deeps Betting Grounds (Pty) Ltd ('Deeps Betting') as the third respondent, Angel Betting as the fourth respondent and the Commissioner of Companies and Intellectual Property Commission as the fifth respondent. I shall refer to the parties in the application for condonation as in the main application.
- [6] This application for condonation was argued before me on 21 August 2015. I dismissed the application and indicated that my reasons would follow. The reasons for dismissing the application follow hereunder.
- [7] In the founding affidavit Tollie states that he is the sole shareholder and director of Angel Betting. At the stage when the application papers in the main application were served Tollie was in Cape Town, but he was informed telephonically that the application would be heard on 14 November 2014. Tollie alleged that he had sent a letter to the Registrar and the applicants' attorney, Mr. Honiball, informing them that he could not adequately reply to the

application on 14 November 2014. Honiball did not receive such letter and same could not be found at the Registrar's office.

- [8] According to Tollie settlement negotiations in respect of the main application were on-going and therefore the answering affidavit was not filed before the return date of 5 December 2014. He acknowledges that he was aware of the court order to the effect that the answering affidavit had to be filed on or before 13 February 2015.
- [9] Tollie alleged that after 5 December 2014, further discussions took place between himself and Honiball in an effort to settle the disputes. Mr. Kgotlagomang was aware of the fact that Tollie was negotiating with Honiball in person.
- [10] Tollie alleged that he made numerous attempts to contact Kgotlagomang regarding the continuation of the matter and the filing of his opposing affidavit, but all attempts were unsuccessful.
- [11] Honiball admits that Tollie approached him on numerous occasions regarding a possible settlement. Honiball undertook to convey the settlement proposal to his clients, but informed Tollie that he should file his answering affidavit if he wished to oppose the main application. He

also informed Tollie that settlement negotiations would not result in the suspending of court proceedings.

[12] Kgotlagomang confirms Honiball's version in respect of the settlement negotiations taking place during January 2015. He stated further that Tollie, contrary to his advice and instructions given during their telephonic conversation, failed to bring him the application papers. Tollie instructed him to brief a certain counsel in Johannesburg and indicated that he would forward the application papers directly to counsel. Kgotlagomang prepared the brief and arranged a consultation with counsel during December 2014. During this consultation Tollie was instructed to submit further information to Kgotlagomang. At the end of January 2015 Kgotlagomang arranged a further consultation with Tollie in order to finalize the answering affidavit. Due to an unforeseen funeral that Tollie had to attend, this consultation had to be re-scheduled.

[13] At the beginning of February 2015 Kgotlagomang requested an extension of time to file the answering affidavit, which was refused by the applicants' attorneys. When he informed Tollie about this, he remarked that they were in any event waiting for Honiball's response to the settlement proposals. Subsequent to these events, Kgotlagomang's secretary called Tollie again to arrange a consultation to finalize the answering affidavit but was informed that Tollie

would not be able to attend. When she enquired why not, he responded that he was 'stuck' in Cape Town. After Tollie failed to attend the consultation and before a further consultation could be arranged, Kgotlagomang's mandate was terminated on 5 May 2015.

[14] Tollie further averred that he attended the offices of Webbers Attorneys, Bloemfontein, on 15 April 2015. He consulted with a certain Mr. Loubscher in respect of a different matter. He expressed concern that Kgotlagomang did not provide him with feedback regarding the main application and was concerned as to whether he was attending to the matter at all. In response hereto Loubscher advised him that he could not act on his behalf whilst Towell & Groenewaldt was already acting as such. Tollie then attended the offices of Towell & Groenewaldt, but was once again unable to get hold of Kgotlagomang. He then proceeded to consult with Loubscher on 22 April 2015 regarding the main application.

[15] On 23 April 2015 Loubscher contacted the correspondent attorneys in Kimberley to provide him with a copy of the file contents to consider the matter. He received the scanned copies of the contents of the court file on 28 April 2015.

[16] On 5 May 2015 Tollie consulted with Loubscher in respect of the main application and the answering affidavit was

prepared. Tollie was informed that he had to terminate the mandate of Towell & Groenewaldt Attorneys and this was done by sending an e-mail message on 6 May 2015.

[17] Tollie submitted that he has reasonable prospects of success in the main application as the applicants

17.1 had knowledge of his involvement in Angel Betting and that he did not act fraudulently *vis-à-vis* Deeps Betting,

17.2 had not made out a case for an *interim* and final interdict, and

17.3 did not have the necessary authority to act on behalf of Deeps Betting to claim payment of the amount of R25,000.00 and that there is no legal basis for such claim.

[18] In reply to the answering papers, Tollie denies being aware of the fact that his answering affidavit had to be filed irrespective of the settlement negotiations. The file contents had not been requested from Towell and Groenewaldt on 23 April 2015 because their mandate had not been terminated at that stage.

- [19] Tollie admits that counsel was briefed on his behalf during December 2014 and that a consultation took place. He reiterated that he had attempted to make arrangements with Kgotlagomang, without success, but provided no further details in this regard. He submitted that Kgotlagomang should have withdrawn as attorney if he could not get instructions from Tollie, but that he was the one to eventually terminate Kgotlagomang's mandate.
- [20] Tollie did not provide any additional information or reasons for non-compliance with the court order of 5 December 2014. More specifically no information was provided in respect of the period February 2015 up to his first consultation with Loubscher on 15 April 2015.

## **THE LEGAL POSITION**

- [21] In terms of Rule 27(3) of the Uniform Court Rules ('the Rules'), a court may, on good cause shown, condone any non-compliance with the Rules. Although a court has wide discretionary powers to condone non-compliance with the Rules, such discretion is subject to the requirement and safeguard that good cause must be shown for such non-compliance. In **NEDCOR INVESTMENT BANK LTD v VISSER NO**<sup>1</sup> the following was said:

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<sup>1</sup> 2002 (4) SA 588 (T) at 591H

*“Rule 27(3) requires 'good cause' to be shown by the plaintiff. This gives the Court wide discretion. (Du Plooy v Anwes Motors (Edms) Bpk 1983 (4) SA 212 (O) at 216H - 217A.) The requirements are, first, that the plaintiff should at least tender an explanation for its default to enable the Court to understand how it occurred. (Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 353A.) Secondly, it is for the plaintiff to satisfy the Court that its explanation is bona fide and not patently unfounded.”*

[22] In **STANDARD GENERAL INSURANCE COMPANY LIMITED v EVERSAFE (PTY) LTD**<sup>2</sup> the legal position was stated as follows:

*“It is well-established that an applicant for any relief in terms of Rule 27 has the burden of actually proving, as opposed to merely alleging, the good cause that is stated in Rule 27(1) as jurisdictional prerequisite to the exercise of the Court's discretion. Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352G. The applicant for any such relief must, at least, furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about and to assess his conduct and motives (Silber v Ozen Wholesalers (supra at 353A)). Where there has been a long delay, the Court should require the party in default to satisfy the Court that the relief sought should be granted. Gool v Policansky 1939 CPD 386 at 390.”*

And further:

*“An applicant for relief under Rule 27 must show good cause and the question of prejudice does not arise if it is unable to do so.”<sup>3</sup>*

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<sup>2</sup> 2000 (3) SA 87 (W) at 93 par [12]

<sup>3</sup> at 95E-F

[23] In the matter of **UITENHAGE TRANSITIONAL LOCAL COUNCIL v SOUTH AFRICAN REVENUE SERVICE**<sup>4</sup> the principles were stated as follows:

*“...condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.”*

[24] Adv. van Niekerk SC, on behalf of the applicants submitted that Tollie fell well short in his effort to satisfy these requirements and that he has not met the jurisdictional prerequisite of good cause, as alluded to in the judgments cited above. He submitted further that Tollie failed to divulge all relevant facts and circumstances regarding his failure to comply, even after being called to do so by way of the answering affidavit.

[25] Adv. Hefer, on behalf of Tollie and Angel Betting, submitted that I should look at the interdependence of the reasons for and extent of omission on the one hand and the merits of the case on the other. He conceded however that should I find that Tollie has not shown good cause for his failure to timeously file his answering affidavit, the other requirements and factors need not be considered. This is how I understand the position to be, as set out in **CHASEN**

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<sup>4</sup> [2003] 4 ALL SA 37 (SCA) par [6]; Also reported as 2004 (1) SA 292 (SCA)

**v RITTER**<sup>5</sup>. The issue of prejudice towards the other party does not arise if the applicant is unable to show good cause.<sup>6</sup>

[26] Mr. Hefer further submitted that Tollie has shown good cause for his non-compliance with the Rule and court order. In this regard he referred to Tollie's allegations that since the granting of the order on 5 December 2014, he had made numerous attempts to contact Kgotlagomang regarding the continuation of the matter and the filing of his opposing affidavit but was unable to reach him. He pointed out that Kgotlagomang's version is not supported by correspondence in support of his efforts/attempts to get hold of Tollie for purposes of finalizing the answering affidavit. Kgotlagomang should have withdrawn as legal representative if Tollie had failed to furnish instructions.

## **APPLICATION OF THE LAW TO THE FACTS**

[27] Kgotlagomang set out what steps he had taken. Tollie failed to provide the requested information and failed to attend arranged consultations. Tollie was aware of the contents of the court order. He failed to divulge that, as far back as December 2014 he had a consultation with counsel in respect of the main application. When confronted with this fact in the answering affidavit, he merely criticised the

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<sup>5</sup> 1992 (4) SA 323 (SE) at 329C

<sup>6</sup> Standard General Insurance **supra** at 95E to F

fact that Kgotlagomang did not expressly state what the purpose of this consultation was. I pause here to state that Kgotlagomang's version that the reason for this consultation was to prepare the answering affidavit cannot be otherwise interpreted. In his replying affidavit Tollie merely ignores these allegations by Kgotlagomang and it therefore stands uncontroverted. Despite the very specific allegations of Kgotlagomang to the effect that Tollie had to provide further information to enable counsel to finalise the answering affidavit and that he did not honour these arrangements made by Kgotlagomang, Tollie attributed his failure to comply on the alleged unsuccessful attempts to contact Kgotlagomang. These allegations are without any degree of particularity as to dates on which such efforts were made and to the nature of such efforts.

[28] Tollie did not deal with the period February 2015 to 15 April 2015, the day of the first consultation with Loubscher. He also did not explain his failure to timeously consult another attorney if Kgotlagomang was to blame.

[29] Given the lack of particularity, the uncontradicted allegations by Kgotlagomang and Honiball pertaining to the instructions to file the opposing affidavit despite settlement negotiations continuing, the lack of any factual allegations pertaining to what steps were taken between February and April 2015 in order to ensure compliance with the court

order, I was of the view that Tollie's explanation is not *bona fide* and that it is patently unfounded. He failed to show good cause for the non-compliance, hence my dismissal of the application for condonation. I do not deem it necessary to deal with the other requirements as Tollie had not satisfied the requirement of good cause.

### **AD MAIN APPLICATION**

[30] In view of the application for condonation being dismissed the main application stands to be adjudicated on the version of the applicants.

[31] At the onset of argument in the main application Mr. Van Niekerk indicated that the applicants do not seek confirmation of paragraph 1.3 of the *rule nisi* as the application papers and court order have not been served on the fourth respondent. It is not necessary to make such an order due to the automatic inherent effect of an order declaring a director delinquent.<sup>7</sup>

### **THE FACTS:**

[32] The applicants and Tollie are directors and shareholders of Deeps Betting. In terms of a written agreement of sale entered into on 24 December 2013, the applicants bought 49 % of the issued shares in Deeps Betting for the amount

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<sup>7</sup> *Kukama v Lobelo and Others* (38587/2011) [2012] ZAGPJHC 60 (12 April 2012) & [2013] ZAGPJHC 72 (31 May 2013);

of R3.5 million rand. Tollie holds the remaining 51 % of the issued shares. Prior to this agreement Tollie held 100 % of the issued shares in Deeps Betting. The applicants complied with the terms of the written agreement and paid the purchase price as stipulated in the agreement. Tollie accepted such payment.

[33] Deeps Betting is the holder of seven temporary bookmaker licences entitling it to do business as such in the towns of Kimberley, De Aar, Kuruman, Postmasburg, Springbok, Upington and Colesberg. Pursuant to these licences being issued, Deeps Betting commenced doing business in Kimberley and is in the process of opening further business premises in the towns referred to above. The abovementioned licences referred were issued by the Northern Cape Gambling Board ('the NCGB') during September 2013 and are still valid.

[34] Subsequent to the sale agreement and on 11 February 2014 the applicants and Tollie entered into a written shareholders agreement. In terms of clause 16.1, under the heading "*GOOD FAITH*", the parties agreed to cooperate and consult with each other regarding the activities of Deeps Betting, it being their intention that

34.1 the relationship between them shall be governed by the principles of utmost good faith as such principles

are understood in the context of a partnership, as if they were partners in a partnership, and

34.2 the affairs of Deeps Betting shall be administered and promoted with the highest degree of integrity between the shareholders.

[35] The applicants further aver that they, as directors, owe Deeps Betting a duty of utmost good faith in terms of the common law as well as the provisions of sections 75, 76 and 77 of the Companies Act, Act 71 of 2008 (*“the Act”*). This duty entails that the directors act in the best interest of Deeps Betting, promoting the business thereof and further entails the duty not to compete with the company for personal gain. It also entails the duty to inform other directors of any dealings by a specific director that could in any way affect the business dealings of Deeps Betting.

[36] On 16 September 2014 the NCGB published advertisements in the Provincial Gazette of five entities who had applied for bookmaker licences. Potential objectors were invited to lodge objections within a certain period of time.

[37] Subsequent to this advertisement the first applicant had a discussion with Tollie about the advisability of or otherwise objecting to these applications for licences. At this stage Tollie tried to convince him that it was not worth objecting

to any of these applications as he had allegedly spoken to a source at the NCGB and that he could guarantee that none of the said applicants would be successful in their application. According to Tollie an objection by Deeps Betting would only result in annoying members of the NCGB and that this would be extremely detrimental to Deeps Betting's future business dealings. Despite assurances of Tollie, the applicants decided that they would indeed object to the applications and informed Tollie accordingly. He did not go along with the decision, but as the majority of directors were entitled to object on behalf of Deeps Betting, they proceeded therewith. The applicants then instructed their attorneys to inspect the applications referred to above and prepare the objections thereto.

- [38] One of the entities who had applied for bookmaker licences appeared to be Angel Betting. At the time of the advertisement in the Provincial Gazette the applicants were unaware of the existence of Angel Betting and/or details regarding the company's shareholders or directors. After the perusal receipt of the copies of the applications and during the perusal of Angel Betting's application, it appeared that Angel Betting had applied for bookmaker licences in respect of 12 towns in the Northern Cape, including the city of Kimberley.

- [39] On further perusal of this application it also emerged that Tollie, apart from being the 100 % shareholder of the issued shares in Angel Betting, was also the sole director of Angel Betting. A successful application would result in Angel Betting operating in direct competition with Deeps Betting and more specifically its business in Kimberley and Tollie gaining financially from opportunities that should have been pursued by him on behalf of Deeps Betting.
- [40] In an annexure to the said application form is a document referred to as "GENERAL TERMS AND CONDITIONS" which contains the terms and conditions for all bets offered. There are several references to Deeps Betting and even a reference to "Angel Betting World Website", which is listed as '*deepsbettingbets.net*'. The documentation creates the impression that the form used by Angel Betting is that of Deeps Betting. The name of Deeps Betting appears to have merely been replaced by the words 'Angel Betting World' and the person who prepared the application merely neglected to change the name of Deeps Betting to Angel Betting in several places on this form. It appears further that the terms and conditions for all bets offered by Angel Betting is the same as that of Deeps Betting.
- [41] Clause 15 of the shareholders agreement, entered into between the applicants and Tollie, contains a confidentiality clause in terms of which the applicants and Tollie

acknowledge that any information supplied in connection with each other's technical, industrial or business affairs which has or may in any way whatsoever be transferred or come into possession or knowledge by any of them, may consist of confidential or proprietary data, disclosure of which or use thereof by third parties might be damaging to the party concerned. The parties to the agreement agreed to hold such material and information in the strictest confidence and to prevent any copying thereof by whatever means.

[42] It is further alleged that no resolution was ever taken by the board of directors entitling any of the directors to remuneration from Deeps Betting, as the business of Deeps Betting was a new one. The first applicant, in his personal capacity, advanced monies to Tollie by means of a loan from the end of July 2014. It had nothing to do with Deeps Betting. When the first applicant became aware of Tollie's conduct as referred to earlier, he decided not to honour his personal undertaking and stopped paying Tollie the amount of R25,000.00 at the end of October 2014.

[43] On 29 October 2014 Tollie insisted that the amount of R25,000.00 be paid into his bank account referring to it as "*his salary*". Instructions were given to the employees of Deeps Betting not to pay any disbursements from Deeps Betting unless authorised to do so by at least two directors.

On 31 October 2014 Tollie called one of the employees of Deeps Betting and requested him to pay R20,000.00 of Deeps Betting's funds into Tollie's personal bank account. The employee advised him that he would need permission from Deeps Betting's Chief Executive Officer before making such payment. Tollie proceeded to scream and shout at the employee, accusing him of being disrespectful and threatening to have the employee suspended for his actions.

- [44] The first applicant instructed the employee as well as the Chief Executive Officer ('CEO') not to make any payments to Tollie. Tollie subsequently threatened the CEO that his temporary licence to act as an employee of Deeps Betting would be revoked at the insistence of Tollie. Such threat, if acted upon, will have serious detrimental consequences for the business dealings of Deeps Betting. Tollie again called the abovementioned employee, informing him that he would be at the premises of Deeps Betting on Monday 3 November to take his money and that no-one would stop him. On Sunday 2 November 2014 Tollie arrived at Deeps Betting's premises in Kimberley, requesting the money from the employee. To defuse the situation, the first applicant telephonically instructed the employee to give the money to Tollie on condition that he sign for the receipt thereof in the daily cash reconciliation. Tollie refused to sign for the money and the employee did not hand over the

money. Tollie conveyed to the employee that the CEO has been suspended and that he (Tollie) would request the NCGB to revoke the CEO's temporary licence to act as an employee of Deeps Betting. He also informed the employee that he had applied for other licences which are in direct opposition to Deeps Betting and that it was his intention to have investors and partners in the Northern Cape Province doing business with him, in competition with Deeps Betting. Tollie left the premises but again telephoned and informed the employee that he would come and collect his money the following morning.

[45] On Monday 3 November 2014 Tollie arrived at Deeps Betting's premises in Kimberley and demanded his money from the employee. He then took R25,000.00 and ordered the employee to capture the transaction as "salary" on the daily cash reconciliation after which he left.

## **THE LEGAL POSITION:**

[46] In terms of section 162(2) of the Act:

*"A company, a shareholder, a director... may apply to a Court for an order declaring a person delinquent or under probation if-*

*(a) The person is the 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 declaration of delinquency..."*

[47] Subsection 5(a) to (c) provides as follows:

“(5) A court **must** (my emphasis) 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... inflicted harm upon the company... contrary to Section 76(2)(a);

(iv) acted in a manner-

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

[48] In terms of section 76(2)(a) and 76(3) of the Act:

“(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-

(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; and...

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-

(a) in good faith and for a proper purpose;

(b) *in the best interests of the company; and ...*”

[49] The principles which govern the actions of a person who occupies a position of trust were confirmed by Heher JA in **PHILLIPS v FIELDSTONE AFRICA (PTY) LTD and ANOTHER**<sup>8</sup> where he stated:

*“The fullest exposition in our law remains that of Innes CJ in Robinson v Randfontein Estates Gold Mining Co Ltd, supra, at 177-180. It is, no doubt, a tribute to its adequacy and a reflection of the importance of the principles which it sets out that it has stood unchallenged for 80 years and undergone so little refinement.*

*‘Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other’s expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationship. A guardian to his ward, a solicitor to his client, an agent to his principal afford examples of persons occupying such a position. As was pointed out in The Aberdeen Railway Company v Blaikie Bros. (1 Macqueen 474), the doctrine is to be found in the civil law (Digest 18.1.34.7), and must of necessity form part of every civilized system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent . . . Whether a fiduciary relationship is established will depend upon the circumstances of each case . . . But, so far as I am aware, it is nowhere laid down that in these transactions there can be no fiduciary relationship to let in the remedy without agency. And it seems hardly possible on principle to confine the relationship to agency cases.’ “*

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<sup>8</sup> [2004] 1 All SA 150 (SCA) par [30]; See also *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 (SCA) par [18]

[50] Section 76(2) envisages a fiduciary duty in respect of a director of a company. This entails, *inter alia*, not to improperly compete with the company. If a director places himself in a situation of conflict of interest by acting in promotion of his personal interest and/or the interest of a trade competitor, it would constitute a breach of his duties as director.<sup>9</sup>

[51] Where a director has taken personal advantage of information or opportunities at his disposal to gain benefits for himself or has breached his position of trust, it will constitute circumstances in terms of sub-section (5)(c).<sup>10</sup> The first order of delinquency against a director under the Act appears to have been granted in **KUKAMA v LOBELO and OTHERS**<sup>11</sup> and indicates that courts will not shy away from placing directors under delinquency should circumstances warrant this.

[52] In terms of section 162(6)(b) of the Act:

*“A declaration of delinquency in terms of-*

*(b) subsection (5) (c) to (f)-*

*(i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of*

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<sup>9</sup> *Da Silva and Others v CH Chemicals (Pty) Ltd supra* at 641; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 198 - 199

<sup>10</sup> *Grancy Property Limited and Another v Gihwala and Others; In Re: Grancy Property Limited and Another v Gihwala and Others* (1961/10; 12193/11) [2014] ZAWCHC 97 (26 June 2014) para 156 and 206; *Msimang NO and Antoher v Katuliiba and Others* [2013] JOL 29907 (GSJ)

<sup>11</sup> (38587/2011) [2012] ZAGPJHC 60 (12 April 2012)

*the declaration to one or more particular categories of companies; and*

- (ii) *subsists for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration, subject to subsections (11) and (12);"*

[53] In respect of the final interdict sought, the requirements for same have been set out in **SETLOGELO v SETLOGELO**<sup>12</sup> and these have been confirmed in several subsequent cases. The requirements are that the applicant must establish a clear right, an infringement of the right and the absence of any other suitable remedy.

#### **APPLICATION OF THE LAW TO THE FACTS:**

[54] Tollie clearly stood in a fiduciary relationship with Deeps Betting and also owed his co-shareholders in Deeps Betting, his co-directors and Deeps Betting itself a duty of trust and good faith in terms of the shareholders agreement referred to earlier. Tollie also owed Deeps Betting a duty of good faith in terms of the provisions of section 76(2) and (3) of the Companies Act, as well as in terms of the common law.

[55] Mr. Hefer submitted that the circumstances of the matter do not warrant Tollie to be declared a delinquent director of Deeps Betting. I disagree.

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<sup>12</sup> 1914 AD 221 at 227

- [58] The only reasonable inference that can be drawn from the Angel Betting's application for the bookmaker licences, is that Tollie made use of information gathered by him in his capacity as a director of Deeps Betting. The use of the documents and/or information of Deeps Betting not only constitutes a breach of the shareholders agreement, but a serious breach of Tollie's fiduciary duty as a director of Deeps Betting. His conduct, as was submitted, amounts to a breach of Section 76(2) of the Act.
- [59] Tollie intended to and did in fact commit a serious breach of his duties by applying for a bookmaker licence on behalf of Angel Betting, in direct competition with Deeps Betting and promoting his personal interests in conflict with the interest of Deeps Betting.
- [60] I am satisfied that the applicants have proved that Tollie grossly abused the position of director in that he took advantage of the information of Deeps Betting and seized an opportunity to directly compete with Deeps Betting through Angel Betting. I am also satisfied that he intentionally inflicted harm upon Deeps Betting by insisting on and taking the R25,000.00 from Deeps Betting and further, that Tollie acted in a manner that amounted to a breach of trust by using the forms and/or information of Deeps Betting in the application for the bookmakers licence, with the intention to compete with Deeps Betting.

Such acts satisfy the requirements as set out in section 162(5)(c) of the Act.

[61] The effect of an order of delinquency is that a person is disqualified from being a director of a company, as set out in section 69(8)(a) of the Act. A declaration of delinquency may be made on the basis of section 162 (5) (c)–(f) subject to **any** conditions the Court sees fit. In terms of paragraphs 1.1 and 1.2 of the *rule nisi* Tollie is declared a delinquent director of Deeps Betting and is disqualified from acting as a director of Deeps Betting. The terms in which the order is framed appear to me to fall within the ambit of sections 162(5), read with the provisions of 162(6)(b) of the Act. Given the circumstances of this case, the condition limiting the declaration of delinquency in respect of Deeps Betting only is justified.

[62] In respect of paragraph 1.4 of the *rule nisi*, Mr. Hefer submitted that the allegations pertaining to the relief that Tollie be ordered to pay Deeps Betting the amount of R25,000.00 do not disclose any cause of action. He further submitted that the applicants have not succeeded in showing the necessary authority and/or grounds for the claim for the payment of R25,000.00 on behalf of Deeps Betting. Although Mr. van Niekerk did not specifically deal with these aspects in his heads of argument, he did submit

during argument that a case had been made out for such relief.

[63] In my view the founding affidavit does not contain allegations to sustain a claim for damages based on contract or delict. Although it can be envisaged that the claim could fall under the provisions of section 77(2) of the Act, the founding affidavit does not contain the necessary averments to sustain the claim for payment of the said amount.

[64] In respect of paragraph 1.5 of the *rule nisi*, namely that Tollie and Angel Betting be ordered to take all necessary steps to withdraw the application for a bookmaker licence currently pending before the NCGB, Mr. Hefer submitted that this relief is a mandatory interdict and that the applicants had to establish a clear right in this regard. The clear right is dependent on whether it can be found that Tollie breached the relationship of trust and the provisions of the Act. He submitted that such clear right can only exist if Tollie has indeed breached the relationship of trust and if the applicants have established and proved that he used certain information or documentation of Deeps Betting in its application before the Northern Cape Gambling Board. I have already made a finding to this effect. I am further satisfied that Tollie committed an act of interference with the right of Deeps Betting through the application for a

bookmakers licence in respect of Kimberley, in competition with Deeps Betting. The position is different in respect of the other towns in which Deeps Betting has no interests and/or licences. Mr. Van Niekerk conceded that the relief sought in this regard should only be in respect of the application for the licence in Kimberley. I fully agree with this concession.

- [65] In respect of paragraph 1.6 of the *rule nisi*, Mr. Hefer submitted that no allegation has been made to believe that Tollie would in future interfere with the operations of Deeps Betting. He submitted that confirmation of the interdict is also dependent on whether Tollie should be declared a delinquent director. Mr. van Niekerk submitted that the applicants, as shareholders of Deeps Betting, have a clear right to insist that no shareholder or director misappropriate company funds or unlawfully interfere with the administration of the company and the running of its business. He submits that Tollie has infringed these rights and that there is no other remedy available to the applicants to safeguard these rights. As I have already found that the applicants have made out a case that Tollie should be declared a delinquent director and given his past interference with the operations of Deeps Betting as set out in the founding affidavit, I am satisfied that the applicants have made out a case for a final interdict and that paragraph 1.6 of the *rule nisi* should be confirmed.

[66] In respect of costs, Mr. van Niekerk submitted that the costs should follow the outcome and further that because of the conduct of Tollie, which was the direct cause of this litigation, the Court should express its displeasure by awarding costs on a punitive scale, to wit attorney and client costs. Tollie committed a serious breach of trust and acted in a callous manner which, in my view, warrants a punitive cost order in respect of the main application. The same, however, cannot be said of the application for condonation and there is no reason for a punitive cost order in respect thereof.

[67] I make the following order:

- 1. Paragraphs 1.1 and 1.2 of the *rule nisi* is confirmed;**
- 2. Paragraphs 1.3 and 1.4 of the *rule nisi* are discharged;**
- 3. Paragraph 1.5 of the *rule nisi* is confirmed in respect of the application for the bookmaker licence for Kimberley in that the first and third respondents are ordered to take all necessary steps to withdraw the application for a bookmaker licence currently pending before the**

Northern Cape Gambling Board in respect of  
kimberley;

4. Paragraphs 1.6 of the *rule nisi* is confirmed;
5. Paragraph 1.7 of the *rule nisi* is confirmed in as far as the first and third respondent are ordered, jointly and severally, the one paying the other to be absolved *pro tanto* to pay the costs of the main application on an attorney and client scale;
6. The applicant in the application for condonation (first respondent in the main application) is ordered to pay the costs of the application for condonation on a scale as between party and party.

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SL ERASMUS  
ACTING JUDGE

**For the Applicants:** Adv. J.G. van Niekerk SC (oio Van de Wall & Partners)

**For the Respondents:** Adv. J.J.F. Hefer (oio Duncan & Rothman Inc)