IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE HIGH COURT, KIMBERLEY)

Case No: 458/2011

Heard on: 12/08/2011

Delivered on: 11/11/2011

In the matter between

JACOB CASPER KRUGER DU TOIT	**Applicant**

And

RUBEN JOODT	**First respondent**
SAAMWERK SOUTWERKE (PTY) LTD	**Second respondent**
KALKPOORT SOUTWERKE CC	**Third respondent**

JUDGMENT

PAKATI AJ

1. On 17 March 2011 my sister, Hughes-Madondo AJ, issued the following interim order:

"1. Dat ń Bevel Nisi toegestaan word wat die Respondente of

enige belanghebbende party, aanse om op 27 Mei 2011, om 10h00 of so spoedig moontlik daarna as wat die saak aangehoor mag word, redes, indien enige, aan te voer waarom die volgende bevel nie gemaak moet word nie:

1.1 *Dat Eerste Respondent verbied word om enige direkte of indirekte stappe (uitgesluit enige regsstappe) te neem wat ten doel het of die effek (direk of indirek) het om die Tweede en Derde Respondente se besigheid te benadeel of hul besigheidsreputasie te skend of ten doel het om die Applikant se naam of reputasie te skend.*

1.2 *Dat Eerste Respondent verbied word om enige mededelings of bewerings of verklarings oor die Tweede en Derde Respondente te maak aan enige derde party of die Departement van Minerale Bronne wat ten doel het of die effek het (op ń direkte of indirekte wyse) om die Tweede en Derde Respondente se besigheid te benadeel of hul besigheidsreputasie te skend of oor Applikant wat ten doel het of die effek het (op ń direkte of indirekte wyse) om die Applikant skade te berokken of sy naam en reputasie te skend.*

1.3 *Dat Eerste Rspondent verbied word om enige werknemer, direkteur of lid van Tweede Respondent en enige lid of werknemer van Derde Respondent te dreig,te intimideer, te beledig of op ń direkte of indirekte wyse te verhinder om hulle werk en/of daaglikse take te verrig.*

1.4 Dat Eerste Respondent die koste van die aansoek betaal.

2. *Dat hierdie bevel tesame met afskrifte van die aansoekstukke so spoedig moontlik op die Respondent beteken word.*

3. *Dat paragrawe 1.1, 1.2 en 1.3 sal dien as ń tussentydse interdik wat onmiddelik van krag is."*

2. Mr Du Toit and the first respondent, Mr Reuben Roodt, are directors of the second respondent, Saamwerk Soutwerke (Pty) Ltd ("Saamwerk Ltd"). It is common cause that Roodt owns 12% of the shares in the company and holds 26% interest in the third respondent, Kalkpoort Soutwerk CC ("Kalkpoort CC"). Du Toit is the majority shareholder of Saamwerk Ltd holding 38% of the shares. 12% of the shares in Saamwerk are unallocated. Roodt owes 25% of the member's interest. Mr Du Toit is a majority member in Kalkpoort CC and holds 74% of members' interest. He, as a majority shareholder, has a financial interest in Saamwerk Ltd and Kalkpoort CC. Both Du Toit and Roodt are employees of Kalkpoort CC. Saamwerk Ltd has a management team that operates its daily activities.

3. Du Toit has been involved with mining and processing of salt for many years. In 1999 he established Kalkpoort CC and in 2005 Saamwerk Ltd. The nature of business of both entities is the production, supplying as well as mining and processing of salt. Saamwerk Ltd is in possession of mining rights of salt in respect of the plant called Eenzaamheid. The Department of Minerals and Resources ("the Department") also approved an application for mining of salt in respect of the plant known as Vrysoutpan.

4. On 17 May 2006 an Association Agreement to regulate their relationship was signed by both parties. Since Roodt is not an

employee of Saamwerk Ltd he does not have much influence on its operations. Saamwerk Ltd has six employees and Kalkpoort CC has a workforce of 124. These employees and their families depend on these business entities operating as going concerns for their livelihood and wellbeing.

5. Roodt's duties in Kalkpoort CC were extended to supervise the running of the engines and making sure that they were fitted with safety plates and fan belts and that the fire extinguishers were properly and strategically located. The employees had to wear safety plates on their heads and safety masks over their faces. According to Du Toit problems started in 2007 when Roodt failed or was negligent in carrying out these occupational safety and health duties. Their relationship became sour as a result. On 07 June 2007 he offered to sell his interest in Kalkpoort CC to Roodt who never came back to him about it until 07 August 2007. In the meantime Du Toit received numerous complaints from the employees of Kalkpoort CC regarding the conduct of Roodt. He received information that Roodt had an argument with one Mr David Senye and attempted to stab him with a knife. In another incident he shouted at Mr P Meyer, the financial manager of Kalkpoort CC, and poked a finger in his face on 28 November 2008.

6. Du Toit states that in 2008 Roodt discussed the problems relating to the employees of Kalkpoort CC with Mr Stuurman, attached to a non-governmental organization, without consulting him. Further that Roodt absented himself from work without leave or prior arrangement and abused alcohol during working hours. In a meeting held by the parties and their employees Roodt intimated that the employees of Kalkpoort CC and Du Toit were disrespectful towards him and that he was

misused as a black empowerment partner, which is denied by Du Toit.

7. Du Toit alleges that within a week of Roodt assuming duties the working conditions became unbearable and unstable for the stated reasons. It was difficult to draw clients to their businesses because of Roodt's conduct. He failed to supply Du Toit with his statement of creditworthiness when asked for it. Du Toit intimated that Roodt had a bad credit record which explained why he could not obtain financial assistance from Absa bank when they needed it. A disciplinary hearing against him was scheduled for 29 April 2008 but he did not turn up. At one stage this matter was referred to the Commission for Mediation, Conciliation and Arbitration (CCMA) to resolve the issues. However, before the CCMA could take any decision Roodt and Du Toit resolved their differences in the interest of Kalkpoort CC.

8. A routine inspection was conducted by members of the Department on 25 November 2008 on the premises of Kalkpoort CC whereupon Roodt raised a complaint with their officials about the profit sharing policy of Kalkpoort CC. He did so without the knowledge of Du Toit. These allegations were not disputed by Roodt.

9. In 2009 Roodt and Du Toit signed a new Association Agreement wherein they agreed that a more trustworthy relationship will be maintained between them.

10. On 13 August 2010 one Mr Desmond Maganga, from Siyanda District Municipality in the Department of Economic Development and Tourism, addressed the directors of Saamwerk Ltd. It transpired that the purpose of his visit was really to gather information concerning the social and labour policies of Saamwerk Ltd as well as the black empowerment profile and the clientele. This was strange to Du Toit. He

confronted Maganga who informed him that he was there on the instructions of Roodt and Mr John Block, a director of a company called South African Salt Works (Pty) Ltd, a competitor in the same trade. This, according to Du Toit, was aimed at sabotaging the businesses of Saamwerk Ltd and Kalkpoort CC.

11. During November to December 2010 Du Toit discovered through his investigations that Roodt's wife Ms Patsy Roodt, an employee of Kalkpoort CC, was misappropriating funds. As a result of this she was suspended with full pay on 04 January 2011. During an enquiry into Ms Roodt's conduct on 31 January 2011 Mr Roodt got angry and pointed a threatening finger at Mr Jacobus Hendricksz and Mr Harry Van Zyl, employees of Kalkpoort CC. He threatened and intimidated them with violence and said: "...*you will see what will happen to Kalkpoort...,"* referring to Kalkpoort CC.

12. In a meeting held between Roodt, Hendricksz, Du Toit and Du Toit's two sons Jacques and Burger, Roodt offered to sell his shares for R2million. Du Toit refused and told him that he had not paid his contribution for his shares and cannot therefore put up those shares for R2million. Roodt became angry and broke the tape recorder with which the minutes were recorded and said: "*You boers will sit on the street because I am going to lock the doors of Kalkpoort"*. He then left the room. He never came to work since then. No binding decisions could be taken due to his unavailability.

13. Du Toit says that a letter was shown to Hendricksz which Block forwarded to the Department wherein he referred to problems that Roodt allegedly experienced. This, to him, clearly showed that Roodt's motive was to destroy Saamwerk Ltd. According to Du Toit the conduct displayed by Roodt damaged the good name and reputation of

Saamwerk Ltd and Kalkpoort CC.

14. To the contrary Roodt contends that the initial agreement was that he and Du Toit had to continue as directors of Kalkpoort CC. He was the Human Resource Officer whilst Du Toit supervised the mine. As a majority shareholder, Du Toit made all the decisions with his sons and he was only informed of the decisions already taken.

15.Roodt contends further that early this year he proposed to sell his interest to Du Toit's sons for R2 million because he recuperated at home after he was involved in a car accident. Du Toit's sons counter-offered to buy his interest for R1 5000 000-00. He was not satisfied as a result of which and the sale did not materialise. The meeting was adjourned to a later date.

16. According to Roodt Saamwerk Ltd was not operating legally. He disputes that he is harming the good name and reputation of the businesses. He avers that Du Toit used him as a Black Empowerment Employee member and wanted to leave him with nothing. He states that Du Toit was not affected by the alleged intimidation.

17. Mr Tredoux for Du Toit argued that there is sufficient objective evidence to grant the final interdict. He argued further that there is no defence put forward by Roodt (the first respondent) and that material allegations have not been disputed by him.

18. Mr Phiri for Roodt contended that the Association Agreement attached to the founding affidavit was not signed and that Du Toit relied on hearsay by the employees of Kalkpoort CC and that no criminal charges were laid against Roodt for the alleged disruptive conduct. He added that the dispute concerned the purchase and sale of Roodt's interest in Kalkpoort CC. He submitted that Du Toit

contradicted himself by saying he was not entitled to a dividend whereas he still had not paid for his shares. Mr Phiri contended that Du Toit failed to show how the good name and reputation of the businesses were damaged and that there was no reason for Roodt to act so destructively.

19. In his answering affidavit Roodt failed to respond to material allegations made by Du Toit in his founding affidavit. A respondent's answering affidavit is required to deal pertinently with the allegations contained in an applicant's founding affidavit. If a respondent fails to admit or deny, or confess and avoid, allegations in the applicant's affidavit the Court will, for the purposes of the application, accept the applicant's allegations as correct. See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A)** at 634.

20. Both Du Toit and Roodt, as directors of the company, have to exercise their powers and carry out their duties *bona fide* and for the benefit of the company. Apart from the duties imposed on a director in terms of the Act, 61 of 1973 (now repealed by Act 71 of 2008), a director is at common law subject to fiduciary duty requiring him to exercise his powers *bona fide* and for the benefit of the company and to display reasonable care and skill in carrying out his office. He cannot be relieved of this duty through the articles of association or in a contract or in any other way. Any act amounting to an evasion of this duty is seen as a breach of the duty itself. See **CILLIERS & BENADE CORPORATE LAW 3RD EDITION Page139-140**. See also **HOWARD V HERRIGEL AND ANOTHER NNO 1991 (2) SA 660 (A) 678A-B.**

21. The overwhelming evidence shows that Roodt was busy destroying the good name and reputation of Saamwerk Ltd and Kalkpoort CC. He

breached his duty as a director. Section 42 and 43 of the Close Corporation Act, 69 of 1984, provide as follows:

"42 FIDUCIARY POSITION OF MEMBERS

1) *Each member of a corporation shall stand in a fiduciary relationship to the corporation.*
2) *Without prejudice to the generality of the expression 'fiduciary relationship', the provisions of subsection (1) imply that a member-*
   a) *Shall in relation to the corporation act honestly and in good faith, in particular-*
      i) *Shall exercise powers as he or she may have to manage or represent the corporation in the interest and for the benefit of the corporation; and;*
      ii) *shall not act without or exceed the powers aforesaid; and*
   b) *shall avoid any material conflict between his or her own interests and those of the corporation, ...*

   43 LIABILITY OF MEMBERS FOR NEGLIGENCE

   1) *A member of a corporation shall be liable to the corporation for loss caused by his or her failure in the carrying on of the business of the corporation to act with the degree of care and skill that may reasonably be expected from a person of his or her knowledge and experience."*

22. If the company cannot or will not act against those who wronged it, a derivative action on behalf of the company may be instituted in certain circumstances. Such action will have to be instituted against the wrongdoers by someone acting on behalf of himself and all the

shareholders other than the wrongdoers. See **CILLIERS & BENADE** *supra* at p 302-303. Section 49 of the Close Corporations Act provides as follows:

"49 UNFAIRLY PREJUDICIAL CONDUCT

1) *Any member of a corporation who alleges that any particular act or omission of the corporation or of one or more other members is unfairly prejudicial, unjust or inequitable to him or her, to some members including him or her, or that the affairs of the corporation are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or her, or to some members including him or her, may make an application to a Court for an order under this section."*

Section 50 provides:

"50 PROCEEDINGS AGAINST FELLOW-MEMBERS ON BEHALF OF CORPORATION

1) *Where a member or a former member of corporation is liable to the corporation*

a) To make an initial contribution or any additional contribution contemplated in subsection (1) and (2) (a), respectively, of section 24; or

b) on account of-

i) the breach of a duty arising from his or her fiduciary relationship to the corporation in terms of section 42; or

ii) negligence in terms of section 43,

any other member of the corporation may institute proceedings in respect of any such liability on behalf of the corporation against such *member or former member after notifying all other members of the corporation of his or her intention to do so."*

23. Roodt has shown no interest in the prosperity of Saamwerk Ltd and Kalkpoort CC. He has already indicated that he wished out of the two businesses. The Act allows Du Toit to institute a derivative action against Roodt based on the fact that he is in breach of an obligation pertaining to his fiduciary duties towards the corporation. See **CLOSE CORORATION SERVICE BY CILLIERS BENADE, OOSTHUIZEN, DE LA REY, issue 35 at 4-27.**

24. In para D of his heads of argument Mr Phiri argued as follows:

"D. Reasons why the rule nisi should not be made final.

1. *It is submitted that if this rule nisi is made final it would be of great consequence to the first respondent and of less consequence to the applicant due [to] the following:*

    i) *First Respondent will not be allowed to come near the premises of Second and Third respondents.*

    ii) *First Respondent will not be able to participate in the day to day running of the businesses of both second and third respondents.*

    iii) *First Respondent will not be able to consult with [the] applicant in order for [the] first respondent to sell his interests from third respondent since [the] applicant and first respondent are the only members."*

25. I am unable to uphold the contention of Mr Phiri. Roodt acted in bad faith by consulting outsiders and soliciting their help to prejudice the businesses in their good name and goodwill. Roodt has

essentially made bare denials. I am satisfied that the applicant, Du Toit, has established a proper case for a final interdict the requirements of which are stated as follows in **SETLOGELO v SETLOGELO 1914 AD 221** at 227**:**

"...a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

I therefore make the following order.

1. **The Rule Nisi issued on 17 March 2011 is hereby confirmed and made final.**
2. **The First respondent, Mr Ruben Roodt, is ordered to pay the taxed costs of this application on a party and party scale.**

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PAKATI AJ

NORTHERN CAPE HIGH COURT

On behalf of the Applicant	Adv. JC Tredoux
On behalf of the 1st Respondent	Mr. A Phiri