THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case no: 511/2023

In the matter between:

BOUDEWYN HOMBURG DE VRIES SMUTS **APPELLANT**

and

KROMELBOOG CONSERVATION SERVICES (PTY) LTD **FIRST RESPONDENT**

COMPANIES AND INTELLECTUAL PROPERTY COMMISSION **SECOND RESPONDENT**

Neutral citation: *Smuts v Kromelboog Conservation Services (Pty) Ltd and Another* (511/2023) 2024 ZASCA 156 (14 November 2024)

Coram: DAMBUZA, MABINDLA-BOQWANA and MOLEFE JJA and HENDRICKS and BAARTMAN AJJA

Heard: 21 August 2024

Delivered: 14 November 2024

Summary: Company law – s 162(5)(*c*) of the Companies Act 71 of 2008 – whether conduct of a director justified declaration of delinquency.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Henney J, sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel, where so employed.

JUDGMENT

Mabindla-Boqwana JA (Dambuza and Molefe JJA and Hendricks and Baartman AJJA concurring):

Introduction

[1] The issue in this appeal is whether an order declaring the appellant, Dr Boudewyn Homburg De Vries Smuts, a delinquent director in terms of s 162 of the Companies Act 71 of 2008 (the Act), by the Western Cape Division of the High Court, Cape Town (the high court), was justified. The order was made pursuant to an application brought in the high court by the first respondent, Kromelboog Conservation Services Pty (Ltd) (Kromelboog) against Dr Smuts. The appeal is with the leave of that court.

Background

[2] In 2015, Dr Smuts, who is a nature conservationist, was appointed as Kromelboog's sole director until his removal on 7 July 2021. Kromelboog is a company that engages in livestock farming. It is solely owned by a trust named Tamarisk Trust (Tamarisk). At relevant times Mr Timothy Allsop was its trustee.

[3] In 2015, Tamarisk purchased four adjacent farms in Beaufort West, Western Cape, commonly known as 'Little England', 'Welgevonden', 'Nooitgedacht' and 'De Hoop' (the properties). This was followed by conclusion of a lease agreement, on 16 July 2015, between Tamarisk and Kromelboog in terms of which Tamarisk would lease the properties to Kromelboog for farming purposes. The lease was for a renewable period of five years, at a rental of R600 000 per annum. Dr Smuts signed the lease on behalf of Kromelboog and Mr Allsop, on Tamarisk's behalf.

[4] Dr Smuts was also a trustee and an 'executive officer' of a not-for-profit charitable trust, the Landmark Foundation Trust (Landmark), which he founded in 2004. Landmark conducted a research project known as Shepherding Back Bio-diversity Project (SBBP). The aim of the project was to reintroduce traditional herding or human shepherding as a conservation initiative in semi-arid rangeland livestock agricultural areas.

[5] On 27 May 2016, Tamarisk, Landmark and Kromelboog concluded a written management agreement in terms of which Landmark was appointed as a manager of the properties in order:

'. . . to demonstrate the effectiveness of holistic farming methods in the livestock farming sector, including the use of non-lethal predator controls and reintroduction of shepherding to enable enhanced grassland/pasture management through better grazing rotation.'[1]

[6] In terms of clause 4.1 of the management agreement, any and all expenses incurred by Landmark in carrying out its duties would be refunded by Kromelboog. Landmark would improve the housing facilities of farmworkers, adopt industry standard remuneration levels, improve water points and water distribution, improve farm fences, roads and machinery, establish alternative

[1] Clause 2.2 of the written management agreement.

and/or renewable and/or sustainable energy solutions for the properties, and improve the veld and quality grazing.

[7] Given that Landmark was a not-for-profit charitable trust, and had specific tax requirements, Kromelboog was incorporated as the management and operations arm of the farming activities in the properties. It is averred on behalf of Kromelboog that it was responsible for all commercial farming activity on the properties. Dr Smuts, however, disputes this. He asserts that Kromelboog was established because Landmark could not trade. According to him, Landmark managed the properties and the farming operations while Kromelboog was merely the financial vehicle to address the constraint of Landmark not being permitted to trade as a not-for-profit organisation.

[8] As indicated in the annual financial statements for the financial year ending on 28 February 2020, which were signed by Dr Smuts on 4 May 2020, Kromelboog opened and managed a business bank account at Nedbank. It purchased and maintained farming equipment and livestock; it employed and paid staff; it administered all tax benefits and obligations for the employees; it paid all utilities and taxes due in respect of the properties; and purchased and sold livestock. According to Kromelboog, this was indicative of the fact that it traded in farming operations.

[9] The mentioned annual financial statements also reveal that Kromelboog operated at a loss of R2 537 860 for the 2020 tax year and suffered a net operating loss of R3 845 005 before taxation. The accumulated losses were more than R16 million for the first six years of SBBP being carried out on the properties. The losses were funded by Tamarisk through shareholder loan funding, which increased to approximately R27 million. Dr Smuts asserts that the R27 million

loan account included the purchase of all livestock, game animals, implements, equipment, vehicles and tractors, among other things.

[10] Kromelboog also purchased Kambro, another farm, using Tamarisk's money. Dr Smuts states that in December 2020 he had raised with Mr Allsop the fact that the financial losses of Kromelboog were not so much due to the SBBP, but rather because of Mr Allsop's appetite for buying multilayered farms, the carrying out of capital improvements on the properties, as well as purchase of new vehicles and renovation of the gardens and homesteads for his own private use.

[11] Mr Francois Gerber, Kromelboog's current director, avers on behalf of Kromelboog, that Mr Allsop donated some contributions in support of the furtherance of the SBBP. In response to this, Dr Smuts asserts that an undertaking to make donations was made by Mr Allsop and Tamarisk, and Landmark accepted it.

[12] It is important to mention that the foundation of Dr Smuts' defence is based on a Joint Venture oral agreement (JV), which he says he concluded in 2013, with Mr Allsop and Tamarisk, while on a trip from Plettenberg Bay. He avers that during that trip, he shared with Mr Allsop the biggest challenge Landmark had in implementing the SBBP. It related to the acquisition of the right to utilise and operate farmland for a generational period of 25 years. Mr Allsop agreed to solve this problem by acquiring suitable farm property on which Landmark could have generational tenure of 25 years. The only condition Mr Allsop had was that any increase in the value of the farms would accrue to him as the owner or to one of the trusts he controlled.

[13] In an email dated 28 December 2020, Dr Smuts wrote to Mr Allsop who was still a trustee of Tamarisk stating:

'You asked that I put together a synopsis of the farm efforts. It is important that. . . you make a decision which direction you want to take this.

. . .

We set out to do this in an establishment period of 5 years. I obtained resources to assist with this conversion but with the project creep into 5 farms (LE, Welgevonden, Nooitgedacht, De Hoop and Kambro), a massive built infrastructure rehabilitation effort, it put an inordinate burden on you and us. *We have achieved a great deal, but ultimately did not have enough resources to fly this Cessna to the moon. I gave it a good go. The reality is that the Karoo needs a generation to effect the benefits of this method of land management, not that the extreme drought, that is ongoing, helped.*

I would suggest you make a decision around how to proceed as things look a bit glum from my perspective. . . ' (Emphasis added.)

[14] The email presented Mr Allsop with various options including the 'selling of the lot'. Dr Smuts says that, at that stage, he also reminded Mr Allsop that the donor funding would come to an end on 31 December 2020 and thereafter alternative funding would be required, if the project was unable to fund itself fully.

[15] Dr Smuts says he was surprised when on the morning of 5 January 2021, Mr Allsop repudiated the JV. According to him, Mr Allsop did so by instructing him and Landmark to vacate the farms, both in his personal capacity and as a trustee of Tamarisk. Dr Smuts and Landmark accepted such repudiation in May 2021. He also states that at the time of the JV's repudiation and its acceptance by Landmark, the lease had already reached its expiration on 15 July 2020. The management agreement, however, continued until its repudiation by Kromelboog under its new management which he and Landmark accepted.

[16] Dr Smuts requested Kromelboog to purchase certain farming assets from Landmark. The purchase price of approximately R1.9 million was agreed to between Kromelboog and Landmark for the said assets. By January 2021, it was clear that a dispute had arisen between Landmark, Kromelboog and Tamarisk. As a result, the parties engaged in protracted settlement negotiations, which fell apart in June 2021.

[17] On 22 June 2021, Dr Smuts was given Tamarisk's notice of intention to remove him as a director in terms of s 71 of the Act. The reasons stated for his removal included a breakdown in trust between himself and Tamarisk; the insolvency position of Kromelboog; his alleged disparaging remarks about Tamarisk; and a clear conflict of interest that had arisen as a result of the two positions he held, as a director of Kromelboog and as a trustee of Landmark.

[18] On 7 July 2021, Dr Smuts attended a s 71 meeting at which he was legally represented. He regarded this meeting as a ruse, because, according to him, it had already been mentioned that he would be removed, regardless of the representations he had made. After making representations, Dr Smuts was removed as a director of Kromelboog. He did not challenge this removal. Nevertheless, in a letter dated 7 July 2021, BDLS Attorneys Inc, acting for Dr Smuts, asserted a lien on Landmark's behalf stating, inter alia, that:

'Dr Smuts remains an employee of the company, notwithstanding his removal as a director, and he will continue to protect the interests of the company and those of [Landmark] and its donors by furthering the aims of the Shepherding Back Biodiversity Project until [Landmark's] enrichment claim is paid in full by the Tamarisk Trust.

Any interference with our clients' peaceful possession of the properties or any attempts to deny our clients access to any of the properties will be met with an urgent spoliation application. . . .'

[19] On 16 July 2021, Dr Smuts incorporated Shepherding Back Co (Pty) Ltd (Shepherding Back Co), which according to Kromelboog, was formed for the sole purpose of replacing and usurping Kromelboog's entire commercial and farming operations. Dr Smuts denies that Shepherding Back Co was an operational entity. He asserts that it had no bank account and was never registered for VAT. He maintains that Kromelboog was never involved in any farming operations.

[20] Several court applications ensued between the parties. Amongst those were spoliation proceedings brought by Landmark against Kromelboog on 26 July 2021, for alleged dispossession of the farms and farming operations by Kromelboog's new director, Mr Gerber.

[21] On 5 October 2021, Kromelboog obtained a final order interdicting Dr Smuts and Landmark from carrying out farming operations or any form of commercial enterprise on the properties. Parties had brought applications against each other which were heard by Nuku J, who observed:

'. . . The facts also demonstrate that Dr Smuts, through Landmark and Shepherding Back interfered with Kromelboog's right by hijacking Kromelboog's commercial operations on the properties. The facts also demonstrate a determination by Dr Smuts, through the instrumentality of Landmark and Shepherding Back to persist in interference with Kromelboog's commercial operations of the properties.'[2]

Leave to appeal Nuku J's judgment was refused and, we are told, was not pursued any further. Dr Smuts and Landmark finally vacated the properties on 22 December 2021, following a further application by Kromelboog.

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[2] *Boudewyn Hamburg De Vries Smuts N.O. & Others v Kromelboog Conservation Services (Pty) Ltd & Others*; Case no: (12565/2021) (14 April 2022). *Kromelboog Conservation Services (Pty) Ltd & Others v Boudewyn Hamburg De Vries Smuts N.O. & Others*; Case no: (14350/2021) (14 April 2024) (unreported judgment) *(Boudewyn)* para 25.

[22] Mr Gerbert avers for Kromelboog that, shortly before and following his removal as a director, Dr Smuts embarked on a personal crusade to strip Kromelboog of its business. He conducted himself in a manner that caused harm to the company as its director and abused his position as a sole director, placing his own interest above those of Kromelboog. He did this by:

(a) rendering invoices to Kromelboog for his personal benefit, while the company was in a state of insolvency;

(b) causing legal fees to be paid by Kromelboog for personal litigation to the detriment of the company;

(c) clearing Kromelboog's funds from its bank account, minutes before the shareholders' meeting set to consider his removal as a director;

(d) causing Kromelboog to pay a donation to Landmark without the approval of the shareholders; and

(e) usurping Kromelboog's business by claiming possession of the farming properties, requesting registration documents pertaining to vehicles owned by Kromelboog and enticing employees to leave Kromelboog and join Landmark and/or his newly formed entity Shepherding Back Co.

[23] Kromelboog brought an application in the high court, to declare Dr Smuts a delinquent director in terms of s 162(5) of the Act. The application served before Henney J, who analysed each complaint against the principles applicable when a court determines such a declaration. While the high court dismissed two of the complaints relied upon by Kromelboog, it found the grounds for declaration of delinquency in terms of s 162(5) to have been met based on the remaining complaints.

[24] The high court came to the following conclusion:

'The court found that Smuts by authorizing payments to himself which he as sole director were not entitled to do, he breached the provisions of Section 75(3) of the Act. Secondly, by doing

so he clearly breached the standards of conduct of a director as contemplated in section 76 of the Act and in particular, section 76(3) thereof. This conduct clearly constitutes a gross abuse of his position as director in terms of section 162(5)(c)(i). His conduct was clearly intentional or at the very least grossly negligent, which resulted in him inflicting harm on Kromelboog when he acted contrary to section 76(2)(c)(a) of the Act. This also clearly amounts to conduct as contemplated in section 162(5)(c)(iii). This court also find[s] that the payments he authorized after he incurred legal fees, and the donation he made to Landmark was in breach of s 78(4)(a) and section 75(3) of the Act. This once again was improper and a breach of the standard of conduct of a director which also amounted to Smuts having grossly abused his position as director in terms of section 162(5)(c)(i). Such conduct was also intentional or at the very least grossly negligent or wilful which inflicted harm on Kromelboog.'

Issue on appeal

[25] Counsel for Dr Smuts submitted that the high court erred in how it approached the facts (disputed and admitted), in an application for final relief, which resulted in it making factual findings that it should not have made. According to counsel, had the correct approach been followed, it would have been found that facts had not been established to support an order of delinquency in terms of s 162 of the Act.

[26] In terms of s 162(5) of the Act:

'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*).' (Emphasis added.)

[27] Section 76(2) stipulates that:

'A director of a company must –

(a) not use the position of a 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. . .'

[28] Section 77(3)*(a),(b)* or *(c)* makes a director liable for loss or damage sustained by the company in consequence of the director having:

'*(a)* acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22 (1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose. . .'

[29] The purpose of s 162 is to protect the public from directors who engage in serious misconduct contemplated in that section. Individuals who are unworthy of the trust bestowed on them as directors or commit misconduct of a kind described in s 162(5) must be declared as delinquents. Section 162 seeks to protect the public who may be dealing with companies run by people who are not suitable to manage those companies.[3] The applicable provisions also seek to promote acceptable standards of corporate governance.[4]

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[3] *Gihwala and Others v Grancy Property Ltd and Others* [2016] ZASCA 35; [2016] 2 All SA 649 (SCA); 2017 (2) SA 337 (SCA) *(Gihwala)* para 144.

[4] Ibid paras 142 and 144. The court in *Gihwala* also referencing with approval: *Re Gold Coast Holdings Pty Ltd (In Liq); Australian Securities & Investments Commission v Papotto* [2000] WASC 201 para 22.

[30] In *Gihwala and Others v Grancy Property Ltd and Others (Gihwala)*,[5] this Court described the type of conduct that would justify an order in terms of s 162(5)*(c)*. The Court pointed out that the section is not concerned with some 'trivial misdemeanour or an unfortunate fall from grace'.[6] In terms of s 162(5)*(c)*:

'Only *gross abuses of the position of director* qualify. Next is *taking personal advantage of information or opportunity* available because of the person's position as a director. This hits two types of conduct. 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 or acted in breach of *s 77(3)(a)* to *(c)*.'[7] (Emphasis added.)

[31] Dr Smuts' counsel submits that, because of the far-reaching and potentially disastrous consequences of the finding of delinquency, conduct must be 'sufficiently egregious' to justify an order in terms of s 162(5). In the present case, so he contends, the standard of sufficiency had been not met. In other words, the factual matrix is significantly less egregious. It does not support the conclusion that Dr Smuts grossly abused his position as a director in terms of s 162(5)*(c)*(i) or intentionally or gross negligently inflicted harm sufficient to sustain a finding in terms of s 162(5)*(c)*(iii).

[32] I have difficulty with this proposition. The term 'egregious misconduct' entails serious misconduct. Conduct is either trivial or egregious. In this regard, once a court finds a misconduct serious, as described in *Gihwala*,[8] it has no

[5] *Gihwala* fn 3 above.
[6] Ibid para 143.
[7] Ibid.
[8] Ibid para 149.

discretion but to declare a person to be a delinquent director. There are no degrees of egregiousness that the court is required to consider.

[33] As to the approach to be followed in assessing the complaints, both counsel for the parties agreed that a holistic rather than a piecemeal approach is to be followed. I agree. With that in mind, two questions arise, the first one being whether the high court approached the facts properly, given the fact that it was dealing with motion proceedings. The second, whether the complaints against Dr Smuts, warranted the declarator in terms of s 162(5)*(c)* of the Act.

[34] As it shall become apparent, Dr Smuts admitted the occurrence of various transactions or events. He, however, gave explanations or justifications as to why his conduct was not wrongful or 'sufficiently egregious' to warrant a declaration of delinquency. Considering that these were motion proceedings, Dr Smuts' version that there was a JV in place, must be accepted. That brings me to the analysis of the complaints.

Clearing of funds from Kromelboog's bank account

[35] It is common cause that minutes before the start of the shareholders' meeting to consider Dr Smuts' removal as director on 7 July 2021, he instructed Ms Vicky Notley who was Kromelboog and Landmark's accountant at the time, in an email to:

'. . . transfer all the cash resources, except for R10 000, from the Kromelboog account into the second account of Landmark Foundation. . .'

[36] Following this instruction, Ms Notley transferred R367 071.42 from Kromelboog's account to Landmark's account. Effectively, Kromelboog's entire cash reserves were cleared out at the time when it operated at a loss. This was done while Dr Smuts was still the sole director of Kromelboog.

[37] According to Dr Smuts, the shareholders' meeting was a ruse, as there were no shareholders present, but a Mr McPherson of STBB attorneys (Tamarisk's attorneys). Mr McPherson claimed to act for the shareholder representatives as a proxy. Mr McPherson had, according to Dr Smuts, apparently mentioned that Dr Smuts would be removed as a director, the following morning. This necessitated that he:

'. . . transfer the monies to a ringfenced account wherefrom all project expenses and income would be accounted for until the conflict was to be resolved.'

Dr Smuts avers that he did this based on legal advice.

[38] The high court found this conduct to be contrary to the provisions of s 75(3) of the Act, which provides as follows:

'If a person is the only director of a company, but does not hold all of the beneficial interests of all the issued securities of the company, *that person may not –*

(a) approve or enter into any agreement in which the person, or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person, or a related person has a personal financial interest,

unless the agreement or determination is *approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.*' (Emphasis added.)

[39] Having found this transgression, the high court, nevertheless, concluded that on this ground, a case for declaration of delinquency had not been established. This was because the explanation given by Dr Smuts, made it difficult for the court to find him to have acted wilfully or recklessly. In this regard, the court relied on *Lewis Group Limited v Woollam and Others*[9] to conclude that Dr Smuts' conduct seemed to be based on 'misguided reliance by a

[9] *Lewis Group Limited v Woollam and Others* [2016] ZAWCHC 130; [2017] 1 All SA 192 (WCC); 2017 (2) SA 547 (WCC) para 18.

director on incorrect professional advice [that] will not be enough. . . to constitute serious misconduct'.

[40] I take a different view on this issue. The provisions of s 76(3) of the Act imposed a duty on Dr Smuts to act in Kromelboog's best interests. Secondly, as the sole director he ought to have disclosed his personal financial interest to the shareholder. Even if the aim was to ring-fence the funds, as he explained, he was not exempt from the legal requirement of seeking the 'shareholders' authorisation. Furthermore, Landmark's bank account was not neutral, it was an account in which Dr Smuts had personal financial interest. Dr Smuts solicited advice from a conflicted position. That he must have known as a director or ought to have reasonably known. It is most concerning that he neither sees this as problematic nor does he acknowledge the conflict.

Freezing of Kromelboog's bank account

[41] After his removal as a director of Kromelboog, Dr Smuts caused Kromelboog's Nedbank account to be frozen. Dr Smuts saw the halting of the bank account, while no longer a company representative, as a perfectly correct thing to have done. His explanation is that he was not willing to countenance allegations propagated in public that he was stealing money. The fact is, while he was still the sole signatory to the account, he was no longer its director. On what authority did he have to make this decision? His conduct left Kromelboog with no access to its account for weeks.

Use of Kromelboog's funds for legal fees

[42] During January 2021 until his removal, Dr Smuts caused Kromelboog to incur approximately R241 136.60 in legal fees. It will be recalled that this is the period during which the dispute had arisen between the parties. On 31 January

2021, BDLS attorneys addressed an invoice to Kromelboog for, inter alia, 'taking instructions to assist with repudiation of Joint Venture Agreement'.

[43] On 24 June 2021, two days after receiving a notice of removal as a director, Dr Smuts caused Kromelboog to pay an amount of R190 536.60 to his attorneys. The parties agreed that invoices relating to the spoliation dispute with a Mr David Diaz should not be included amongst the invoices complained of.

[44] We were referred to a series of invoices, the subject of which was fees relating to Dr Smuts' removal as a director or repudiation of the JV. One of these was counsel's invoice dated 27 July 2021 in the amount of R61 180, which refers to a telephonic conversation with Dr Smuts in relation to a 'Notice of Removal of Director'. Dr Smuts' answer to this invoice is:

'As the sole director I needed to be advised on this and consultation with legal advisors is entirely appropriate.'

[45] On 31 June 2021, an invoice was rendered to Kromelboog by BDLS 'to taking instructions with respect to proposed repudiation'. In response to this Dr Smuts, states:

'The repudiation of the JV, to which Kromelboog had become a party and the risk of significant damages claims was an aspect that had to be considered and I needed to take advice in the interests of Kromelboog.'

[46] It is not clear how this could be of interest to Kromelboog as the claim for repudiation of the JV was made by Dr Smuts on behalf of Landmark against Kromelboog. This once more reveals that Dr Smuts was acting in a conflict-of-interest position. The alleged repudiation of the JV formed the basis of Landmark's spoliation application against Kromelboog launched on 26 July 2021.

[47] On 6 July 2021, another invoice was rendered to Kromelboog by BDLS in the amount of R86 336.25, recording consultation with client to discuss way forward and to brief counsel, and two consultations with counsel. Counsel's invoice dated 7 July 2021, which was in the sum of R58 075 records, inter alia:

'On appearance with Bool Smuts at meeting of shareholder at STBB in terms of section 71 of the Companies Act: on discussion with instructing attorney regarding further conduct of the matter and settling letter to STBB informing lien for improvement and other issues (half day fee)'

Dr Smuts admits the rendering of these invoices and simply states that the details of these attendances are as set out above.

[48] Kromelboog paid amounts of R50 600 and R190 536.60, respectively, in respect of the invoices which were incurred while Kromelboog was insolvent. The payment was not for Kromelboog's benefit. BDLS was requested to withdraw as Kromelboog's attorneys due to a conflict of interest, which they did.

[49] Dr Smuts maintains that he acted to protect Kromelboog's interests. He states that Kromelboog was a beneficiary of massive financial investments from Landmark to which it had obligations as part of the JV. While he does not deny that his actions were also in the interest of Landmark, he states that instructions to attorneys were given to protect Kromelboog's interests.

[50] Even excluding the invoices mentioning spoliation, rendered prior to the proceedings that Landmark launched on 26 July 2021, the evidence is overwhelming that Dr Smuts sought legal advice for his removal as the director and the alleged repudiation of the JV. He caused Kromelboog to pay for it.

Donation from Kromelboog to Landmark

[51] Mr Gerber alleged, on behalf of Kromelboog, that Dr Smuts caused Kromelboog to donate R108 000 to Landmark. This was made in circumstances where Dr Smuts, being a trustee of Landmark, would have personal financial interest and where shareholder approval would have been necessary. No resolution was taken by the trustees of Tamarisk in this regard.

[52] Dr Smuts' counsel argues that the donation could not be considered because it was not raised in the founding papers. I disagree. The donation came to be an issue by virtue of Dr Smuts presenting Landmark's audited annual financial statements for the year 2022, in his supplementary affidavit. In that affidavit, the following is stated:

'The annual financial statements have been independently audited and the transfer of the funds is referred to, specifically in the report of Landmark's auditors.

As a result, *the contents of the annual financial statements* and the account transaction report reflecting the individual account entries, *are directly relevant to the matters at hand*.' (Emphasis added.)

[53] Counsel further contends that the 'Note' made in the financial statements under the heading 'Donations Received' to an amount of R108 000, described as 'Kromelboog – Rehabilitation Cost', was too vague to conclude that it was a donation. And that, Dr Smuts had not made any averments about this in his supplementary affidavit. Thus, suppositions could not be made on behalf of Kromelboog, without any personal knowledge by Mr Gerber of what the transaction was all about.

[54] In my judgement, nothing prevented Dr Smuts from seeking leave to file a response to this issue, especially because it was serious and squarely raised as

emanating from Landmark's annual financial statements. Counsel's submission on this ground must be rejected.

Invoicing for alleged services

[55] Another complaint is that Dr Smuts invoiced Kromelboog for what he referred to as consultation fees. On 28 April 2021, while negotiations were ongoing, Dr Smuts sent an email to Ms Notley attaching an invoice dated 23 February 2021 and addressed to Kromelboog, for an amount of R3 098 000 for services allegedly rendered during his directorship. The invoice recorded:

'In view of Tamarisk trust inten[t]ion to renege on the 25 [year] lease agreement and partnership and value set by Tim Allsop on David Daitz remuneration of R50,000 pm, the management money for the CEO function I provided on the understanding of the 25 years lease is thus the following. . .

This amount is payable in the event that a settlement agreement is not reached in which case the fees are payable within 7 days.'

[56] In addition, on 29 April 2021, Dr Smuts invoiced Kromelboog in the amount of R48 940 for consultancy services that he allegedly provided to Kromelboog with the following narration:

'Consulting work to negotiate the attempt by Tim Allsop and Tamarisk Trust to repudiate/cancel the access contract and operations of Kromelboog as management entity for the Shepherding Back Biodiversity projects of Landmark Foundation on the original 25 year access, occupation, and partnership agreement.'

[57] This invoice was paid by Kromelboog on Dr Smuts' authorisation on 30 April 2021. On 3 June 2021, Dr Smuts invoiced Kromelboog in the amount of R25 150 for alleged consultancy services recording similar terms as the 29 April invoice. This invoice was paid by Kromelboog on Dr Smuts' authorisation on 4 June 2020. On 22 June 2021, Dr Smuts invoiced Kromelboog in the amount of R15 200 repeating the same terms, and the amount was paid on 22 June 2021.

[58] On 6 July 2021, which was the day before Dr Smuts would appear at the shareholders' meeting convened to consider his removal, he invoiced Kromelboog for an amount of R70 120, for consulting fees which he narrated to be for:

'Preparation for 7 July attempt to remove me as Director. . . Consulting with lawyers and advocates, accountants and documents

. . .

accommodation and subsistence.'

[59] This invoice was paid by Kromelboog on Dr Smuts' authorisation on 6 July 2020. According to Kromelboog, these alleged services had nothing to do with Kromelboog. They were for Dr Smuts' personal or Landmark's benefit.

[60] Dr Smuts contends that the invoices for consultancy services, 'lay outside' his role as a director. He states that he approved those services as a director because they were in Kromelboog's interest, and he stood by this decision. At the same time, in an email to Ms Nortley seeking payment, Dr Smuts, states that Kromelboog had never paid him for the services he provided as 'Chief Executive Officer'. He further states in his answering affidavit:

'I was required to spend hundreds of hours dealing with legal issues and contract negotiations *as the director* of Kromelboog.' (Emphasis added.)

[61] Dr Smuts raised an invoice for remuneration as the 'executive officer', for the work dating back to when Kromelboog started operating. He asserts that in terms of the JV, it was agreed, he would provide services for free as a 'co-funding contribution', in return for the 25-year tenure on the land he would be given. He, accordingly, donated his time in terms of the JV, but there was no genuine intention to try and resolve the dispute by Mr Allsop and Tamarisk.

[62] The content of the invoices contradicts any assertion of work having been done by Dr Smuts for Kromelboog as a consultant. The invoice dated 6 July 2021 is remarkable. In it, Dr Smuts charged Kromelboog for 'consulting fees' '[in] [p]reparation for 7 July attempt to remove [him] as Director'.

[63] In terms of s 66(9) read with s 66(8) of the Act, a company may pay remuneration to its directors only in accordance with a special resolution approved by the shareholders within the previous two years. Dr Smuts never obtained such a resolution.

[64] To get around these difficulties, Dr Smuts sought to rely on s 78(4)*(a)* of the Act which provides that:

'(4) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company —

(a) may advance expenses to a director *to defend litigation in any proceedings* arising out of the director's services to the company. . .' (Emphasis added.)

[65] Reliance on this provision is misplaced because legal advice sought in preparation for a shareholders' meeting convened for a director's removal, can hardly be considered as litigation for the purposes of s 78(4). Neither can payment or advancement of fees for 'consultancy services'. It also cannot be correct to suggest that s 75(2) renders the strictures in s 75(3)[10] inapplicable by virtue of a proposal to remove Dr Smuts as a director in terms of s 71. Section 75(2) stipulates:

'This section does not apply—

(a) to director of a company –

. . .

[10] Which provides that a single director who does not hold all of the beneficial interest of all the issued securities of the company may not approve or enter into any agreement in which that director has a personal financial interest unless he or she receives or there is approval by ordinary resolution of the shareholders, after having disclosed the nature and extent of the interest to shareholders.

(ii) *in respect of a proposal to remove* that director from office as contemplated in section 71. . .' (Emphasis added.)

[66] The exclusion in s 75(2), from the requirement to disclose personal financial interest, is in respect of the proposal to remove a person as a director. It does not entitle a director to incur expenses and conclude agreements, in instances where he or she has a personal financial interest, without any regard to the provisions of s 75 of the Act.

[67] Dr Smuts' construction of the provision would defeat the whole object of s 75. It potentially may result in abuse of a position of a director, where a person sought to be removed, secretly approves or concludes agreements with financial implications for the company and in which they personally benefit. That person would act with impunity by hiding behind s 75(2). Invoices clearly obtained for personal financial interest and where no shareholders' resolution was obtained in terms of s 75(3) were, in this case, clearly unlawful.

Seeking to obtain possession of Kromelboog's operations

[68] A further complaint is that Dr Smuts sought to usurp Kromelboog's business. On 6 July 2021, Dr Smuts sent a voice note to Ms Notley requesting her to provide him with all the registration documents pertaining to the vehicles owned by Kromelboog, for him to obtain possession thereof on behalf of Landmark, prior to the shareholders' meeting convened for the following day. At the time of this request, Dr Smuts was still the sole director of Kromelboog.

[69] In response to this complaint, Dr Smuts says that the intention was always to sell the vehicles (in respect of which the registration documents were requested), as early as February 2021, as agreed between him and Mr Allsop. He denies that there was some sort of nefarious 'stratagem' as alleged on behalf of

Kromelboog. Dr Smuts asserts that he merely acted with due diligence and obligation to undertakings and agreements which he entered into as Kromelboog's director.

[70] The high court found the explanation given by Dr Smuts on this aspect, unassailable. In my view, the court erred by determining this issue in isolation from others. It ought to have considered Dr Smuts' actions in the context of his conduct entirely, given the timing and what he said he needed the documents for. The evidence supports the contention that in his voice to Ms Nortley, there was an attempt by Dr Smuts to use his position to benefit Landmark.

[71] On 15 July 2021, after his removal as a director, Dr Smuts held a meeting with Kromelboog's employees and enticed them to leave their employment and join Landmark. He then sent a voice note to an employee recording that he would 'help' the employee if he promised to stay loyal to Landmark and not with 'the new people', ie Kromelboog's new directors.

[72] Dr Smuts' response to this is that, when he met the farmworkers and herders, he no longer was the director of Kromelboog. He advised them that 'Landmark had asserted its possession and would honour the payment commitments and salaries and that [he and Landmark] would continue to manage the farming as per their possession'.

[73] While Dr Smuts dismisses this conduct as being irrelevant to the application on the basis that he was no longer a director, given the apparent scheme to transfer the operations from Kromelboog to Landmark or Shepherding Back Co, after the alleged 'repudiation of the JV', his approach to the employees should be seen in that light.

[74] As was found by Nuku J, Dr Smuts' conduct could 'only be described as "hijacking" Kromelboog's business, which he transferred first to Landmark and thereafter to Shepherding'.[11]

Conduct in relation to s 162(5) of the Act

[75] The facts outlined above overwhelmingly show that Dr Smuts conducted himself delinquently. His counsel seeks to suggest that Dr Smuts found himself in a predicament, because being the sole director of Kromelboog was inextricably linked to his implementation of the SBBP. This cannot be used as an excuse. The position of the director is that of trust. The director owes fiduciary duties to the company. The conduct of the director in relation to the affairs of the company is strictly regulated by the Act. If a person commits serious misconduct of the sort described in *Gihwala*, that person must be declared a delinquent director. The court has no discretion in that regard.

[76] Dr Smuts was clearly in a conflicted position. He was a sole director but rendered to Kromelboog invoices for his personal financial interest without obtaining authorisation from its shareholder. He demanded documents as part of the scheme to accept possession of the properties belonging to Kromelboog shortly before he was removed as a director. He caused Kromelboog's bank account to be frozen; used its funds to be paid for legal fees, while the company was in a dire financial position; he caused a donation to be paid to Landmark (where he had a personal financial interest) without the shareholder's authorisation; and transferred funds belonging to Kromelboog to Landmark. That conduct clearly amounts to gross abuse of the position of a director and infliction of harm on Kromelboog as contemplated in ss 162(5)*(c)*(i) and (iii) of the Act.

[11] *Boudewyn* fn 2 para 24.

[77] In addition, Dr Smuts' actions also amount to gross negligence, wilful misconduct, and breach of trust within the contemplation of s 162(5)*(c)*(iv). He made it clear, at one point, that he stood by the decision he had made. He also admitted other events but justified them. He was intent on protecting the SBBP project at all costs to the detriment of Kromelboog whose interests he ought to have protected as a director. He acted as if he was entitled to treat Kromelboog as merely a vehicle to pursue his project (something he asserts), instead of a separate juristic entity, the interests of which he had a statutory duty to protect.

[78] Even after receiving the notice on 22 June 2021, indicating that he was acting in a conflict of interest, objectivity escaped Dr Smuts, he continued with his actions regardless. No matter how disconcerted he might have been about the JV fallout, he was not released from the fiduciary duties he owed Kromelboog.

[79] For these reasons, the high court's order declaring Dr Smuts a delinquent director within the contemplation of s 162(5) of the Act, was correct. It must, accordingly, stand. As to costs, they should follow the result. The high court left the costs for the application for leave to appeal for later determination. Those costs shall form part of the order made in relation to the costs of the appeal.

[80] In the result, the appeal is dismissed with costs, including the costs of two counsel, where so employed.

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NP MABINDLA-BOQWANA

JUDGE OF APPEAL

Appearances

For the appellant:	J A Newdigate SC
	Heads of argument prepared with R A J Acton
Instructed by:	Brett Carnegie Attorneys, Cape Town
	Lovius Block Attorneys, Bloemfontein
For the first respondent:	B J Manca SC with D M Robertson
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	EG Cooper Majiedt, Bloemfontein.